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Dear Members, dear Readers,

We hope this edition of Newsletter Law and Taxes finds you on your best condition.

In this edition of EKONID's Newsletter Law & Taxes, our cooperation partners share their expertise on recent Indonesian legal and tax developments including but not limited to the update on the ever-interesting topic of the Omnibus Law, the territorial based taxation for expatriates, amendment of tax treaty between Indonesia and Singapore, as well as Income Tax Facilities in Special Economic Zones and DGT Form for Non-Indonesian Tax Payers. We also take a deeper look into the implementation regulation of the Omnibus Law: Natural Resources Sector / Geothermal Energy as well as the aspects of Company Acquisition Aspects.

For more information of the Network Law & Taxes we cordially invite you to visit our website www.ekonid.com or our Social Media accounts. With this digital approach, we hope to keep you updated with the latest on Indonesian Law and Tax issues.

I would like to thank our partners for sharing their expertise and valuable insight. We hope that you find this edition of EKONID's Newsletter Law & Taxes to be both informative and interesting. Lastly, I would like to say stay safe and healthy!

Cassandra Ismail

Head of Legal & Investment Consultation Services

Omnibus Law Update: Trading

Indonesia Frees Traders and Commission Agents at Last

Following up on the start made with Law No. 11/2020 on Job Creation ("Omnibus Law"), the President in March issued Presidential Regulation No. 10/2021 on Investment Business Fields (PR 10/2021). Also dubbed the "Positive Investment List", hinting at the previous "Negative Investment List" and thereby highlighting the intense shortening of the list of business fields conditionally open to foreign direct investment. As a result, the number of such fields shrunk from roughly 350 to 50, whereas 50% of the remaining business fields belong to the transportation sector. Two fields that are highly relevant in terms of foreign direct investment in Indonesia are Large Scale Trading (i.e. Wholesale and Distribution) and Commission Agency (KBLI 46100).

Large Scale Trading

Large Scale Trading has seen all types of restriction, first being fully open (until 2014) and then being completely barred (2014 onwards) to be opened again for up to 67% foreign direct investment (after 2016). Trading in goods, especially machines and spareparts, being one of Germany's strongholds, this has long been an issue for investors seeking to establish or expand their operations in Indonesia. PR 10/2021 finally returns to fully opening this important field, prompting many to upgrade their previous joint ventures with Indonesian partners to fully-owned subsidiaries. What remains however, are restrictions imposed by the Ministry of Trade on the levels of distribution, foreign-owned Large Scale Trading businesses

may engage in. Sales to "end customers" are off limits, whereas the determination of who the end customer is remains difficult in the case of commercial/industrial customers.

Commission Agency

For many Indonesian operations by German and other European investors, all or part of the goods transactions are to be between the Indonesian customer and the European supplier, whereas the Indonesian subsidiary of the supplier earns a sales commission. It was however impossible to establish companies with the respective business fields before PR 10/2021, making it necessary to deviate from often worldwide business models in order to accommodate the situation in Indonesia.

In terms of trade, PR 10/2021 certainly has been a huge step towards a liberalized market.

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Omnibus Law Update: Industry

Domestic Sourcing May Intensify for Indonesian Industries

In its latest efforts to implement stipulations made in Law No. 11/2020 on Job Creation ("Omnibus Law"), the Government has issued Government Regulation No. 28/2021 on the Organization of the Industrial Sector ("GR 28/2021"). The following aims to briefly summarize select aspects of it.

Materials

Industrial companies must utilize raw materials and/or supporting materials (altogether "Materials") in production efficiently, environmentally friendly and sustainably. Domestic requirements will be prioritized in terms of the use of Materials. Further, industrial companies must prioritize the use of domestic Materials. The government will ensure that Materials are easy to obtain by guaranteeing certain aspects through the application of the following measures among others:

- Limits on the export of Materials;
- Easing of imports of Materials;
- Mapping and stipulation of areas for the provision of Materials;
- Introduction of alternative Materials; and

- Development of upstream industries and intermediary industries which are based on natural resources.

Conformity-Assessment Institutions

Accredited conformity-assessment institutions appointed by the Ministry of Industry ("MoI") are in charge of assessing the conformity of all domestically produced and imported goods/services that are distributed within Indonesia with the mandatory Indonesian National Standard (Standar Nasional Indonesia - "SNI"), technical specifications and/or procedural guidelines.

Supervision and Control

The MoI is in charge of the supervision and control of industrial business activities, as well as business activities that are carried out within industrial areas. Supervision includes applicable laws and regulations that apply within the industrial field, i.e.:

- Industrial human resources;
- Utilization of natural resources;
- Management of energy and water;
- SNI, technical specifications and/or procedural guidelines;

- Industrial data and industrial area data;
- Green industry standards;
- Industrial area standards;
- Business licensing for said business activities; and
- Security and safety of equipment, processes, production results, storage and transportation.

Given the long history of uncertainties especially with regard to the applicability of regulations issued by the Ministry of Trade that include industrial companies, any clear indication from the government is

certainly welcome in manifesting the competence of the Mol in its designated field.



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Prohibited Agreements in Business Competition

Important Prohibitions of Anti-Competitive Agreements in Indonesia

Indonesia's history in terms of business competition is a rather interesting one. Following the practical absence of fair business competition during the Soeharto-era, Indonesia was pressured to upgrade its competition legislation as part of demands made by IMF-led lenders. The result is Law No. 5 of 1999 on the Prohibition of Monopolistic Practices and Unhealthy Competition ("Competition Law"). This short and selected summary will focus on types of agreements that are prohibited under the Competition Law. All of the agreements mentioned below must result in unhealthy competition in order to be considered illegal under the Competition Law.

Oligopolies and Oligopsonies are prohibited under Art. 4 and 13. While Oligopolies are agreements between business actors that aim to jointly control the production or marketing of goods/services, Oligopsonies result from agreements that seek to control the procurement or receipt of orders, ultimately aiming to control prices. An unhealthy effect on business competition is deemed given if the contracting companies together represent more than 75% of the relevant market.

Determining prices by way of Price Fixing agreements is prohibited (Art. 5), unless expressly permitted. This includes discriminatory and predatory pricing and the fixing of minimum re-sale prices.

The division of markets geographically or by market segment is prohibited under Art. 9. In as far as businesses enter into agreements affecting the price via controlling production and/or distribution (a so-called "Cartel"), Art. 11 prohibits the practice.

A range of Exclusivity and Bundling Agreements is prohibited under Art. 15 of the Competition Law. These agreements aim to either oblige the purchaser of a good/service to not or only supply certain businesses or to purchase further goods/services as a precondition for the sale or the underlying conditions.

The Competition Law includes a comparatively large number of rather broadly defined exceptions that make it hard to enforce in certain constellations.



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Luther LLP is one of the largest continental European lawfirms in Singapore. With our further lawfirms in Yangon and Shanghai as well as our corporate services offices in Kuala Lumpur, Delhi-Gurgaon, Shanghai and Singapore, we offer a comprehensive range of services to our clients. In Indonesia we have formed a strong collaboration with Maqdir Ismail & Partners in order to service our clients in their ventures in this interesting market. Maqdir Ismail & Partners are highly regarded for their expertise particularly in litigation, corporate law as well as in mergers and acquisitions.

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Taxation

Territorial Based Taxation for Expatriates

For the purpose of attracting more foreign investors and increasing job opportunities in Indonesia, especially during the COVID-19 pandemic, in November 2020, the Government of Indonesia issued Omnibus Law No. 11 Year 2020. The Omnibus Law, as the name suggests, cuts through the red tape of 79 different Laws of various topics, including manpower, foreign investment, environment, and taxation. Further implementing regulations with regards to taxation were issued this year, namely Government Regulation No. 9 Year 2021 ("GR-9") on 2 February 2021, and the Regulation of the Minister of Finance (MoF) No. 18/PMK.03/2021 ("PMK-18") on 17 February 2021. Under the new income tax rules and PMK-18, qualified expatriates are exempt from worldwide income taxation for the first four tax years. However, remuneration received by these expatriates for the work performed in Indonesia must be reported in Indonesia, regardless where it is paid.

In order to qualify for exemption from worldwide income taxation, they must have certain expertise in the field of science, technology and mathematics, which can be proven by having: certificate of expertise from a government-appointed institution; certificate of education; and/or

at least five years of work experience in the above-mentioned field of expertise.

Furthermore, they must hold certain positions related to the field of expertise which refers to the International Standard Classification of Occupations (ISCO) or KBJI.

In order to be exempt from worldwide income taxation, they must submit an application to the Director General of Taxation (DGT) via their registered Tax Office. The Head of Tax Office (on behalf of DGT) will review the application and will provide a response within 10 days. Expatriates making use of the territorial taxation rules cannot make use of the Indonesian tax treaties



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Tax Treaty

Indonesia Ratifies Amended Tax Treaty with Singapore

Indonesia ratified the amended tax treaty with Singapore (see Presidential Regulation No.35 Year 2021 ("PR-35") dated and effective from 11 May). The amended tax treaty has not yet entered into force. First Singapore has to ratify the tax treaty as well and subsequently the notification of ratification documents have to be exchanged. It is expected that the amended tax treaty will enter into force as per January 1, 2022.

Many of the existing treaty provisions continue, including the withholding tax (WHT) rates on dividend and interest income, which remain 10% to 15% for dividends and 10% for interest. Nevertheless, there are some positive changes which are set out below.

Introduction of a capital gains tax provision

The old tax treaty did not have a capital gains article. This meant that Indonesia could tax the sale of the shares in Indonesian private companies held by Singapore resident shareholders. The amended tax treaty includes a capital tax provision (article 13). Indonesia should no longer tax capital gains on the sale of shares in Indonesian private companies held by Singapore resident shareholders, unless, broadly speaking, the Indonesian company is land rich and the

Singapore shareholder holds more than 50% of the Indonesian company.

Royalty WHT lowered to 10% or 8%

Indonesia imposes a 20% WHT under domestic law on payments of royalties to non-residents. Under the existing treaty this rate is reduced to 15% regardless of the type of royalty. Under the new treaty, the rate of WHT has been reduced to:

- 10% on payments for the use of, or right to use, copyright, any patent, trademark, design or model, plan, secret formula or process; and
- 8% for the use of, right to use, industrial, commercial or scientific equipment or knowledge.



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Tax Facilities

Income Tax Facilities Special Economic Zones

In February 2020, the Government issued GR-12 regarding investing in Special Economic Zones (i.e., (Kawasan Ekonomi Khusus/KEK). Recently, the Ministry of Finance issued PMK-237 which provides implementation guidance. Below some income tax incentives available for taxpayers investing in industries in Special Economic Zones will be briefly discussed.

Tax Holiday

Taxpayers who conduct their main activities in a KEK will be entitled to a tax facility reduction of 100% of the amount of corporate tax payable. The duration of the tax facility depends on the value of the investment and ranges from 10 years for investments between IDR100 and IDR500 billion, 15 years for investments between IDR500 billion and 1 trillion, and 20 years for investments of more than IDR 1 trillion. After this period the taxpayer will still get a reduction of CIT of 50% for two years.

CIT Allowance

Taxpayers who cannot qualify for the tax holiday mentioned above can still qualify for a CIT allowance.

The tax relief for the selected sectors/regions comprise of four incentives:

- Additional tax deduction of 30% of the amount invested in certain assets;
- Option to use accelerated tax depreciation at double normal rates;
- The period for tax loss carry forward may be extended to a maximum of 10 years (instead of five years)
- WHT on dividends to non-resident shareholders is reduced to 10% (or a lower DTA rate).

The application to obtain the income tax benefits should be submitted electronically, utilizing the OSS system together with an application for a business identification number or within one year after OSS has issued a business license for the investment and/or expansion.



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KPMG Advisory Indonesia (KAI) has been providing business advisory services focusing on taxation and related business issues since 1957. KAI is one of the largest practices in the country, providing services to multinational corporations, joint ventures and domestic companies operating in a wide range of business sectors. Our experienced tax professionals are drawn from a wide number of countries and backgrounds. Industry specialization, service line expertise and international exposure, together with continuous advanced training, equips them to work with our clients and to be their professional tax advisors in a wide spectrum of business matters.



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Law Updated**Job-Creation Law Updates: Natural Resources Sector/Geothermal Energy**

On 5 October 2020 the Indonesian House of Representatives approved the job creation law, which is effective since 2 November as Law No. 11 of 2020, issued in the State Gazette of the Republic of Indonesia No. 245 of 2020. The Job Creation Law amends several provisions from Law No. 21 of 2014 on Geothermal Energy ("Geothermal Law"), most of the changes being related to the concentration of authority in development and supervision functions upon the central government. Under the Job Creation Law, the central government is now authorized to create norms, standards, guidelines and criteria for the direct and/or indirect execution of geothermal energy business activities, which will be the basis for local governments to perform their related competency. Government Regulation No. 25 of 2021 ("Regulation") has been enacted on 2 February 2021 to further set forth the implementing regulations on the indirect use of geothermal energy, i.e. geothermal utilization activities through the process of converting heat and/or fluid energy into electrical energy. A determination of working area ("Geothermal Area") and granting of business license ("IPB") for the indirect use purposes may be granted by the government after initial surveys by way of a tender process.

Pursuant to this Regulation, geothermal business comprises; (i) exploration stage, (ii) feasibility study, (iii) exploitation and utilization stage, and (iv) return of the Geothermal Area to government. Each of these stages has its own deadline based on the government's approval, which has to be kept in order to avoid administrative sanctions eventually leading to a revocation of the IPB.

A feasibility study may be carried out during or immediately after the exploration

stage. The IPB holder is obliged to return the IPB to the government, if in the course of the feasibility study it is concluded that the project is not realizable. Otherwise, after exploration and feasibility study, the IPB holder is required to request approval for exploitation and utilization by the government. The IPB holder may only utilize the electricity derived from geothermal exploitation after obtaining a business license as an electricity supplier.

The IPB holder may return the working area to the government in case, (i) the IPB holder does not find any geothermal reserves that can be utilized commercially before the end of the IPB term, or (ii) if the IPB expires. Before returning the Geothermal Area, the IPB holder is obliged to conduct reclamation activities and to ensure the preservation of environmental functions.

Though there are some bureaucratic hurdles and complexities that need to be overcome upon realizing geothermal projects in Indonesia, there is a promising market waiting to be explored by future-oriented investors.

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Tax Payers**DGT Form for Non-Indonesian Tax Payers**

The prevailing form of Certificate of Domicile ("COD") (by way of a DGT Form) is prepared based on The Director General of Tax Decree No. PER-25/PJ/2018, which became effective as of 1 January 2019. The Decree stipulates that the tax withholder is required to submit the relevant information for the DGT Form through an electronic system managed by the DGT. The Original COD is scanned and uploaded into DJP Online; a corresponding receipt will be issued upon submission.

The tax withholder keeps the original COD/DGT Form, and is required to prepare a Withholding Tax Slip for every transaction with a Foreign Tax Resident, and to attach the receipt of their DGT Form submission upon filing the Withholding Tax Return when the tax is due. There is still uncertainty as to whether or not a DGT Form which is only provided during the tax audit or tax objection shall be acknowledged by the tax officer.

DGT Circular No. SE-35/PJ/2021 of 31 May 2021 provides internal guidelines for tax officers on the examination of a COD which is received during the process of tax audit, tax objection or cancellation of tax assessment. Before the issuance of such a Circular, the acknowledgment relied upon the professional judgment of the tax auditor or the tax examiner.

The Circular mentions that a COD which is received during the process of a tax audit, tax objection or tax assessment cancellation may still be acknowledged by the tax officer, as long as the formal requirements - as stipulated in the Circular - are fulfilled, including using the official form of a COD (DGT Form); the signature of the authorized foreign taxpayer and the Competent Authority; the declaration of the foreign taxpayer regarding the prevention of tax treaty abuse; and the declaration of beneficial ownership. The Circular provides guidance for both, taxpayer and tax officer, in such cases.

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Acquisition

Corporate Acquisition Aspects

The most common type of acquisition in Indonesia is the purchase of shares in a company, either from a selling shareholder or from the company itself. A foreign entity may either acquire all shares or, depending on equity restrictions, enter into a joint venture in an Indonesian company with a local partner. Foreign investors may not create a legal partnership. Asset acquisitions are also quite common for the transfer of business units. Other methods include mergers or amalgamations, where the target company is dissolved into the surviving company and therefore ceases to exist.

The statutory framework for the combination of businesses through a limited liability company is generally provided in Law No. 40 of 2007 on the Limited Liability Company, and several implementing regulations, such as Government Regulation No. 27 of 1998 on Mergers, Consolidation and Acquisition of Limited Liability Companies. Under this framework, the requirements pertaining to M&A in Indonesia commonly follow a certain deal protocol including, among others, a public acquisition/merger announcement and a share valuation to determine their fair market value. There is no mandatory rule as to share valuation in Indonesia. However, it can be said that the DCF (Discounted Cash Flow) approach is regarded as widely accepted with regard to share valuation. Generally this is based on a best assumption taken by the valuation firms, which may differ from one to another as to their parameters. These include company growth rate, interest / discounted rate, internal rate of return, industry expectation, etc.

Further, an extraordinary general meeting of shareholders of the target company or each of the merging companies is held, in which a quorum of at least ¾ of the total number of shares with voting rights is present (unless otherwise stipulated in the articles of association or a specific regulation), and in which approval needs

to be obtained from shareholders holding at least 75 percent of the number of votes cast. Another requirement is the approval of creditors, or other third parties if required by law or pursuant to agreements, in respect of the proposed transaction and a waiver of their rights for claims to be settled prior to the effectiveness of the merger or acquisition. From administrative side, the approval of the relevant agencies having competence over the merging or acquired company (such as the Financial Services Authority or the Ministry of Law and Human Rights which oversees all limited liability companies, no matter the sector) and the consent of any relevant industry regulator, depending on the target company's business, needs to be obtained.

It should be noted that Indonesia also has a quite complex regulatory and government monitoring system, hence the administrative requirements should not be underestimated by the parties. But these efforts in the market entry phase can eventually be rewarded with the opportunity of tapping into one of the biggest markets in the region, especially if investment plans come with a broad time horizon.



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