EKONID AHK

NEWSLETTER

LAW & TAXES

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Dear Members, dear Readers,

Irrespective of the outcome of the Indonesian presidential elections, the year of 2014 is sure to bring along changes for companies in Indonesia, whether they are local companies or foreign investments.

Just to name a few, remarkable changes have already been made in terms of the new Indonesian Industry Law, which entered into force on 15th January 2014 and the new Trade Law of 11th February 2014, which exerts greater control over import and export in Indonesia and underlines the apparent current policy line to protect national interests and to strengthen the domestic market. For example, the new Indonesian Investment Negative List ("DNI 2014"), which has been signed by the President of the Republic of Indonesia and come into effect on 24th April 2014, limits the maximum of foreign shareholding in distributorship business to a level of 33 %. For Germany being an export nation with a particular interest in upcoming markets like the Indonesian one, naturally, legal issues and questions were soon to follow amongst German investors.

In addition, the existing structures in the Indonesian legal system continue to compose obstacles for foreign investors in various fields of law, such as labor, tax, corporate, compliance and litigation. Thus, we have asked some of the most high profile and expert law firms, coming from Indonesian as well as international backgrounds, to discuss exclusively for our Newsletter current legal topics and to share their insights with you as a reader. We wish you a pleasant reading and the best success along the way of doing business in Indonesia.

Silke Helmholz

Deputy Managing Director & General Counsel

Tax audit and litigation process: an endless and costly journey?

Under a self-assessment system, tax audits are inevitable. Indonesia has adopted the self-assessment system during the Tax Law Modernization Program in 1983. Accordingly, taxpayers are entrusted to calculate, pay and prepare tax returns based on the prevailing laws and regulations. The Director General of Tax (DGT), on the other hand, reserves a right to conduct audits and examinations on the tax returns filed by taxpayers. The window period of DGT to conduct a tax audit is, under normal circumstances, five years from the date of tax return.

A Tax Assessment Letter to collect tax underpayment will be issued by DGT as a result of the tax audit. Any discrepancies founded during a tax audit will be put in the Tax Assessment Letter, plus any applicable penalties, notably 2% interest penalty per month.

Under the latest Tax Law, taxpayers who do not agree with the Tax Assessment Letter may decide not to pay the afore-mentioned Tax Assessment Letter. The risk is that 100% surcharge will be imposed if the Tax Assessment Letter is finally confirmed by the highest taxing authority, the Tax Court. Further, taxpayers who do not agree with Tax Assessment Letter may file an objection letter with the DGT. In practice, the outcome mostly appears unfavorable for taxpayers. Consequently, most dispute resolution processes will continue at the Tax Court under a tax appeal process. Practice has shown that, contrary to the results of objection processes, the results in Tax Courts are mostly favorable for taxpayers. It is widely perceived that appeal process with the Tax Court is able to produce fair outcome to taxpayers.

In the most recent developments, however, DGT files reconsideration letters on every lost appeal results. The reconsideration letters are filed with the Supreme Court. Though the decision of Tax Court shall be considered as final and binding based on the Tax Court Law, under certain conditions either DGT or the taxpayer may file such reconsideration letter with the Supreme Court. This reconsideration process creates huge uncertainty in tax dispute resolution process in Indonesia, as the timing for decision from the Supreme Court is vague.

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Compliance

Environmental permit

Prior to obtaining a business license, companies doing business in Indonesia need to obtain an environmental permit (Ijin Lingkungan – "IL") from the Ministry of Environment, governor or regent/ mayor according to their authorities. The legal framework for the environment licensing is provided by Government Regulation No. 27 of 2012 on Environmental Permit ("GR 27").

The permit shall generally be obtained by all parties doing business and/or conducting activities which, under the relevant laws and regulations, require an environmental impact analysis (Analisis Mengenai Dampak Lingkungan Hidup – "Amdal") or an environmental management/ monitoring efforts report (Upaya Pengelolaan Lingkungan Hidup dan Upaya Pemantauan Lingkungan Hidup - "UKL-UPL") as condition to obtain a business license. Business activities which are not required to obtain Amdal or UKL-UPL exempted from this obligation.
The following procedure needs to be observed to obtain IL from the relevant authorities:
- Compose Amdal or UKL-UPL report
- Review of Amdal or UKL-UPL report by the relevant authorities to obtain the Decree of Environmental Feasibility for Amdal, or Letter of Recommendation for UKL-UPL
- Submit application to the relevant authorities

The process to obtain IL takes 3 to 6 months, depending on the location of business activities.
Business for which Amdal needs to be prepared includes various industrial activities such as cement industry, petrochemical industry and other activities as provided at Regulation of Ministry of Environment No. 05 of 2012 on business plan and/or activities requiring Amdal.
Those business activities, for which the preparation of UKL-UPL is necessary, are subject to regulations issued by the local government which has competence for the administration of the project.

For business activities which are not classified as obliged to obtain Amdal and UKL-UPL, the company will be required to declare its commitment and ability to manage environment by signing a "Letter of Statement of the Environmental Management" (Surat Pernyataan Kesanggupan Upaya dan Pemantauan Lingkungan Hidup "SPPL"), acknowledged by the environmental local office when the application to obtain the business license is submitted.

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Corporate Tax: Tax facilities, maximize your return on investment

The Director General of Tax (DGT) issued various tax facilities as its efforts in achieving an attractive investment climate for Indonesia, particularly in the competition with its neighbor nations in ASEAN.

One of the examples of these efforts is the reduction of the corporate income tax rate, which is now at 25% from the previous rate at 28%. In addition to the corporate income tax rate reduction, Indonesia also offers various tax facilities, namely further reduction of corporate income tax for listed companies to 20%, tax holiday, investment allowance, and other facilities.

Below are some of 45 tax facilities which are currently available for investors.

Name of tax facility	Key requirements	The facility
Tax holiday	• Pioneer industries, i.e. : basic metal industries, oil refinery and/or oil and gas sourced basic organic chemical, machinery, renewable resources industries, and/or communication equipment • Minimum investment of 1 trillion IDR (approx. US$ 87 million) • Deposits 10% of the investment plan in Indonesian banks	• Corporate income tax exemption (tax holiday) for 5 up to 10 years, started from initial commercial production • 50% corporate income tax reduction for 2 years after tax holiday period ended • The Minister of Finance may grant extension of the facilities under certain conditions
Tax allowance for investment in certain business sectors and certain regions	Taxpayer who invests in: • 52 business sectors or • 77 business sectors in certain regions	• Investment allowance at 30% of the total investment, allocated for 6 years for 5% annually • Accelerated depreciation and amortization • 10% withholding tax on profit-repatriation or as per tax treaty • Extended tax loss compensation for 5 years up to 10 years, under certain conditions
Facilities for renewable energy resource utilization	Taxpayer who conducts activities on renewable energy resources utilization	• Investment allowance at 30% of the total investment, allocated for 6 years for 5% annually • Accelerated depreciation and amortization • 10% withholding tax on profit-repatriation or as per tax treaty • Extended tax loss compensation for 5 years up to 10 years under certain conditions

In practice, however, rules and regulations and the actual approval process might not always be in line. A closer look on the requirements and process is advised to secure the tax facility for foreign investors.

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Does a company which employs a non-resident director need a working permit?

First of all, we believe that a director cannot be deemed as a worker or employee as defined by the Manpower Law, but as an organ of the company pursuant to the Company Law. Based on the Company Law, the board of directors ("BOD") is an organ of the company which is appointed and terminated by the general meeting of shareholders, instead of based on employment agreement as in a regular employee. However, even though a director cannot be considered as a worker based on the Manpower Law, but the terminology used by the Manpower Law for foreign workers are "foreign manpower" ("TKA") and not "foreign workers" so that by the definition of the Manpower Law, a foreign director is definitely a "TKA". The Manpower Law defines "the TKA" as "a visa holder of foreign citizenship with the intention to work in Indonesian territory". The term "working in the Indonesian territory" can be interpreted as a "physical presence in Indonesia", but it is also possible that this can be interpreted broadly as "doing work for entities that established in the Indonesian territory" (although physically he was not in Indonesia). The Company Law states that the BOD shall carry out and be responsible for the management of the company for the interest of the company. So, the issue with the "non-resident director" is that how can he/she carry out the day-to-day management if he/she is not in Indonesia? In practice, the non-resident director will do his/her duties (e.g.: to sign certain documents) from outside of Indonesia or enter into Indonesia regularly. Both practices show that there is "intention to work in Indonesian territory". Based on the foregoing elaboration we believe that such company should arrange for the work permits of its foreign directors and based on our past experience, the Manpower Agency will take broad interpretations by not limiting the scope of the definition of foreign manpower as those who are domiciled or doing his/her job in the Indonesian territory.

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Grandfather clause, a protection for foreign investor in Indonesia

On 24 April 2014, the new Negative List of Investment has come into effect ("Negative List"). The Negative List aims to enhance foreign direct investment in Indonesia as it has now increased the threshold for foreign shareholding in several industries, eg.: pharmaceuticals, power generation and advertising. But on the other hand, the Negative List also diminishes the threshold of foreign shareholding in certain industries. One significant example is in trade industry, specifically in the line of business of distributorship. Previously, foreign investors could have up to 100% of foreign shareholding if they intended to establish a company in the distributorship line of business. However, the Negative List provides that the distribution business activity is now open only for up to 33% of foreign shareholding. Legal issues may arise here as to whether existing foreign distributors are obliged to divest its foreign shareholding in order to comply with the Negative List. Fortunately, the BKPM has consistently applied and recognized the so-called grandfather clause which means that any approval(s) or license(s) that were issued by BKPM under the old regime of Negative List will continue to apply and be deemed valid while the new restrictions under the present Negative List will only apply to all future approval(s) or license(s). The concept of a grandfather clause is also reflected under the provision of Negative List which states that the restriction contained in the Negative List shall not be applicable for investments approved in certain sectors prior to the enactment of the Negative List, unless such provisions are more beneficial to the referred investment. Thus, taking into account the concept of grandfather clause, by law, existing distributor companies having 100% foreign shareholding (or less but more than 33%) will not be obliged to adjust its foreign shareholding in accordance with the Negative List. However, if a foreign distributor company operates under a grandfather clause intends to expand its selling capacity, BKPM will treat this matter on a case-by-case basis as to whether or not BKPM will accept the proposed expansion.

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Asset acquisition from the perspective of Indonesian Competition Law

In general, acquisition can be categorized into two types, namely shares acquisition and asset acquisition. Indonesian laws only recognize shares acquisition. Such recognition is embodied by the Company Law by defining (shares) acquisition as a legal action undertaken in order to take over shares which results in the change of control of a company. In performing acquisition, business community needs to proceed with caution and prudence so it will not result in monopoly practice or unfair business competition. For that purpose, the Commission for the Supervision of Business Competition (KPPU) encourages business community to consult with KPPU pertaining to their plan to perform acquisition. The acquirer can consult only if the acquisition, through self-assessment mechanism, meets certain criteria stipulated by KPPU. It needs to be understood, however, that the pre-acquisition consultation does not obviate the obligation to perform the post-acquisition notification. Even so, KPPU has given its commitment not to change its assessment on the acquisition provided that there is no material change to the data submitted by the acquirer at the time of consultation. The case is quite different with the asset acquisition. Apparently, the Competition Law adopts the definition of acquisition under the Company Law. As consequence, the said post-acquisition notification and pre-acquisition consultation do not apply to asset acquisition. Asset acquisition is considered not resulting in the change of control of a company. To some extent, the notion is valid. However, asset acquisition would have another effect which, from another perspective of the Competition Law, potentially causing monopoly practice or unfair business competition. Through asset acquisition the acquirer can eliminate any significant competitors, in terms of market control, or become dominant among its competitors, in terms of financial, supply or sales capability. This situation is known as dominant position. Being dominant is not violating the Competition Law, however, if this domination is directed to take certain advantage by imposing conditions in the view to hamper or impede customers to obtain competitive goods or services, by restraining the market and the development of technology or by hampering any party from entering the market, then it is definitely a violation of the Competition Law. As closing, although the Competition Law does not recognize the asset acquisition, KPPU should be wary of the practice of asset acquisition since it could lead to a dominant position situation.

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Indonesia - New Commercial Law (Trade Law number 7 of 2014)

Indonesia's parliament has passed the first Comprehensive Commercial Law (Trade Law) on 11 February 2014. It authorizes the government to exercise greater control over exports and imports. The plan of the Indonesian government to protect the national interests and strengthen the domestic market will be implemented in this way.

Unfortunately, the draft does not define the conditions under which the measures are possibile, sufficiently clear and thus provides wide scope for interpretation that lead to legal uncertainty. In addition, the new law contains clauses which may be in conflict with WTO rules, to which Indonesia has committed. For example, the introduction of so called "safeguard measures" to protect the domestic economy from foreign products is in principal allowed, but shall be restricted to the necessary duration. These kinds of time limits cannot be found in the law.

The Trade Law grants the Indonesian government, among others, the following rights:

- To promote and favor locally produced goods, however with no difference between domestic or foreign producers (with local production)
- Trade bans or restrictions may be imposed on certain goods/ services in the interest of domestic trade
- Exports and imports may be restricted in the context of national interests
- Mandatory use of national standards (SNI standard) for traded goods in Indonesia may be requested
- Penalties and criminal sanctions (imprisonment between 1 year and 12 years) may be imposed for violations of provisions of the Law.

Overall, it must be noted that the new Trade Law still needs a large number of implementing regulations. Thus, the actual impact of the new Trade Law will depend on these ancillary regulations, which shall be issued within two years of the promulgation date of the law.

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Litigation, arbitration and mediation

Enforcement of claims in Indonesia

Before starting entrepreneurial activities in Indonesia one should think about appropriate forms of dispute resolution prior to signing agreements. It is standard and expected by Indonesian business partners that in case of dispute initially an amicable solution is sought and within a lawyer's warning letter the debtor is offered a so-called conciliation meeting, a meeting for an amicable out-of-court dispute resolution where voluntary fulfillment is still available.

Article 1338 of the Indonesian Civil Code gives parties the freedom to agree on arbitration clauses, limited however to the area "Commercial" (Article 5 Arbitration Law), excluding purely civil disputes between private individuals. In arbitration proceedings with Indonesian parties Singapore (SIAC) as an established center of arbitration is often chosen. The local Indonesian National Board of Arbitration (BANI) is frequently ignored in the considerations, although there are favorable aspects, which should at least be considered. After all a SIAC arbitration is classified as an international arbitration award, while on the other hand a BANI arbitration award shall be considered as national.

International arbitration awards are not automatically recognized in Indonesia. In order to enforce the award the Central Jakarta District Court has to issue a writ of execution (Exequatur - Article 66 Arbitration Law). Although Indonesia has ratified the New York Convention of 1958 (recognition and enforcement of international arbitral awards), this process is time-consuming and the debtor is given the opportunity to move assets. A BANI arbitration award has the advantage that it only demands the registration at the local district court. There are also foreign arbitrators listed at BANI, who may be appointed by a foreign party. The preparation and representation in the proceedings should be placed in the hands of lawyers who are familiar with the operation of BANI.

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Credit insurance

German machinery and engineering services are in high demand in Indonesia. German companies may want to use this situation by extending market penetration of their products. These export transactions are typically accompanied by commercial banks and export credit insurers that can offer financing and hedging of the special risks arising from these transactions. Government export coverages play an important role, too. In this context different covers are available for transactions on the basis of up-to-date information material or on a case-by-case basis. Collaterals are normally not required.

Legal backup to these transactions - despite the existence of proven structures - cannot be created without knowledge of special circumstances and legal practice in the importing country.

The availability and enforceability of certain security rights or foreign exchange restrictions are only some examples of legal issues that cannot be neglected without jeopardizing the entire deal.

For Indonesia the following legal framework applies in this context:
An exporter may assign his rights for payment in accordance with the Article 613 in conjunction with Article 584 of the Indonesian Civil Code to a bank or insurance. The assignment is effective when the debtor gives his consent or has been duly notified.

Payments of Indonesian customers in connection with the settlement of export business are not subject to special currency transfer restrictions with regard to the height of payment. However, there are administrative reporting requirements for foreign exchange payments. Banks in Indonesia automatically require the customer to fill out these reports in the context of a foreign exchange transaction.

The purchaser may block the payment on the basis of a preliminary injunction, based on a court decision or order from the police or public prosecutor.

In order to avoid legal difficulties a reliable advisor, who is familiar with specifics of Indonesian law, should be consulted.

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Technical guidance for outsourcing contracts in Indonesia

The revocation of the outsourcing system in Indonesia is still the main demand of the labour demonstrations of 1 May 2014 (May Day). The outsourcing system is governed by the Manpower Law No. 13 of 2003 ("**Manpower Law**") and the Minister of Manpower and Transmigration Regulation No. 19 of 2012 ("**MOM Reg 19/2012**"). Under the Manpower Law, the only works that can be outsourced are those activities that are separate from the main activity of a company and do not have a direct impact on the production process.

In the last few months, we noted that at least two ministries have issued circular letters relating to outsourcing matters. The first letter is the Circular Letter of the Minister of Manpower and Transmigration No. SE.04/MEN/VIII/2013 dated 26 August 2013 ("**SE MOM 4/2013**"). The SE MOM 2013 is the guidance which implements MOM Reg 19/2012. This contains technical details of procedures to be adopted in reporting or registering an outsourcing contract to the authority (including the application forms), specifies certain requirements for an outsourcing company and what is to be included in an outsourcing agreement.

We also noted that the Minister of State-Owned Enterprises issued a circular letter No. SE-02/MBU/2014 on 5 March 2014 regarding partial work assignment ("**SE MOSOE 02/2014**") for state-owned enterprises. In SE MOSOE 02/2014, the Minister instructs state-owned enterprises to ensure that all outsourcing practices in state-owned enterprises are in compliance with the Manpower Law. The SE MOSOE 02/2014 also provides details on what kind of works can be outsourced.

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Permitted positions for foreign workers in the metal processing industry

The Minister of Manpower and Transmigration ("**MOMT**") has issued a new regulation concerning the employment positions permitted to be held by foreign workers in the processing industry, specifically in the metal processing industry sector in Indonesia.

The new regulation, under the MOMT Decree No. 359, dated 24 December 2013 entitles permitted positions for foreign workers in the processing industry in the metal industry category, excluding machines and utilities ("**Ministerial Decision No. 359 of 2013**"), stipulating that only certain positions can be held by foreigners, especially in the metal processing industry. These are, amongst others, the positions of commissioner, director, manager, advisor, analyst and engineer. Any position which has not been stipulated in the ministerial decree can only be held with the approval of a minister of the related industry. However there are also certain positions that are prohibited for foreign workers. Any position related to human resources, personnel recruitment, career development, job advisory services and occupational analysis are prohibited to foreign workers. This is in accordance with the Ministerial Decision of MOMT No. 40 of 2012, namely, certain positions that are prohibited to foreign workers, as previously issued.

Ministerial Decision No. 359 of 2013 was issued to implement Law No. 13 of 2003 ("**Manpower Law**"). According to Article 42, paragraph 5 of the Manpower Law concerning the employment of foreign workers, each foreign worker who is employed by an Indonesian company has to obtain written permission from a minister prior to commencing their working activities in Indonesia. Therefore, in order to further clarify foreign worker employment in various industries and to avoid any misinterpretation of the terms concerning which positions are permitted or prohibited pursuant to the law, MOMT, under ministerial decree, issued its latest 2013 regulation concerning foreign worker employment.

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Corporate governance

Corporate governance in insurance companies

In order to strengthen the national insurance industry as well as to optimize the implementation of good corporate governance in insurance companies, on 8 April 2014 the Financial Services Authority/Otoritas Jasa Keuangan ("**OJK**") issued Financial Services Authority Regulation No. 2/POJK.05/2014 on "Good Corporate Governance" ("**POJK No. 2/POJK.05/2014**"). Insurance companies are categorized in Article 1 paragraph 1 of this regulation as follows: insurance companies, life insurance companies, reinsurance companies, insurance brokers, reinsurance brokers, insurance agents companies and others.

The principles which embody good corporate governance are stipulated in Article 2 POJK No. 2/POJK.05/2014 and include "transparency, accountability, responsibility, independence, and fairness". The transparency principle embodied in Article 69-70 No. 2/POJK.05/2014 regulates the disclosure of information about the policy and effective communication strategies to ensure that the OJK is provided with the necessary information in a timely and efficient manner.

To embody the principles of responsibility and accountability, there is a stipulation referred to as "Risk Management and Internal Control" in Article 66-67 POJK No. 2/POJK.05/2014, which requires the insurance company to apply risk management protocols to identify, assess, monitor, and manage business risks more effectively.

Furthermore, an independence principle is also embodied in Article 78-81 POJK No. 2/POJK.05/2014 namely, by way of the "Self Assessment and Implementation Report on Good Corporate Governance". Insurance companies are required to submit such a report to the Chief Executive (OJK Commissioner Board Member) in the forms of both printed hard copy and electronic communication.

Moreover, the fairness principle embodied in Article 75-76 POJK No. 2/POJK.05/2014 regulates "Business Ethics". Article 76 POJK No. 2/POJK.05/2014 requires that the insurance company must create guidelines on ethical behaviour which are to be applied to the whole institution.

In addition to the foregoing, there are also various administrative sanctions stipulated in Article 83 in the event of non-compliance with the regulations.

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Notification requirement in M&A transactions

In Indonesia, business actors frequently conduct M&A transactions for efficiency and streamlining the company. M&A is also seen as one of the perfect solutions to strengthen their position in the market in order to be able to compete with the others. The M&A transactions, knowingly or not, will affect a competition among business actors in the relevant market as well as impact to the consumers and community.

M&A transaction potentially leads to monopoly practices or unfair competition and must be controlled in order not to harm the consumers and community. For that purpose, the Indonesian Competition Supervisory Commission (better known by its Indonesian Acronym "**KPPU**") as the independent authority established to supervise the prohibition of monopolistic practice and unfair business competition has issued the Commission Regulations Number 2 Year 2013 ("**Regulation 2/2013**") which regulates the guidelines of implementation on merger or consolidation of business entities and acquisition which may result in the occurrence of monopolistic practices and unfair business competition.

With this Regulation 2/2013, an M&A transaction which generates a business entity with the value of asset in excess of IDR 2.5 trillion or with the sales value (turnover) exceeding IDR 5 trillion shall be obliged to give notification to the KPPU. In particular, for M&A transaction conducted by two or more business actors engaged in banking, then such business actors shall be required to give a notification when the asset value of the business entity exceeds IDR 20 trillion. Meanwhile, if one party to the transaction is engaged in banking and other parties are not engaged in banking, then the business actors shall be required to perform the notification when the amount of asset value exceeds IDR 2.5 trillion. The notification requirement also applies to M&A transaction conducted outside the jurisdiction of Indonesia ("Offshore M&A"), when the M&A transaction influences the Indonesian domestic market.

Business actors who conduct M&A transaction potentially leading to monopoly practices or unfair competition are obliged to submit the notification to KPPU no later than 30 working days as from the date of M&A transaction is legally effective. If notification is not submitted, the business actor can be sanctioned with administrative fines up to the maximum amount of IDR 25 billion.

In April 2014, KPPU issued a ruling that punishes a business actor who was late to give notification by condemning the business actor to pay a fine of IDR. 1,249,000,000. With the existence of the ruling, until now KPPU has convicted at least three business actors in relation to the delay in making the notification to KPPU. This also proves that KPPU no longer hesitates to punish business actors proven to have violated the terms of submission notification to KPPU.

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Acquisition of a mining company

Mining industry in Indonesia is increasingly growing. It is characterized by the increasing number of investors who invest in the mining industry. The tender requirement implemented by the government in order to obtain the new mining business license (IUP), however, makes an acquisition of an existing mining company as a preferable method to invest in mining business in Indonesia.

The acquisition of mining company has been regulated in Minister of Energy and Mineral Resources Regulation Number 27 of 2013 on Procedures and Determination of Share Divestment Prices and Changes of Investment Particulars in the Mineral and Coal Mining Business ("**Regulation 27/2013**"). Pursuant to this regulation, any change in investment including shares acquisition, may be conducted by the business entity engaged in mining business after obtaining the approval of the minister, governor, or regent/mayor in accordance with their authority.

The change of shares ownership shall be made with reference to the provisions of the share ownership restriction as stipulated in Article 27 paragraph (1) and (2) of Regulation 27/2013. Under these provisions, a change of foreign ownership to the company in the stage of exploration may only be conducted when the foreign shares ownership is limited to 75%. Meanwhile, for the company that has been in stage of production may be conducted when the foreign ownership is limited to 49%. With those requirements, a foreign investor wishing to acquire shares of a mining company is prohibited to own shares in excess of the above percentage.

The application for the change of shares ownership must be submitted to the minister, governor, or regent/mayor in accordance with their authority, by enclosing a number of documents as required in Article 27 paragraph (5) of Regulation 27/2013. Furthermore, the granting or rejection of the application will be determined within a period of 14 working days as of the date when the application is received completely and correctly. If the application for the change of ownership is rejected, the rejection must be submitted in writing to the applicant along with the reason thereof.

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Intellectual property and brand protection

Alternative dispute resolution forum for intellectual property rights (BAM-HKI)

Since April 2011, Indonesia finally has a new institution on alternative dispute resolution forum for intellectual property rights (IPR) disputes, namely Arbitration and Mediation Board for Intellectual Property Rights (**BAM HKI**). BAM HKI's presence is expected to enrich the differentiation of arbitration body in Indonesia, which previously only consisted of Indonesian National Board of Arbitration (BANI), Indonesian Capital Market Arbitration Board (BAPMI) and National Sharia Arbitration Board (BASYARNAS). IPR arbitration which was initiated by nine people, consisting of IPR's practitioners and academics and supported by 15 (fifteen) business associations, was formed with the expectation to become an alternative settlement for people seeking justice and legal certainty in respect to IPR disputes. In international forum, IPR arbitration has previously been known with the establishment of the World Intellectual Property Organization (WIPO) Arbitration and Mediation Center in 1994, with headquarters in Geneva, Switzerland.

Before BAM HKI was established, IPR disputes could be settled through Commercial Court or BANI. However, during that time, the settlement through those forums has not fulfilled the needs of justice seeker in IPR. The settlement through the court which tends to be long and costly as well as the lack of understanding of the judges in IPR also become the main constraints for the justice seekers who want a quick dispute settlement and satisfy the justice. On the other hand, the dispute settlement through BAM HKI which upholds the principle of confidentiality and with quick examination and supported by the availability of arbitrators who are experts in IPR becomes an advantage for people who want their case examined quickly but do not want to open the case in the public.

In addition to sociological reasons, the establishment of BAM HKI is also mandated by IPR related laws. The laws and regulations as the legal basis on the establishment of BAM HKI are, among others, Copyright Law (Law No 19/2002), Trademark Law (Law No 15/2001), Trade Secret Law (Law No 30/2000), Patent Law (Law No 14/2001), Industrial Design Law (Law No 31/2000), the Plant Variety Protection Law (Law No 29/2000), Layout Design of IC Law (Law No 32/2000), which explicitly mandates the dispute settlement through arbitration and alternative dispute resolution, Law No. 7 Year 1994 concerning Ratification of Agreement Establishing the World Trade Organization and Law No. 30 Year 1999 concerning Arbitration and Alternative Dispute Resolution (Law No 30/1999).

Pursuant to the laws and regulations above, BAM HKI is authorized to receive, examine, and decide disputes relating to the following areas: (i) patents, (ii) trademarks, (iii) geographical indications, (iv) copyrights, (v) industrial designs, (vi) layout-designs of integrated circuits, (vii) trade secrets, (viii) plant varieties and (ix) other fields related to IPR. In respect to the judicial procedure in BAM HKI, there is no difference with the applicable procedures in BANI, since the judicial procedure in BAM HKI also refers to the Law 30/1999.

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Qualifying beneficial owners from an Indonesian perspective

According to Indonesian Tax Laws ("ITL"), payments to foreign residents of dividends, interest, royalties and services are subject to a 20% withholding tax ("WHT"). Under a Double Tax Avoidance Agreement ("DTA") concluded by Indonesia and another country, the applicable WHT rate is often reduced for dividends, interest, royalties provided that the income recipient, amongst others, may be regarded as a "beneficial owner". As DTAs generally do not provide a definition as to when an income recipient may be regarded as a beneficial owner, interpretation of the term is typically based on the domestic law of the country of the payer. Indonesia's beneficial ownership concept has developed significantly over the years and has become increasingly restrictive; its exact meaning remains ambiguous. For corporate structures potential beneficial owners may be: 1. A company that actually benefits from the income and/ or 2. A company not acting as an agent, nominee or conduit company and/or 3. A company that can confirm that it (i) has its own competent and empowered management, (ii) employs sufficient qualified personnel, (iii) operates an active business, (iv) is subject to tax on the earned income and (v) pays less than 50 percent of the income out (e.g. interest, royalties or other fees and dividend is excluded). The last definition is derived from a form that needs to be filed with the WHT return if DTA benefits are claimed. Accordingly, its conditions are considered critical to qualify as beneficial owner, although it seems to be the least supported by the ITL. With the previous in mind, a foreign company receiving specific income from an Indonesian resident company should carefully consider its structure and the DTA position so that it places itself in the best position to successfully claim DTA benefits.

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The dynamic world of transfer pricing in Indonesia

Positive developments in the Indonesian transfer pricing landscape are appearing. Frequent changes in legislation and regulation, combined with a desire to generate sufficient tax revenue, have created uncertainties for many taxpayers who have been subjected to aggressive tax audits and corresponding adjustments. Traditionally, taxpayers in disagreement with tax audit adjustments would follow a process of filing an objection and, if unsuccessful, lodging an appeal with the Tax Court. At the moment, the Tax Court is considering a large number of transfer pricing-related cases, some having been stuck in the Court system for a considerable length of time. And the outcome of verdicts is unpredictable. However, there are some positive trends in the current Indonesian transfer pricing landscape. As Indonesian taxpayers are now considering alternatives to the domestic dispute resolution process, such as Mutual Agreement Procedures (MAPs) and Advance Pricing Agreements (APAs).

Under MAPs and APAs the competent authorities of the countries on both sides of related-party transactions will strive to reach agreement on which country obtains the taxing rights. No official information is available regarding the number of MAPs and APAs submitted, but based on informal discussions, quite a few have been initiated and some are on the brink of conclusion. Although the outcome of the MAP and APA processes is not yet clear in Indonesia, Indonesian taxpayers should consider the obvious benefit of the elimination of double taxation under this process. While the current climate is still very challenging, there are some positive trends and a more level playing field may be on the horizon.

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Taxation of individuals

Worldwide income taxation – What does it mean for cross-border employees?

The Indonesian tax system follows a worldwide income concept, with a very broad interpretation of the term "income". According to the Indonesian Income Tax Law, income is defined as "any addition to a taxpayer's economic ability that is received or obtained by a taxpayer, from within or outside Indonesia, which can be used for consumption or to add to the taxpayer's wealth, in whatever name or form".

Does it mean that double taxation will occur? Maybe, but not necessarily. The law allows for an offset if the same income is taxed in the source country during the same tax year. Great. But is it really as straightforward as it sounds? For example, let's look at capital gains from the sale of your primary residence. Many expatriates may want to sell their primary residence when on secondment, because: a. they are living overseas, b. the property market is good or c. the gain is tax-exempt in their country. However, it would not be tax-exempt in Indonesia if sold after residency was established in Indonesia. Any gain received by a resident taxpayer would be subject to 30% income tax, assuming that the salary is higher than IDR 500,000,000. Another interesting topic is restricted share awards. When are they subject to income tax in Indonesia? Theoretically, it would be taxable upon vesting. However, if the source country taxes it upon sale in a subsequent tax year, does that mean the income would be double-taxed, in Indonesia and the source country? How would the taxable amount be calculated in each country? With the Indonesian tax authorities always concerned about meeting their target revenue, it seems that these details concerning individual taxation may become a higher priority. As more employers are offering various types of compensation arrangements, it is important for them to start thinking about whether their employees are being taxed fairly.

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KPMG Advisory Indonesia

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 continual 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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EIBN
EU - INDONESIA
BUSINESS NETWORK

YOUR GATEWAY TO INDONESIA

The EU-Indonesia Business Network aims to enhance trade and investment between the EU and Indonesia. It seeks to promote the Indonesian market among European companies, especially SMEs, and to serve as a first-entry contact point for all European businesses interested in developing their activities in Indonesia.

Launched in 2013, the EU-Indonesia Business Network is a partnership project between five European chambers of commerce in Indonesia and two in Europe. The newly established consortium is also working in cooperation, directly or indirectly through its partners and associates, with more than 2000 multiplier organizations, European and Indonesian governmental bodies, European companies and other regional counterparts.

Over the course of five years, the EIBN will coordinate 140 events in Europe and the ASEAN region, publish around 30 publications and develop an online information portal providing timely, accurate and in-depth information on market potential and detailed procedures on how to operate in the Indonesian market. Moreover, by offering a wide range of customized services, the EIBN will assist all European companies in every stage of their market investigations and business establishment in Indonesia.

The project was initiated and is co-funded by the European Union.

www.eibn.org **info@eibn.org**

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