EKONID AHK

NEWSLETTER

LAW & TAXES

June 2015 | Edition 1

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Dear Members, dear Readers,

Asian countries dominate foreign direct investment ("FDI") into ASEAN countries and considering the size of the German economy and its overall investment activities, in Asia and in ASEAN, the Indonesian – German bilateral trade volume has significant potential for further expansion.

Primarily, investments are made with high confidence into known and familiar markets. Therefore, this edition of EKONID's Newsletter Law & Taxes shall provide further overviews on recent Indonesian legal and tax developments including new regulations on construction permanent establishment, the Director General of Taxes ("DGT") audit plan and strategy, the revision of Indonesian bilateral investment treaties ("BIT") and the use of letter of credit for the export of certain goods. We also take a deeper look into the implementation of the Indonesian currency law as well as the protection of minority shareholders in M&A transactions and we hope that fruitful discussions surrounding this shared insight will foster the creation of an even stronger, mutual beneficial and long-lasting economic relationship platform.

On the daily business, especially with the implementation of special projects between Indonesia and Germany, companies are confronted with diverse, often unexpected legal and tax matters besides a lot of bureaucratic obstacles. For this situation, I would like to draw your attention to our Network Law & Taxes, a close cooperation with the German-Indonesian Chamber of Industry & Commerce (EKONID) and selected high profile and expert law firms, tax consultants and auditing firms from Indonesia and Germany. By integrating the expertise of our Network Law & Taxes cooperation partners, German and Indonesian companies gain a 360°-consulting service in law and tax matters and can rely on compliance with high standards for seriousness, specific expertise and experience. For more information of the Network Law & Taxes we cordially invite you to visit our website ***www.ekonid.com***.

I wish you a pleasant reading experience and would like to thank our cooperation 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.

Silke Helmholz

Deputy Managing Director & General Counsel

Enforceability of Non-Competition Clause

Business competition has been forcing entrepreneurs to apply various business strategies to be ahead of their competitors. One strategy that is often used is to obstruct workers holding key positions from changing sides and providing their expertise to competitors. One way of doing it is by including a provision in the work agreement that prohibits the worker from working at company that engages in the same business. This provision is commonly called the 'non-competition clause'.

In principle, Indonesian Law is silent on the enforceability of non-competition clause. However, the right to work is one of the fundamental human rights protected by the 1945 Constitution under Article 27 paragraph (2) and Article 28 (D) paragraph (2), which is also being recognized under the Human Rights Law of 1999 and the Manpower Law of 2003.

Every person and citizen has the right to work, to earn a humane livelihood, to receive fair and proper remuneration and fair treatment in employment, to be employed in line with their ability and capacity, and to freely choose employment and to equitable conditions of employment (Human Rights to Work). Thus, in the case that the non-competition clause is being construed as preventing a person from accessing any of said rights, then the provision should be deemed violating the fundamental Human Rights to Work. Therefore, such provision should be null and void pursuant to Article 1335 of the Indonesian Civil Code.

On the contrary, if the provision containing a non-competition clause is (somehow) formulated in such a manner so as not to violate the Human Rights to Work, then it should be enforceable.

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Implementing the Indonesian Currency Law

Since 28 June 2011, the Indonesian Government has been prohibiting the use of foreign currencies in payment transactions performed in Indonesia. Although the Currency Law has imposed imprisonment and fine for offenders of such mandatory use of Rupiah, there are still many transactions using foreign currencies.This is mainly because of the existence of loopholes in the Currency Law that is being interpreted allowing the use of foreign currencies as long as it is agreed in writing and the interpretation of the Ministry of Finance that excludes non-cash transaction from the scope of the Currency Law.

To implement the Currency Law, Bank Indonesia has enacted BI Regulation 17/3/PBI/2005 on the mandatory use of Rupiah within the territory of Indonesia (BI Regulation). Under the BI Regulation, the use of foreign currencies in non-cash transactions is prohibited, in addition to the prohibition to use foreign currency in cash transactions that has been introduced since 2011.

Refusal of the Rupiah as currency is also prohibited, except where there is doubt regarding the authenticity of the Rupiah or if payment in foreign currencies has been agreed in writing. Differing from the Currency Law, the BI Regulation explains that "written agreements" that may exempt one from using Rupiah are agreements (i) within the framework of the implementation of the State Budget (APBN), (ii) on grants to or from offshore, (iii) in international trade transactions, (iv) related to bank savings in foreign currencies, or (v) international financing transactions and (vi) strategic infrastructure projects and subject to BI approval.

The BI Regulation also introduces the obligation to use Rupiah in price quotations for good and/or services. To bridge the impositon of mandatory use of Rupiah in transactions within the territory of Indonesia, the BI Regulation sets 1 July 2015 as the latest date for any party to use foreign currencies.

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Exception from Speaking Bahasa Indonesia

Foreigners who intend to work in Indonesia generally must possess a sufficient knowledge of Bahasa Indonesia in order to satisfy the Minister of Manpower Regulation Number 12 of 2013 on Procedure for Utilization of Foreign Employees (MoM Regulation 12/2013). The obligation to speak Bahasa Indonesia is stricter stipulated in the Government Regulation Number 57 of 2014 on Development, Guidance, and Protection as well as Improvement of the Function of Bahasa Indonesia (GR 57/2014), under which foreigners should meet the required standard proficiency of Bahasa Indonesia. How the standard is set would be relied on the stipulation of the Minister of Manpower. If a foreigner cannot meet the required standard, then he/she must attend a class to achieve the required standard of Bahasa Indonesia proficiency.

Although pursuant to Article 26 paragraph (2) of MoM Regulation 12/2013 the position of director and commissioner have been exempted from the obligation to speak Bahasa Indonesia, the fact that in terms of hierarchy GR 57/2014 is superior to MoM Regulation 12/013, has been inflicting confusion to foreigners as they are now questioning whether they need to meet the required standard of Bahasa Indonesia proficiency. One argument that is often posed to support such exception is the fact that many of them are not living in Indonesia during their position as director and commissioner. Another argument is that they represent the interest of the shareholders. This is also the reason why they are exempted from the mandatory transfer of knowledge.

Despite of the ongoing debate on the issue, the intention to make Bahasa Indonesia the official language of ASEAN might reflect the standing of the Indonesian Government. Upon the coming ASEAN Economic Community, the Indonesian Government is likely to require every foreigner to master Bahasa Indonesia before they are able to work in Indonesia by requiring them to achieve the standard of Bahasa Indonesia proficiency.

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Office Presentation

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Revision of Indonesian Bilateral Investment Treaties (BIT) – A Threat to German Investors?

The much debated revision of Indonesia's over 60 signed BITs might happen in the near future and leave foreign investors insecure in their legal position. Since the announcement by the former Indonesian government to terminate the Dutch-Indonesian BIT, which came at a time when the country was being sued by foreign investors at the International Center for Settlement of Investment Disputes (ICSID), located in Washington D.C., the public debate was thrilled.

The German-Indonesian BIT came into force in May 2005 and replaced the older BIT from 1968. The BIT aims to promote and to protect foreign investments made by any natural or legal person from one contracting state into another. The BIT ensures among other things fair and equitable treatment for German investors in Indonesia and protects them from direct and indirect expropriation and nationalization without a legitimate reason and adequate compensation. As in many BITs the German-Indonesian BIT also appoints the ICSID as disputes settlement body.

Article 14 of the German-Indonesian BIT determines that the BIT shall be in force for a period of ten years upon ratification and it shall remain in force if it is not terminated by one contracting party 12 months in advance before expiry. So far no termination has been announced from either side.

Thus, currently the German-Indonesian BIT is in force. Furthermore, a survival clause within this BIT grants protection under the rules of the BIT for the next 20 years even after the expiry of the BIT. Another option for German investors would be to restructure their investment in Indonesia in order to find protection under one of the multilateral investment treaties signed by Indonesia such as the ASEAN Comprehensive Investment Agreement as it is unlikely that these are reviewed as well.

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Banking and Finance

Security Rights in Indonesia - New Provision on Fiducia Security

In general, many transactions such as loan agreements or credit facilities in trade financing require securities. In Indonesia, according to Article 1131 of the Indonesian Civil Code, all assets of a debtor, either present or future, can be regarded as securities for the debtor's personal agreements. The Indonesian laws on security rights provide more specific instruments to ensure a preferential position of the creditor, such as pledge or fiducia security. According to the law on fiducia security (Law 42/1999), fiducia security means the transfer of ownership right over property, provided that the property over which the right of ownership is transferred shall remain under the control of the owner. This differs from pledge, where a transfer of possession is required. Therefore, fiducia security is highly relevant in financial transactions.

According to Law 42/1999, fiducia security must be registered. In order to improve this registration service, a new regulation no. 21 of 2015 (Reg. 21/2015) was issued by the government and has been in force since April 6, 2015. The fiducia security right holder must register the fiducia security right with the Ministry of Law and Human Rights by submitting the date and number of fiducia notary deed, identities of the parties, information about the master agreement, description of secured objects, the value of debt and the value of the objects. This application must be submitted within 30 days of the execution of fiducia security deed. After the payment of the registration fees, which depends on the security value, the fiducia right will be registered and a fiducia security certificate will be issued. Correction is possible within 30 days after issuance. The fiducia security terminates when the secured debts are settled, the holder of the fiducia security waives its right or the fiducia security object is destroyed.

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New Rules for Goods Originating from Indonesia

Indonesia issued new rules for goods originating from Indonesia, such as the criteria for origin, types of rules for originating goods and the application process for the certificate of origin (CoO). The regulation number 77/M-DAG/PER/10/2014 on Rules for Goods Originating from Indonesia (Reg. 77/2014), which has been effective since January 01, 2015 was now further implemented by the regulation number 22/M-DAG/PER/3/2015 on Provisions and Procedures to issue Indonesian CoO (Reg. 22/2015), which has been in force since April 1, 2015.

In order to qualify as a good originating from Indonesia, two requirements must be fulfilled. First, the good needs to fall under the origin criteria, which means that the good entirely consists out of Indonesian raw materials, satisfies the value added content rules or the tariff classification of the good changed due to substantial changes during manufacturing process in Indonesia. Second, the good needs to fulfil the consignment criteria according to which it is directly delivered to the importing country without any transit. However, a few exceptions apply to this criteria. In general, further implementing regulations are expected.

For goods originating from Indonesia, two types of rules apply depending on international agreements or preference of the importing country. Either the good falls under the preferential rule, according to which the good obtains reduction or exemption of import duties by the importing country or the good qualifies under the non-preferential rule according to which the good does not benefits from customs facilities.

Depending on the applying rule, different types of CoO are issued, the preferential and the non-preferential CoO. The non-preferential CoO excludes customs concessions, which constitutes a change to previous regulations.

Before the application for a CoO, an exporter must secure an access right from the CoO issuing authority. After obtaining the access right, the exporter can apply for CoO.

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Schulz Noack Bärwinkel

Schulz Noack Bärwinkel (SNB) is a German law firm based in Hamburg, which was established in 1929. Over the years we developed a strong focus on the Asian markets, especially China, Vietnam and Indonesia. Today SNB maintains offices in China and Southeast Asia with an international team led by highly experienced German attorneys.

Through our partnership with a leading Indonesian commercial and corporate law firm, we provide our clients with high quality legal services. Our team consists of German-speaking attorneys with substantial Asia experience and language skills, combined with a thorough understanding of the Indonesian business environment.

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Tax Allowance Facility: Less Requirement Hassle to Attract Investments

The government issued Government Regulation No. 18/2015 ("GR 18") on 6 April 2015 to simplify the requirements for companies that invest in certain designated business sectors and/or regions to obtain tax facilities. Under this new regulation investors can file applications for tax allowances using new mechanisms.

GR 18 stipulates general criteria as requirements to enjoy the tax facility. These include
(a) high investment value or export purposes,
(b) high absorption of manpower and
(c) high local content.

GR 18 now covers 66 types of investment in designated sectors and 77 types of investment in designated sectors and regions.

The provided tax facility includes
(a) reduction of net taxable income of 30% on the investment amount in the form of tangible fixed asset prorated 5% per year for 6 years,
(b) accelerated fiscal depreciation and amortization,
(c) reduction of withholding tax on dividend to non-resident to 10% or as per tax treaty, and
(d) extension of tax losses to be carried forward longer than 5 years.

GR 18 is guided by further implementing regulations from BKPM and relevant ministries.

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Compliance

Tax Account Representative Letters

Based on the Minister of Finance Regulation No. 79/PMK.01/2015, the tax office assigns an Account Representative ("AR") with the following specific tasks:
(i) to support and provide consultation to taxpayers, and
(ii) to increase revenue collection from taxpayers.

In executing the role of increasing revenue collection, an AR may send a letter inviting taxpayers for counselling or visit the office of taxpayers.

Recently, ARs actively sent letters to taxpayers asking various inquiries on tax returns, including the request for reconciliation between Corporate Income Tax and Value Added Tax, or Corporate Income Tax and withholding taxes, as well as questions related to transfer pricing issues.

The objective of the letters is to ensure compliance of taxpayers with the prevailing regulations and to increase tax revenue collection. Taxpayers are encouraged to prepare appropriate and timely responses to those letters to avoid unnecessary complications with the authorities in charge, including escalation of the process into a tax audit, transfer pricing audit or issuance of a tax assessment letter.

The 2015 tax revenue target of the government budget puts lot of pressures to the tax office, which is clearly reflected in the increased number of letters which have recently been sent out by ARs to taxpayers.

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New Regulations for Construction Permanent Establishment

Foreign investors intending to conduct construction services in Indonesia may establish a construction permanent establishment (Badan Usaha Jasa Konstruksi Asing – BUJKA), being a specific form of representative office, by obtaining a BUJKA license issued by the Ministry of Public Work (MPW). The current legal basis is Minister Regulation number 10/PRT/M/2014 regarding principles and requirements in granting BUJKA license (MPW Regulation).

A respective one stop service has been implemented at the Indonesian Investment Coordinating Board (BKPM) in January 2015. The application to obtain the BUJKA License needs to be submitted to an MPW-officer seconded to BKPM; administration fees amount to US$ 10,000 for construction work and US$ 5,000 for construction consultation services which cover planning and/or supervision. Pursuant to the MPW Regulation the BUJKA may only render construction works with "high risk", "high technology" and "high value". These terms have now been defined in the MPW Regulation. High risk means that the construction work execution and utilization endangers public safety, property, human life and environment. High technology implies the use of special construction methods, high technology equipment, special construction equipment and requirement of a large number of experts. High value refers to construction works with a value of at least 100 billion IDR and planning work/construction supervision of at least 10 billion IDR. The MPW Regulation also requires knowledge transfer and provides broader sanctions in cases of non-compliance.

The BUJKA needs to operate jointly with a local construction company from the procurement stage until completion of the project. In the joint operation agreement the parties share benefits and liabilities of the construction work in a specified percentage. The agreement needs to regulate the scope of work, financing obligations and work distribution to each party. Under the MPW Regulation, generally at least 30% of the construction work value shall be conducted by the local construction company and at least 50% of the project value shall be rendered in Indonesia. With regard to construction planning, the entire technical planning work needs to be rendered in Indonesia and at least 50% of the construction planning work's value must be conducted by the local construction company. Exceptions from these ratios may be applied.

The license is valid for 3 years and can be extended. The BUJKA shall report its activities annually. The annual report becomes the basis for performance evaluation when BUJKA applies for an extension of the license.

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The Use of Letter of Credit for the Export of Certain Goods

In January 2015, the Government of the Republic of Indonesia issued a regulation concerning the obligation for exporters in Indonesia to use a letter of credit ("L/C") as their payment method. The obligations are stated in the Minister of Trade Regulation No. 04/M-DAG/PER/1/2015 on the Provisions for the Use of a Letter of Credit for the Export of Certain Goods. However, in practice many companies have difficulties implementing the regulation due to various factors.

To overcome this problem, the Minister of Trade has recently issued Regulation No. 26/M-DAG/PER/3/2015 on Special Provisions Implementing the Use of a Letter of Credit for the Export of Certain Goods (the "Regulation"). In general, this Regulation oversees the suspension of the obligation of exporters to use L/Cs in terms of payment for export activities they undertake. The exporters who have not been able to use L/Cs as their payment method may apply to the Minister of Trade for the suspension of their obligation to use an L/C. The Minister of Trade can give a suspension of the obligation to use an L/C after receiving a recommendation by the technical Minister related to the goods to be exported.

This Regulation basically has positive value, among other things to optimize and maintain the accuracy of reports on the implementation of export, as well as to stabilize the value of goods. Nevertheless, the Government must also consider the ability of exporters to implement this Regulation. Other than the ability and the time period for exporters to adjust to the obligation to use L/Cs, exporters involved in export activities bound by a contract made between the parties overseas must receive the consideration of the technical Minister to provide a recommendation to the Minister of Trade.

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The Use of Domestic Components in LTE-based Devices

Telecommunications instruments and devices have become technology that is indispensable to modern human life. The daily life of human beings currently relies largely on the ability of technology to support their productivity; thus, Long-Term Evolution ("LTE") investment would increase efficiency in the cellular industry sector. In this regard, the Government has issued a Draft on the Technical Requirements of the LTE-based telecommunications instrument and device (the "Draft"). The Draft regulates several things, amongst these the technical requirements and the use of domestic components. Any telecommunication-based instrument and device technology based on LTE standards in terms of manufacture, assembly, trade-accreditation, and/or used in Indonesia must comply with the provisions of the Minister of Communication and Information Technology Regulation.

Besides these technical requirements, this Draft also states that such telecommunication devices and instruments produced under LTE-based technology standards must meet local industrial component ("TKDN") provisions: these stipulate a minimal 30% (thirty percent) TKDN for the Base Station and 20% (twenty percent) for the Subscriber Station upon issuance of the regulation. In addition, certification needs to be carried out for each product specialty line. According to Ministry of Industry Regulation Number 69 of 2014, the process for companies to obtain a "certificate of production" must include assessment of the "production aspects" of a company, as well as a calculation of the TKDN. The assessment must be carried out by the MOI Directorate for the Electronic Telecommunication Industry.

Within 2 (two) years of this regulation becoming effective, the TKDN that must be met will be increased to a minimum 40% (forty percent) for the Base Station, and 30% (thirty percent) for the Subscriber Station. The TKDN for the Base Station includes the Base Station device and services, which are comprised of installation, commissioning, optimization, and maintenance of the Base Station to be operated.

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Tightening of Oil & Gas Trade Regulation

The Minister of Trade ("MOT") has issued a regulation to enforce tighter control of oil and gas imports and exports as set forth in the MOT Regulation Number 03/M-DAG/PER/1/2015 concerning Imports and Exports of Oil and Gas. At present, export and import permits are issued only upon the recommendation of the Ministry of Energy and Mineral Resources. This policy was adopted by the MOT to prevent fraudulent oil & gas sales. Prior to the enforcement of this regulation, exporters and importers needed only to attach a letter of recommendation from the technical Minister without being registered beforehand.

Based on the above, this regulation has transformed the oil & gas sector. The scope of the regulation embodies this legal transformation and the enforcement of the law in the oil & gas sector. According to the 1945 constitution, oil & gas as natural resources is an important sector and protected by the state as revenue. Earlier this year, the Government had discussions on the 2015 National Energy Policy as Indonesia has seen a decrease in value of over US$4.2 billion or almost 370 trillion Rupiah for the last ten years due to "mafia practices" in the oil & gas sector, in the form of illegal oil & gas trading and exploitation. In consideration of this situation, the MOT has been taking appropriate legal action as a precautionary measure before the situation worsens as these "mafia practices" also have an adverse effect on upstream and downstream industries. There is bound to be a challenge to the Government, and it will not be easy for the Government to eradicate illegal practices. The Government knows it needs to revise its oil & gas regulations to be more transparent, to enhance accountability and so that parties are less easily misled by the oil & gas mafia.

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Mergers & Acquisitions

Protection of Minority Shareholders in M&A Transactions

M&A is a transaction that is very important to companies. It is so important such that the transaction will require an approval from the General Meeting of Shareholders (GMS) of the companies. The importance of M&A can also be seen from the quorum requirement for the GMS, in which at least ¾ (three – fourth) of the total shares issued with voting rights are present or represented at the meeting and that the resolutions thereof shall be valid if approved by more than ¾ (three-fourth) of total votes cast at the meeting.

It is often the case that the M&A transactions will only benefit the majority shareholders, and cause harm to minority shareholders. To protect the interests of minority shareholders in M&A transactions, therefore, Government of Indonesia through Law Number 40 Year 2007 concerning Limited Liability Company ("Company Law") has regulated a number of provisions that would protect the interest of minority shareholders in M&A transactions.

Article 126 of Company Law expressly stipulates that the legal actions of M&A shall be subject to the interest of minority shareholders. Any minority shareholders who does not agree with the resolution of GMS regarding M&A transaction, for example on the reason that the M&A will not benefit or will prejudice the interest of minority shareholders, then such minority shareholders may use their right, i.e., to request the company to repurchase their shares at a reasonable price. If the shares requested to be repurchased exceeds the buyback limit stipulated in the Company Law, then the company is obliged to endeavor that the remaining shares be purchased by a third party. The exercise of this minority shareholders' right, however, shall not disrupt the process of the M&A.

Alternatively, Article 61 of the Company Law also gives any shareholder of a company the right to lodge a lawsuit against the company before a court, if the shareholder "is harmed by the actions of the company, which he considers unfair and with no reasonable grounds, as a result of a resolution of the general meeting of shareholders, the directors or the commissioners." This lawsuit will basically contain a request that the company to cease the harmful action and take specific steps to deal with the consequences that have already arisen and to prevent similar action in the future.

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Intellectual Property and Brand Protection

Unused Registered Marks

Today the trademark or mark is not merely seen as a name or a symbol, but it is now considered as a highly valuable corporate asset and it has become a decisive characteristic of a product. It is very important therefore for the marks' owners to register their marks in order to protect the exclusive rights of their marks. Nevertheless, some of the registered marks apparently have never been used by their owners following to their registrations, or in other words, those registered marks cannot be seen or found in any products after their registration.

Law No. 15 of 2001 on Marks ("Marks Law") is actually very clear in stipulating that where there is a mark that has been registered but not used by the owner, then the registration of that mark may be deleted. Article 61 paragraph (2) of the Marks Law provides that the Directorate General of Intellectual Property Rights ("DGIPR") is entitled, at its own initiative, to delete the mark registration of a registered mark that has never been used for a period of three (3) consecutive years from the date of registration or last use, unless there are reasons acceptable to the DGIPR for not deleting such mark, such as import prohibition, or prohibition related to the permit for distribution of the goods using the mark concerned or any temporary decision from the competent authority. The deletion of the registered mark shall thereafter be recorded in the General Register of Marks as well as announced in the Official Gazette of Marks.

In addition to the deletion by the initiative of DGIPR, deletion of the registered mark that has never been used by the owner may also be requested by third parties. Article 63 of Marks Law provides that the deletion of the registered marks by third parties shall be made in the form of a claim filed at the Commercial Court. Upon receiving a legally binding decision of the court, DGIPR shall then delete the mark concerned from the General Register of Marks and announce it in the Official Gazette of Marks. With the deletion of the registered mark, the legal protection of the mark shall be ended.

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Import of Hazardous and Toxic and Non-Hazardous and Toxic Waste

Indonesia is a country that has ratified Basel Convention. It ratified the Basel Convention in 1993 through Presidential Decree No. 61 Year 1993 on the Ratification of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal. With the ratification of the Basel Convention, importation of Hazardous and Toxic Waste (B3 Waste) to Indonesia, which were previously permitted, should have been prohibited. The prohibition applies to any parties to import their B3 Waste to Indonesia territory.

Nonetheless, Indonesia once had allowed the importation of B3 Waste following the ratification of the Basel Convention, i.e., for specific kinds of waste. The policy was then ended after the issuance of Government Regulation No. 18 Year 1999 on Management of Hazardous and Toxic Waste as amended by Government Regulation No. 85 Year 1999, in which Indonesia completely prohibits importation of B3 Waste for any reason. This was further strengthened with the enactment of Law Number 32 Year 2009 on the Protection and Management of the Environment and Government Regulation Number 101 Year 2014 on the Management of Hazardous and Toxic Waste.

Meanwhile, Indonesia still allows the importation of Non-B3 Waste based on Regulation of the Minister of Trade of the Republic of Indonesia Number: 39/M-DAG/PER/9/2009 on the Import of Non-Hazardous and Toxic Waste (Non-B3 Waste) ("Regulation No. 39/2009"). Article 2 of the Regulation No. 39/2009 provides that Non-B3 Waste that can be imported into Indonesia only in the form of residual waste, scrap or remnants which are used for raw materials and/or auxiliary materials that are listed in Appendix I of the Regulation.

The importation of Non-B3 Waste may only be conducted by a company conducting industrial businesses that has obtained a recognition as Non-B3 Waste Producer Importer by Director General of Foreign Trade of Ministry of Trade. The importation must be accompanied with a Letter of Statement from the exporter stating, among others, that the waste being exported is not B3 Waste and have been technically verified by surveyor appointed by the Minister of Trade in the country of loading prior to the shipment.

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Kudri & Djamaris, Attorneys - Counsellors at Law

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Managing Tax Exposures Using Advance Pricing Agreements

No-one likes to pay taxes. But paying taxes twice is, of course, even less palatable. But unfortunately this has become an unwelcome reality for many corporate taxpayers in Indonesia. One of the main causes is the focus of the Indonesian Tax Office ("ITO") on the pricing of related-party transactions. For a number of years, the ITO has been imposing transfer pricing adjustments on many taxpayers. However, since transfer pricing always concerns two parties, an adjustment in Indonesia can lead to double taxation if ultimately the Indonesian tax court upholds the adjustment.

However, there are opportunities to manage this risk. One is applying for an Advance Pricing Agreement ("APA"). An APA is an agreement with the tax authorities in one country (unilateral APA) or between the tax authorities of the countries on both sides of the transactions (bilateral APA). In an APA a taxpayer requests the tax authorities in one or both countries to confirm that the pricing mechanism of the related-party transactions meets the arm's length principle, i.e., that it mirrors how unrelated parties would have priced their transaction. Hence it gives a corporate taxpayer certainty that, provided the critical assumptions are met, it will not be faced with transfer pricing adjustments for a period of three years.

Although there were already guidelines in place which included the formal requirements of the APA application, recently new guidelines entered into force. These include: taxpayer or entity eligibility requirements to request an APA; steps in the APA application procedures; the parties, transactions, transfer pricing methods, comparables and period of years covered by an APA; standards and requirements for the initial ITO meeting and any subsequent meetings; the contents of the decision letter containing a draft of the APA; and post-APA compliance measures, including rules for compliance reports and for renewal of an APA.

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International Tax Law

Indonesian Mutual Agreement Procedures ("MAP")

Double Tax Avoidance Agreements ("Tax Treaties") aim to avoid double taxation but do not always resolve all issues by default. A MAP may help resolve double taxation. A MAP involves the Indonesian Director General of Tax ("DGT") discussing with the Competent Authorities of a Treaty Country the possibilities to reach mutual agreements regarding tax disputes.

Recently, the Minister of Finance ("MOF") issued a regulation on the MAP process.

It states that a MAP can be requested after a taxpayer has received a tax assessment notification. Subject to MAP application limitations in a Tax Treaty, a request for the initiation of a MAP can be made by:

1. Indonesian taxpayers, through the DGT;
2. The DGT itself; or
3. The Competent Authority of a Treaty Country.

This regulation specifies the circumstances each of the aforementioned parties are able to request a MAP and further provides limitations on when no MAP may be requested, such as if the Tax Court has declared that court proceedings on the related tax assessments have been sufficient.

A MAP may be rejected/cancelled if:

1. The DGT cannot obtain complete documentation / information;
2. The MAP process will not result in agreement;
4. The MAP request is withdrawn;
5. The Indonesian taxpayer disagrees with the draft MAP agreement, or
6. The Tax Court issues its verdict on the tax dispute before the MAP is agreed.

The timing and cost of a MAP are critical to consider. Further, as Tax Court decisions may take less than 2 years and the MAP process covers 3 years, there is a risk of cancelation of the MAP. Indonesian taxpayers face a dilemma between either the "Appeal" or the "MAP" process. We recommend taxpayers assess the costs/benefits of following each avenue.

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DGT Audit Plan and Strategy

Following approval of the Government Budget for 2015, the Director General of Taxes ("DGT") issued a Decision, that, for fiscal year 2015, the DGT should achieve a revenue budget of IDR 1,193 trillion (approximately USD 91 billion).

In a Circular the DGT outlines that one of its strategies is to collect IDR 73.5 trillion (approximately USD 5.5 billion) from tax audits in 2015. This is a significant increase from 2014, when the budgeted amount was IDR 24 trillion (approximately USD 1.8 billion). The Circular states that two types of tax audits may be conducted: Special Audits and Joint Audits (e.g.in the financial services and energy and natural resources industries).

Special Audits would involve:

- Tax Offices, Account Representatives and Audit Teams proposing taxpayers to be audited;
- The Director of Tax Audit and Collection instructs Regional Tax Offices to audit three companies; and
- The DGT will conduct audits of:
  - 50 coal mining and oil and gas companies;
  - 30 companies with related party transactions; and
  - 10 Group companies.

Joint Audits would be conducted with other government institutions, such as The Director General of Customs and Excise (DGCE), The Government Auditor (BPKP), The Special Task Force for Upstream Oil and Gas Business Activities (SKK Migas) and The State Revenue Optimization Team (TOPN) and The Financial Services Authority (OJK).

The DGT has not published any information regarding the type of business activities it will focus on.

Companies can expect more aggressive tax audits this year as the DGT revenue budget from tax audits has tripled. Taxpayers are recommended to have adequate supporting documentation to reduce assessment exposures.
This would include:

- Reconciliations between all tax returns and amounts in general ledger accounts;
- Robust transfer pricing documentation; and
- Documentary support for use of double taxation treaties.

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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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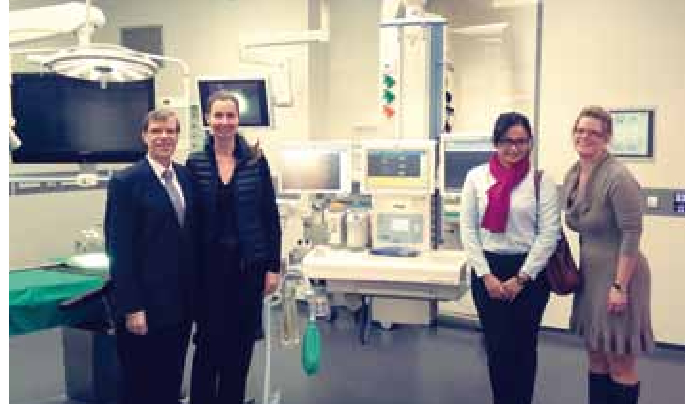
In-house Legal Talk



From March 23rd to 27th the first In-House Legal Talk was held by Mrs. Silke Helmholz, Deputy Managing Director & General Counsel, and Mrs. Cassandra Stephanie Paulira, Senior Executive Corporate Services, from the German-Indonesian Chamber of Industry & Commerce (EKONID). Within the scope of the In-House Legal Talk Mrs. Helmholz and Mrs. Paulira were invited to the premises of:

- Dräger Medical GmbH
- Loesche GmbH
- Kalenborn Kalprotect GmbH & Co. KG
- Logwin Air + Ocean International GmbH
- Robert Bosch GmbH.

Mrs. Helmholz and Mrs. Paulira shared their expertise on the regulatory framework in Indonesia and provided key information about each company's specific interest in the Indonesian market. While each company gained first-hand insights to tailor-made solutions, we thank our clients for the invitation and the given possibility to learn more about your company and its corporate culture. We're looking forward to a continued fruitful dialogue among the participants which will continue beyond this In-House Legal Talk.

The Newsletter Law & Taxes
June 2015 edition

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NEWSLETTER

LAW & TAXES

June 2015 | Edition 1

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