INDONESIA

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INTERNATIONAL DEVELOPMENTS

1. WHAT ARE RECENT TAX DEVELOPMENTS IN YOUR COUNTRY WHICH ARE RELEVANT FOR M&A DEALS AND PRIVATE EQUITY?

In 2008, the Minister of Finance issued Regulation No. 43/PMK.03/2008 regarding The Use of Book Value for Transfer of Assets in the Context of Mergers, Consolidations or Expansions, which enables companies to conduct a merger using book value (tax neutral merger).

The following conditions shall be applied to two or more companies that conduct a tax neutral merger:

- There is no capital gain incurred from transfer of assets in the context of tax neutral merger.
- Land and/or building value which is transferred by the dissolving entity to the surviving entity is subject to Article 4 paragraph (2) final income tax at the rate of 5% of the transaction price or Tax Object Sales Value (NJOP), whichever is higher.

Meanwhile, the surviving entity should pay 5% Duty on the Acquisition of Land and/or Building Right (BPHTB) from the transaction price or Tax Object Sales Value (NJOP), whichever is higher after being deducted with Non-Taxable Value of Tax Object Acquisition/NPOPTKP (maximum of IDR 60 million). The surviving entity may request 50% reduction on this duty to the regional government. This reduction could be applied if the company has received a decision from the tax authority to conduct a tax neutral merger.

- No Value Added Tax (VAT) is imposed due to the transfer of assets provided that both the dissolving and the surviving entities are registered as Taxable Entrepreneurs.

Under the regulation, the application to transfer assets at book value requires an approval from the Director General of Taxation (DGT). If the taxpayer does not obtain the approval from the DGT then the transfer of assets will be assessed at market value.

2. WHAT IS THE GENERAL APPROACH OF YOUR JURISDICTION REGARDING THE IMPLEMENTATION OF OECD BEPS ACTIONS (ACTION PLANS 6 AND 15 SPECIFICALLY) AND, IF APPLICABLE, THE AMENDMENTS TO THE EU PARENT-SUBSIDIARY DIRECTIVE AND ANTI-TAX AVOIDANCE DIRECTIVES?

Based on the prevailing Indonesian tax regulation (Director General of Taxes Regulation No. 25/PJ/2010), tax treaty abuse may occur in the following events:

- transaction without economic substance conducted using a structure/scheme in such a way with the sole intention to benefit from tax treaty;
- transaction with a structure/scheme in which the legal form is different from the economic substance in such a way with the sole purpose to benefit from tax treaty; or
- income recipient is not the actual beneficial owner.

Furthermore, a beneficial owner (either individual or entity) mentioned above shall be an income recipient who acts not as an agent, nominee, and conduit company.

In the event that a foreign taxpayer does not abuse the tax treaty, the foreign taxpayer shall be entitled to obtain benefits from the tax treaty.

Based on Director General of Taxes Regulation No. PER 24/PJ/2010, the criteria to apply for tax treaty benefits are:

- the income recipient is not an Indonesian tax resident;
- the administrative requirements to apply the tax treaty provisions have been fulfilled; and

- there is no tax treaty abuse done by the foreign tax resident as intended in the provisions on the prevention of tax treaty abuse.

The Foreign Taxpayer has to provide the Certificate of Domicile of Non-Resident for Indonesian Withholding Tax, namely Form-DGT 1 (both page 1 and page 2) or Form-DGT 2 (for financial institution), a form used by Indonesian Tax Office to confirm that the recipient is the Beneficial Owner and the transaction does not aim to exploit a tax treaty. Form-DGT 1 (page 1) is only valid for a period of one year since the date of issuance and must be renewed annually. The Certificate of Domicile must be submitted before the end of the submission of the Periodic Tax Return for the period when the withholding tax is payable.

GENERAL

3. WHAT ARE THE MAIN DIFFERENCES AMONG ACQUISITIONS MADE THROUGH A SHARE DEAL VERSUS AN ASSET DEAL IN YOUR COUNTRY?

In Indonesia, the main differences among acquisitions made through a share deal versus an asset deal are as follows:

A. Share deal

- Capital gains received by an entity in a share deal are subject to corporate income tax of 25%, while capital gains received by an individual are subject to individual income tax in the range of 5% until 30%.
- Since shares are categorised as non-taxable goods, there is no VAT applicable in share deals.

B. Asset deal

Moveable Assets

- Capital gains received by an entity in an asset deal are subject to corporate income tax of 25%, while capital gains received by an individual are subject to individual income tax in the range of 5% until 30%.
- Generally, 10% VAT is imposed on the transfer of moveable assets. However, this condition does not apply to:
    - **a.** The transfer of non-taxable assets (i.e., mining products, public essential commodities, foods and beverages, gold and commercial paper.)
    - **b.** The transfer of assets that have no relation with the company's business.

Immovable Assets (land and/or building)

- For the seller, the transfer of immoveable assets is subject to final income tax of 5% of the market value or Tax Object Sales Value (NJOP) of the assets, whichever is higher (applicable to individuals and corporations).
- For the buyer, the acquisition of immoveable assets is subject to 5% Duty on Acquisition of Land and Building Right (BPHTB) from the transaction price or Tax Object Sales Value (NJOP), whichever is higher after being deducted with the Non-Taxable Value of Tax Object Acquisition/NPOPTKP (maximum of IDR 60 million).
- Generally, 10% VAT is imposed on the transfer of immoveable assets. However, this condition does not apply to immovable assets that have no relation with the company business.

BUY-SIDE

4. WHAT STRATEGIES ARE IN PLACE, IF ANY, TO STEP UP THE VALUE OF THE TANGIBLE AND INTANGIBLE ASSETS IN CASE OF SHARE DEALS?

In principle, there are no special provisions in Indonesian income tax law to step up the value of the tangible and intangible assets in case of share deals.

In 2015, the Minister of Finance issued a regulation regarding tax incentive on fixed asset revaluation. The tax incentive reduces the previous final tax rate of 10% to a lower final tax rate. Below is the summary of the special tax rates applied to asset revaluation:

- 3% (three percent), for applications submitted starting from 20 October 2015 up to 31 December 2015;
- 4% (four percent), for applications submitted starting from 1 January 2016 up to 30 June 2016; and
- 6% (six percent), for applications submitted starting from 1 July 2016 up to 31 December 2016.

Asset revaluation is usually utilised by companies that need financing, so that the respective companies will have "more" assets to be used as collateral for bank loans. This is also a strategy to step up the value of tangible assets.

Furthermore, the capitalisation of surplus of asset revaluation to paid-up capital is not subject to tax. However, this is in contrast to Indonesian Accounting Standard, which regulates that surplus of assets revaluation could not be capitalised at once.

5. WHAT ARE THE PARTICULAR RULES OF AMORTISATION OF GOODWILL IN YOUR COUNTRY?

Amortisation of goodwill which has useful life exceeding one year may be treated as expenses proportionally during 4 years, 8 years, 16 years, or 20 years using the straight line or double declining balance method.

6. WHAT ARE THE LIMITATIONS TO THE DEDUCTIBILITY OF INTEREST ON BORROWINGS IN THE CASES OF ACQUISITION OF SHARES AND ASSETS?

There are limitations to the deductibility of interest on borrowings. In 2015, the Minister of Finance issued regulation No. 169/PMK.010/2015 regarding thin capitalisation.

The debt-to-equity ratio should not exceed 4:1. The total balance of debts shall cover the balance of long-term debts and/or the balance of short-term debts, including the balance of trade payable which is charged with interest. Meanwhile, total balance of equity shall cover equity as intended in the applicable finance accounting standard and non-interest bearing loan of related parties.

In the event that a Taxpayer's debt to equity ratio exceeds 4:1, the interest expense that can be deducted in calculating taxable income shall be amounting to interest expense in accordance with debt to equity ratio of 4:1.

Please note that in the event that a Taxpayer has zero balance of equity or less than zero, the related Taxpayer's entire interest expense cannot be deducted in calculating the taxable income.

Excluded from the provisions on the debt to equity ratio shall be bank, financing institution, insurance and reinsurance taxpayers, and taxpayers which carry on business in the mining and infrastructure fields.

Furthermore, interest on loans used for shares investment with ownership of no less than 25% could not be treated as deductible expenses since the dividend received by the investor is a non-taxable income.

7. WHAT ARE USUAL STRATEGIES TO PUSH-DOWN THE DEBT ON ACQUISITIONS?

There are no usual strategies to push-down the debt on acquisitions. However, there should be a consideration to complex tax issues such as transfer pricing, VAT, capital gains and interest deductibility prior to the implementation.

8. ARE THERE ANY TAX INCENTIVES FOR EQUITY FINANCING?

There are no tax incentives for equity financing applicable in Indonesia.

9. ARE LOSSES OF THE TARGET COMPANY(IES) AVAILABLE AFTER AN ACQUISITION IS MADE?

The losses of the target company are available for 5-year carry-forward compensation. The tax authority might make an adjustment on the fiscal losses based on the tax audit process.

However, in the context of tax neutral merger, the losses of the target company are not available after the effective date of merger.

10. ARE THERE ANY ITEMS THAT SHOULD BE INCLUDED IN THE SCOPE OF A TAX DUE DILIGENCE THAT ARE VERY SPECIFIC TO YOUR COUNTRY?

There are no specific items to be included in the scope of a tax due diligence.

11. IS THERE ANY INDIRECT TAX ON TRANSFER OF SHARES (STAMP DUTY, TRANSFER TAX, ETC.)?

Securities or documents with any name or in any form whatsoever (including shares) which have nominal value of up to IDR 250,000.00 (two hundred fifty thousand Rupiah) shall not be subject to Stamp Duty. If the value is above IDR 250,000.00 (two hundred fifty thousand Rupiah) and up to IDR 1,000,000.00 (one million Rupiah), the securities or documents shall be subject to Stamp Duty at the tariff of IDR 3,000.00 (three thousand Rupiah), while those having nominal value of more than IDR 1,000,000.00 (one million Rupiah) shall be subject to Stamp Duty at the tariff of IDR 6,000.00 (six thousand Rupiah).

12. ARE THERE ANY RESTRICTIONS ON THE CORPORATE TAX DEDUCTIBILITY OF ACQUISITION COSTS?

Acquisition costs shall be the value of shares or asset and additional costs related to acquisition, such as advisory fees from the corporate finance advisor and/or legal fees.

The value of shares or asset shall be recorded as asset.

There are no specific tax regulations that set forth the tax treatment for additional costs related to shares or asset acquisition. Therefore, it shall comply with the treatment of the prevailing Indonesian Financial Accounting Standard (PSAK).

Acquisition of Shares

In case of a share deal, there are no restrictions on the deductibility of additional costs. The additional costs shall be treated as expenses in the year of shares acquisition (PSAK 22).

Acquisition of Assets

The additional costs for asset acquisition which have useful life exceeding 1 year shall be capitalised and depreciated over the useful life (PSAK 16). The depreciation could be treated as expenses proportionally during 4 years, 8 years, 16 years, or 20 years using the straight line or double declining balance methods.

13. CAN VAT (IF APPLICABLE) BE RECOVERED ON ACQUISITION COSTS?

Generally, VAT input from assets acquisition could be compensated with VAT output in the following fiscal period or be claimed as tax refunds at the end of fiscal year. There is no VAT input for shares acquisition.

However, VAT input for assets categorised as non-capital goods acquired by a company that has not yet delivered taxable goods or services could not be compensated with VAT output in the following fiscal period or be claimed as tax refund at the end of the fiscal year.

The VAT input from the additional costs related to the shares or asset acquisition could be compensated with VAT output in the following fiscal period or be claimed as tax refund at the end of the fiscal year.

14. ARE THERE ANY PARTICULAR TAX ISSUES TO CONSIDER IN THE ACQUISITION BY FOREIGN COMPANIES?

- **Asset Deals**

Foreign companies are not allowed to directly acquire land and/or buildings in Indonesia.

- **Share Deals**

Indonesian prevailing law (President Regulation No. 39 of 2014) regulates the percentage of foreign ownership limitation for different types of business in certain sectors.

In general, all types of business are open to foreign investment, except certain closed type of business and limitations of maximum ownership in several types of industries.

15. CAN THE GROUP REORGANISE AFTER THE ACQUISITION IN A TAX NEUTRAL ENVIRONMENT THROUGH MERGERS OR A TAX GROUP?

Yes, the group can reorganise after the acquisition in a tax neutral environment through mergers.

To apply for tax neutral merger, certain conditions must be satisfied. The conditions are the following:

- submitting an application using book values for merger to the Director General of Taxes, along with the argumentation and purpose of the merger,
- paying all tax payable from every related entity, and
- satisfying the requirements of business the purpose test.

16. IS THERE ANY PARTICULAR ISSUE TO CONSIDER IN CASE OF TARGET COMPANIES OF WHICH MAIN ASSETS ARE REAL ESTATE?

VAT input for a company that purchases real estate as its inventory could not be credited in case that the company has not yet sold or delivered the taxable goods or services to other parties.

17. IS FISCAL UNITY/TAX GROUPING ALLOWED IN YOUR JURISDICTION AND IF SO, WHAT BENEFITS DOES IT GRANT?

There is no fiscal unity/tax grouping under the Indonesian tax law.

SELL-SIDE

18. HOW ARE CAPITAL GAINS TAXED IN YOUR COUNTRY?

Capital gains must be combined with the company's revenue from its main business after being deducted with the deductible expenses. The net profit is subject to 25% corporate income tax. Further, for individuals, capital gains after being combined with their income shall be subject to individual income tax in the range of 5% until 30%.

There is no participation exemption regime available in Indonesia.

19. IS THERE ANY FISCAL ADVANTAGE IF THE PROCEEDS FROM THE SALE OF SHARES ARE REINVESTED?

There is no fiscal advantage if the proceeds from the sale are reinvested.

20. ARE THERE ANY LOCAL SUBSTANCE REQUIREMENTS FOR HOLDING COMPANIES?

Indonesian prevailing law (President Regulation No. 39 of 2014) regulates the limitation of foreign ownership for finance companies. Meanwhile, the limitation of foreign ownership of a holding company in Indonesia depends on the types of industries of the operating companies under the holding company.

21. ARE THERE ANY SPECIAL TAX CONSIDERATIONS REGARDING MERGERS/SPIN-OFFS?

There are no special tax considerations regarding mergers/spin-offs. However, a registration to the Investment Coordinating Board in the framework of an Initial Public Offering has to become effective within 1 (one) year for the taxpayer who applies for spin-offs with the book value.

MANAGEMENT INCENTIVES

22. WHAT ARE THE TAX CONSIDERATIONS IN YOUR JURISDICTION FOR MANAGEMENT INCENTIVES?

There are no specific tax considerations for management incentives. However, any remuneration received by an individual is subject to individual tax.

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