TaxFlash

Amendment of BKPM Investment Regulation: Clarifying Investment Key Concepts and Setting out a Clearer Language

On 11 September 2013, the Indonesia Investment Coordinating Board (*BKPM*) released an amended regulation, Head of BKPM Regulation No.12 of 2013 (Regulation 12). Regulation 12 amended Head of BKPM Regulation No. 5 of 2013 concerning Guidelines and Procedures for Investment Licensing and Non-Licensing (Regulation 5.)

A number of changes which we consider to be material and of concern for investors are as follows:

PMA Status of a Publicly Listed Company – Control by Foreign Shareholders

Regulation 12 has revoked the concept of (foreign) controlling shareholders in a public company by deleting in its entirety Article 49 and 50. Previously, the introduction of those provisions forced public companies to change their status to a foreign investment (PMA) company if there is a foreign party controlling the company. This had the consequence that a public company with PMA status will be subject to the prevailing investment laws and regulations, including the negative list of investment, and it will fall under the authority of BKPM (in addition to the Financial Services Authority (*OJK*) jurisdiction that regulates public companies). Treating a public company as a PMA company is likely to create complex situations, e.g., numerous PMA license application processes and heavy burden for public companies in adhering to various BKPM reporting and administrative procedures. This in turn may discourage the capital market environment.

The revocation of Article 49 and 50 seems intended to avoid this complication. BKPM's position has now reverted to that prior to the issue of Regulation 5, whereby BKPM may apply a policy based on their discretion on a case per case basis whether or not the negative list of investments applies to foreign investments in a publicly listed company. This matter once again has become a grey area. A consultation needs to be carried out with BKPM by foreign investors that intend to acquire a publicly listed company.

Conversion of a Subsidiary Company to a PMA Company

Previous requirements set out under Regulation 5 to convert subsidiaries of PMA companies (i.e., local companies that have changed its status into PMA companies as a result of shares acquisition by foreign investors), into PMA companies have now been removed. As a consequence, subsidiaries of PMA companies are not required to change their status to a PMA company. Nevertheless, a clarification would still need to be sought from BKPM on whether the negative list of investment applies to the subsidiaries of PMA companies.

Investments made by a Venture Capital Company

Amended provision under Regulation 12 that regulates Venture Capital Companies (VCCs) provides a clearer language.

Article 24 (2) stipulates that a VCC is prohibited from becoming a shareholder in a 'large scale' domestic investment company (PMDN) or PMA company. It is not clear what the term 'large scale' refers to as there is neither definition nor further related explanation in Regulation 12 and hence, it may subject to different interpretations.

The new text under Regulation 12 clarifies this by removing such term and at the same time referring to the relevant applicable laws and regulation governing VCCs (in this case, reference is made to the Ministry of Finance Regulation No. 18/PMK.010/2012 (MoF Regulation 18)). It is much clearer now in terms of the language used under article 24(2) as VCCs fall within the authority of the Ministry of Finance (now, within the authority of OJK). MoF Regulation 18 does not recognize the term 'large scale' but what has been restricted is investment made by a VCC is investment in business other than micro, small and medium business (*Usaha Mikro, Kecil dan Menengah* or *UMKM*) – Please also refer to Law No. 20 of 2008 concerning UMKM for definition of UMKM. It seems that BKPM's previous intention to use the term 'large scale' is to refer to business which does not fall within the scope of UMKM.

Regulation 12 added new provision under Article 24 (3).(a) by stating that share participation of a VCC, which is temporary in nature and limited to ten years, can be extended for another five years subject to the relevant prevailing laws and regulation (i.e., MoF Regulation 18). The amendment does not add any new substance as the stipulation is in line with the provision under the MoF Regulation 18 whereby extension is possible with the specific reason that the investee company is in financial difficulties and undergoing a restructuring process. Similarly with the new Article 24 (2), the new text has been made clearer by referring to MoF Regulation 18.

Article 24 (4) states that investments made by a VCC, which is owned by PMDN or foreign party, shall be deemed a national investment. This provision is not introducing a new stipulation but rather confirming the previously issued Head of BKPM Decree No. 19/SK/1991 of 1991, which is still in force to date.

Foreign Trade Representative Office

Article 71 (2) of Regulation 5 which state that a Foreign Trade Representative Office (TRO) can be in the form of a selling agent, buying agent or manufacturing agent has now been deleted by Regulation 12. We view that this does not seem to mean that there will be no longer be different forms of TRO, as these forms of TRO are still acknowledged by the Ministry of Trade Regulation No. 10/M.DAG/PER/3/2006 concerning Guidelines and Procedures for the Issue of License for a Foreign Trade Representative Office (being the relevant regulations governing TRO) (MoT Regulation 10). Different forms of TRO should still be recognized pursuant to MoT Regulation 10.

Divestment Requirement

The divestment obligation remains in place in that for a PMA company with the obligation to divest its foreign shares ownership to a local party as stated under its investment license, it must do so within the stipulated time period and with a possible extension of two years. Regulation 12 does not stipulate the minimum amount capital or percentage of shares to be divested. Further, Regulation 12 requires a PMA company wishing to get approval from BKPM to extend the period for its divestment obligation to submit evidence that efforts have been made to divest its foreign shareholding (but has not been successful).

In addition, Regulation 12 no longer stipulates the requirement for a PMA company which has performed its divestment obligation to maintain its local shareholding. Also, we note that there is no restriction for local shareholders to sell or transfer their shares to other parties following the divestment.

Extension of Principle License Procedure

Regulation 12 introduces a new procedure for the extension of a principle license. Application for extension of a principle license must be submitted before the expiration date. If the application is submitted after the expiration of the principle license, BKPM will conduct site verification. Following the site verification, BKPM will issue the following:

(i) extension of principle license with a maximum extension period in accordance with the initial principle license;

(ii) replacement of principle license with a maximum new period in accordance with the initial principle license; or

(iii) revocation of principle license.

It is important to note that the discussion above is based on our reading of Regulation 12. BKPM has yet to give formal view and/or interpretation regarding the changes made under Regulation 12. There may be different interpretations and different implications could therefore apply. A further follow up and consultation with BKPM is necessary in implementing the provisions under Regulation 12.

If you would like to have further information please contact us. We would be happy to discuss strategies with respect to any specific situation investors may have.

The contents of this publication are for reference purposes only. They do not constitute legal advice and should not be relied upon as such.

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