



Energy, Utilities & Resources NewsFlash

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New GR on PSC Transfers
– Further Clarity and Some
New Exemptions ^{P1}

New GR on PSC Transfers – Further Clarity and Some New Exemptions

On 31 August 2021, the Government of Indonesia (“GoI”) issued Regulation (“GR”) No 93/2021 (“GR-93”). GR-93 provides updated guidance on the Income Tax treatment of consideration arising from transfers of PSC participating interests (“PIs”) in both direct and indirect scenarios. GR-93 was effective from the issue date and applies prospectively.

From the outset Readers will recall that PSC transfers are currently taxed at a flat “Transfer Tax” rate of either 5% or 7% of transfer consideration. The rate varies according to whether the PSC is in “exploration” or “exploitation”.

However a number of long standing issues have existed around these rules and especially around the “tracing rules” in the case of transfers via share sales (or as “indirect” transfers). GR-93 provides some clarity in this area.

GR-93 also covers transfers of PSCs falling under either a cost recovery (“CR”) or a gross split (“GS”) framework. GR-93 thereby amends the PSC transfer-related provisions of GR-79/27 (for CR PSCs) and GR-53 (for GS PSCs). The balance of GR-79/27 and GR-53 however continues to operate.

Some highlights are as follows:

- a) GR-93 now looks to define a PSC interest as “immovable property”. This “immovable property” concept is more consistent with international tax law suggesting (perhaps) greater

recognition of tax treaty application for indirect transfers. However the definition goes beyond most treaties to include the shares etc in the entities which hold the immovable property;

- b) notwithstanding a), GR-93 more clearly distinguishes between “direct” and “indirect” transfer scenarios. In this regard please refer to the table below for a detailed outline of the key features of each scenario. Note in particular the new annual remittance mechanism for indirect transfers;
- c) also in terms of indirect transfers GR-93 makes it clear that the Transfer Tax can apply on an “unlimited” tracing basis and so goes beyond the “in-substance” indirect transfer guidelines that currently exist. There is however no specific relief on “day to day” share trading leaving the scope for taxation via on-market share trading activity unclear;
- d) GR-93 now also provides that the transfer consideration in indirect transfer scenarios will be set as the percentage of transferred ownership (%) multiplied by the fair market value (“FMV”) of the Indonesian PSC assets. There is however no guidance on how to determine FMV in this case. Perhaps most surprisingly this FMV default appears to apply even in arm’s-length transfers;
- e) GR-93 provides a number of new Transfer Tax exemptions as follows:

- (i) for transfers taking place pursuant to approved “book-value” business restructurings (e.g. mergers, spin-offs, take-overs, etc).

This suggests that PSC transfers falling within the (recently issued) Minister of Finance (“MoF”) Decision No.56/2021 (refer to our Tax Flash No.11/2021) covering SOE business restructurings are now protected;

- (ii) for transfers taking place pursuant to any other “restructuring” provided that the restructuring is:
 - a) not “profit oriented”; and
 - b) does not lead to the change of the ultimate “parent entity”.

This exemption appears to be available for MNCs. However requirements that the MNCs must also satisfy include the filing of various approvals and financial statements (see table below);

- (iii) for transfers made as part of “local transactions”, such as share sales between Indonesian entities, where any Income Tax outcome otherwise falls within the “ordinary” tax rules;

- f) GR-93 indicates that a new MoF Decision is still to issue and will provide further guidance in a number of areas. Therefore until this issues PMK-257/2011 continues to be operative to the extent it is consistent with GR-93.

Overall the issuance of GR-93 provides some clarity around the areas of contention for indirect transfers but arguably still without the level of precision that this area warrants. GR-93 does however now provide some welcome exemptions especially for local oil and gas investors.

Please contact our PwC industry specialists for any questions that you may have around this area.



No.	Key Features	Direct*)	Indirect
1	<i>Tracing Rules</i>	Limited to Contractor(s).	Broad – includes multi-tier share ownership
2	<i>Income Recognition</i>	Contractor (Transferor) income.	“Deemed” as Contractor income
3	<i>Transfer of Tax Rate</i>	a) 5% - exploration phase b) 7% - exploitation phase Due on “gross consideration”	a) 5% - exploration phase b) 7% - exploitation phase Due on “gross consideration”
4	<i>Gross Consideration</i>	Arms-length amount including compensation “in whatever form”.	[% of transferred ownership] x [% of PI ownership] x [fair market value (FMV) of the PSC].
5	<i>Transfer Tax Due Date</i>	The earlier of: a) when payment is made; or b) when legal transfer occurs; or c) when approval from Minister of Energy and Mineral Resources (ESDM) is received. To be remitted by the 10th of the next month.	At the end of fiscal year (e.g. 31 December). To be remitted on the 10 th of the next month (e.g. 10 January).
6	<i>Exemptions from Transfer Tax</i>	<ul style="list-style-type: none"> • (Pre-existing) For exploration PSCs – transfers carried out for risk mitigation/non-profit oriented purposes and where meeting 4 other criteria; • (Pre-existing) For exploitation PSCs – transfers made to meet the Indonesian Participation requirement. 	<ul style="list-style-type: none"> • Where any capital gain (or loss) falls within the “ordinary” tax rules; • For Indonesian Listed Co’s subject to 0.1% final tax for IDX trades; • For transfers carried out in accordance with book value restructurings (refer to PMK-56/2021); • For transfers carried out as part of “internal” group restructuring (including for MNCs) subject to the following being provided within four months of fiscal year end: <ul style="list-style-type: none"> a) a restructuring “approval” from the Head Office (HO); b) the audited financial statements of the transferor and transferee for the year before the transfer; c) the consolidated audited financial statements of the Group for the year of the transfer; d) the agreement on the share transfer; and e) the tax returns of the HO, the transferor and transferee.

Note:

*) No change compared to GR-79/27 and GR-53

Contacts

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