

Tax Indonesia / March 2013 / No.06

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TaxFlash



Withholding tax obligations for certain contractual based concessions

The fiscal regime for companies engaged in the upstream oil and gas industries is, at least partially, regulated in their Production Sharing Contracts (PSCs), whereas for companies engaged in metal, mineral and coal mining, their fiscal regime is governed in their Contracts of Work (CoWs) or Mining Cooperation Agreements (MCAs).

Generally, the fiscal regimes for PSCs, CoWs or MCAs either follow the laws and regulations that were in place at the time the agreements were signed or follow prevailing tax laws and regulations. The contracts set out the tax provisions, including the contractor’s own tax liabilities and particularly for CoWs and MCAs including tax withholding/collection on payments made to other parties. Taxation matters that are not governed in the contracts should follow the prevailing tax laws and regulations.

In regard to the tax withholding/collection obligations, the Minister of Finance (MoF) has issued Regulation No.39/PMK.011/2013 (PMK-39) regarding Obligations to Withhold and/or Collect Income Tax Due from Other Parties by Companies Bound by PSCs, CoWs or MCAs (the Contractors). PMK-39 is dated 27 February 2013 and will come into effect 60 days after its enactment (i.e., 28 April 2013).

Article 2 of PMK-39 stipulates that tax withholding and/or collection by the Contractors should be performed according to the prevailing tax laws and regulations at the time tax withholding and/or collection is due.

This stipulation can be interpreted as prevailing even if the contract states that the fiscal regime of such companies must follow the laws and regulations that were in place at the time of the contract was signed (including for withholding and/or collection of income tax obligations).

This interpretation is based on the notion that income tax to be withheld and/or collected is not the Contractors' tax liability and they are merely acting as a withholder/collector and paying agent. The withholding and/or collection obligations include Article 4(2), Article 15, Article 21, Article 22, Article 23 and Article 26 income taxes.

However, another school of thought is of the opinion that the *lex specialis* status is such that the terms in the contracts override the general law for all tax obligations and a MoF Regulation cannot overrule the *lex specialis* status. Therefore, if a CoW/MCA specifically refers to the rules governing the tax withholding/collection on payments made to other parties, those rules would still be applicable.

Even though PMK-39 can be viewed as providing a confirmation of the MoF position, we believe that a DGT's Regulation is needed to further clarify the application of PMK-39.

New other "values" as Value Added Tax base

The MoF has amended Regulation No.75/PMK.03/2010 regarding Other Values regarded as Value Added Tax (VAT) Base through the issue of Regulation No.38/PMK.011/2013 (PMK-38). PMK-38 is dated 27 February 2013 and has been effective since 1 March 2013.

VAT is calculated by applying the VAT rate (currently 10%) to a relevant tax base. In most cases, the tax base is the transaction value agreed between the parties concerned. For certain events or situations, other values must be used as the tax base as listed below. Additions according to PMK-38 are in bold (number 9 and 10).

No	Events	VAT base	Notes
1	Own-use or free gifts and internal deliveries of taxable goods (e.g., between branches, or from the head office to branches)	Cost of sales (selling price minus gross margin)	
2	Sales of (non-inventory) assets originally not for sale and remaining inventories of taxable goods at a company's dissolution	Market value	
3	Deliveries of video and audio recording products	Average selling price	
4	Deliveries of movies	Average result per film	1
5	Deliveries or imports of tobacco products	Retail selling prices	
6	Deliveries of taxable goods through an intermediary trader	Agreed price between buyer and intermediary trader	
7	Deliveries of taxable goods through an auction officer	Auction price	
8	Package shipment services, tour and tourism agency services	10% of the actual billing	2
9	Deliveries of gold jewellery, including services carried out by the factory in relation to gold jewellery	20% of the selling price	2
10	Deliveries of freight forwarding services in which billing includes freight charges	10% of the actual billing	2

Notes:

- VAT imposition base for event (4) is not applicable for deliveries of imported movies. The applicable imposition base for imported movies is Rp 12 million per copy of film.
- Input VAT paid by the vendors in events (8) to (10) cannot be credited against the Output VAT.

Article 22 Income Tax Collection

Following the release of MoF Regulation No.224/PMK.011/2012 (PMK-224) regarding Article 22 Income Tax (*PPh 22*) collection (TaxFlash No.03/2013), the Director General of Taxes (DGT) has recently issued Regulation No.PER-06/PJ/2013 (PER-06) to provide better clarity and accommodate the changes in PMK-224. PER-06 revokes DGT Regulation No.PER-57/PJ/2010 regarding Procedures for Article 22 Income Tax Collection. PER-06 is dated 7 March 2013 and has been retroactively effective since 24 February 2013.

PMK-224 stipulates that PPh 22 on the sales of cement, paper products, steel products, automotive products and pharmaceutical products by producers only applies on deliveries to local distributors. Previously, Article 22 Income Tax applied on all sales/deliveries made by the above producers. PER-06 defines a distributor as a trader which can be an entity or an individual that directly purchases products from producers for resale purposes.

PER-06 also confirms that all the Article 22 Income Tax collectors mentioned in PMK-224 can collect the Article 22 Income Tax due without being appointed by the DGT to undertake this role.

What's new with land and building tax regulations?

Land and building tax (*Pajak Bumi dan Bangunan/PBB*) is a type of property tax chargeable on all land and/or buildings, unless exempted.

PBB has been historically governed under PBB Law. However, starting from 2010, PBB was made a part of regional taxes, which are governed under Regional Taxes and Retribution (*Pajak Daerah dan Retribusi Daerah/PDRD*) Law. As a transition, PBB Law is still applicable until 31 December 2013 as long as no regional government regulation (*Peraturan Daerah/PERDA*) is issued. Since the issuance of the PDRD Law until now, most of regional governments have issued a PERDA with different effective dates. The scope of PBB under PDRD Law covers all land and building except for forestry, plantation and mining area which are governed by separate regulations.

Under PDRD Law, the PBB rate is a maximum of 0.3% and the tax due is calculated by applying the tax rate to the sale value of the tax object (*Nilai Jual Objek Pajak/NJOP*) of a particular land and building deducted by non-taxable NJOP. The non-taxable NJOP is set at a minimum of Rp 10 million. Any changes are to be made by issuing a regional government regulation.

Under PBB Law, PBB rate is specified at 0.5%. The actual tax due is calculated by applying the tax rate to the taxable sale value (*Nilai Jual Kena Pajak/NJKP*) which is a predetermined proportion of the sale value of the tax object. NJKP is currently stipulated to be either 20% (for NJOP up to Rp 1 billion) or 40% (for NJOP above Rp 1 billion). As a result, the effective PBB rate is either 0.1% or 0.2% of the NJOP.

For Jakarta area, the Regional Government has issued Regulation No.16/2011 (PERDA-16) that stipulates specific provisions for PBB in that area. PERDA-16 is dated 30 December 2011 and has been effective since 1 January 2013. The PBB rates set out in PERDA-16 are listed below, while NJOPs applicable in each municipality within Jakarta are determined further in a Governor Regulation.

No	NJOP	PBB rate
1	< Rp 200 million	0.01%
2	Rp 200 million up to <Rp 2 billion	0.1%
3	Rp 2 billion up to < Rp 10 billion	0.2%
4	≥Rp 10 billion	0.3%

Under PERDAs, the PBB rates may differ from one region to another. For example in Surabaya, the applicable PBB rates are 0.1% and 0.2% for NJOP up to Rp 1 billion and NJOP higher than Rp 1 billion, respectively. The rates may be increased by 50% of the initial PBB rates on the use of properties that is considered not environmentally friendly or may be reduced by 50% if the use of properties is environmentally friendly or the properties are cultural heritage.

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