Tax on Inbound Investment

Contributing editors
Peter Maher and Lew Steinberg

2018

GETTING THE DEAL THROUGH

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Acquisitions (from the buyer's perspective)

1 Tax treatment of different acquisitions

What are the differences in tax treatment between an acquisition of stock in a company and the acquisition of business assets and liabilities?

Transfer of shares

Transfer of shares may result in the payment of income tax as a result of capital gain, which shall be borne by the seller, under the following conditions:

- if the seller is an Indonesian tax subject, the obligation to pay tax on the capital gains is the seller's obligation. There is no obligation on the part of the buyer to withhold any amount from the sale price; and
- if the seller is not an Indonesian tax subject, the resident buyer must withhold 20 per cent of the estimated net income (ie, the capital gain amounting to 25 per cent of the transaction value) to the seller from the sale of the shares, except where the taxation of capital gains is reserved to the treaty partner by an applicable tax treaty. To obtain the benefit of the applicable tax treaty, the seller must comply with the certification, eligibility, information and reporting requirements in force in Indonesia. Currently, the seller would need to provide to the purchaser and the company a certificate of tax domicile issued by a competent tax authority (the Internal Revenue Services).

Transfer of assets

Transfer of assets may result in payment of income tax and value added tax. Any gains from the sale or transfer of property, including the following, by an Indonesian company is taxable as ordinary income:

- gains from the transfer of property to a corporation, a partnership and other entities in exchange for shares or capital contribution;
- gains accrued by a corporation, a partnership or other entities from the transfer of property to its shareholders, partners or members;
- gains from a liquidation, merger, consolidation, expansion, split-up or acquisition; and
- gains from the transfer of property in the form of grant, aid or donation, except when given to relatives within one degree of direct lineage, or to religious, educational or other social entities or to small businesses including cooperatives as determined by the Minister of Finance, provided that two parties do not have a business relationship, ownership or control.

Article 4 of Law No. 7 of 1983, amended by Law No. 36 of 2008, regarding the Income Tax Law (ITL) states that if a taxpayer sells property at a price higher than the book value, or at a price higher than the acquisition cost or value, the difference in price is regarded as profit.

Basically, the ITL employs a system of income taxation under which all income items from whatever source or category are combined, totalled and cumulatively taxed. However, article 4 paragraph 2 of the ITL permits the government to tax certain categories of income (including transfer of land or building by an individual or corporate running property business) according to a special scheme, for reasons of simplicity, revenue certainty and efficient tax administration. Income from the transfer or disposal of lands and buildings is subject to withholding tax at the rate of 5 per cent of the selling price, which is deducted with 60 million rupiahs.

Other than income tax issues, the transfer of assets (other than cash and shares) may be subject to value added tax (VAT). A 10 per cent VAT is imposed on the transfer of assets originally acquired by a taxable person, provided the VAT paid at the time of acquisition is creditable. Supply of machinery, buildings, tools, furniture or other assets that were originally not for sale by a taxable person for VAT purposes is subject to tax as long as VAT paid at the time of acquisition may be credited in accordance with the law. Accordingly, a supply of such assets is not subject to tax if the VAT paid at the time of acquisition cannot be credited pursuant to the applicable regulations.

Generally, capital gains are imposed with the general tax rate as mentioned in question 13. However, there are some special tax treatments as described below.

Land or building

Proceeds from transfers of land or buildings are imposed by final flat tax rate amounting up to 2.5 per cent if the seller is an individual taxpayer or corporate taxpayer running a real estate business. The government has just updated the regulation regarding tax income generated from the transfer of and conditional sales and purchase agreements for land or buildings by issuing Government Regulation No. 34 of 2016. This regulation adds new criteria for the imposition of income tax by adding parties who generate income by acting as sellers of land or buildings in a conditional sales and purchase agreement, or parties who generate income by acting as a buyer in a conditional sales and purchase agreement who later transfer its rights to other parties, as the parties who can be imposed with the income tax for the transfer of land or building.

The tariffs for the transfer are:

Tariff	Criteria
2.5 per cent of gross transaction value	Does not apply to the transfer of simple houses and apartments.
1 per cent of gross transaction value	Only applies to the transfer of simple houses and apartments.
0 per cent of gross transaction value	Only applies to the transfer of land or buildings to the government, to the state owned enterprises that are undertaking a special assignment on behalf of the government, or to regional government-owned companies that are undertaking a special assignment on behalf of a governor, mayor or regent.

The gross transaction values are to be determined by the tax office based on the following criteria:

(i) decisions made by the authorised officials, if the transfer is conducted by the government;
(ii) minutes of auction, if the transfer is carried out through an auction;
(iii) the reasonable transaction value that should be received, if the transfer is conducted among the parties who enjoy a special relationship (affiliated parties) and does not meet the criteria mentioned in points (i) and (ii) above;
(iv) the actual transaction value, if the transfer is conducted between the parties who have no special relationship and does not meet either of the criteria set out in points (i) and (ii) above; and

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(v) the market price, if the transfer is conducted through the process of exchange, relinquishment of rights, assignment of rights, auction, grants, inheritance or other process, as agreed by the parties.

Nevertheless, the regulation regarding income tax provision as set out above does not apply to transfer of land or buildings that fulfil the following requirements:

- individual transfers that are subject to non-taxable income tax, if the gross transaction value amounts to less than 60 million rupiahs;
- individuals or businesses who bestow their land or buildings upon first degree, blood-related family members (for individuals), other individuals (for businesses), religious institutions, social institutions (including foundations), cooperatives, or individuals who own micro or small-scale businesses, provided that the recipient in question does not have any business, work, ownership or relationship with the grantor;
- transfer by inheritance;
- transfer of land or buildings as a consequence of corporate actions;
- transfer of building rights as an implementation of build-operate-transfer, build-transfer-operate scheme, or as a utilisation of state-owned assets; or
- individuals or businesses that are not subject to any tax-related transfers of land or buildings.

Revaluations of fixed assets and its penalty

Subject to Directorate of General Taxation (DGT) approval, corporate taxpayers and permanent establishments (PEs) who maintain rupiah accounting may undertake a revaluation of their non-current tangible assets for tax purposes. The revaluation must be conducted on a market or fair value basis. The market values must be determined by a government-approved appraiser. These are subject to DGT adjustments if the values, in the DGT's view, do not represent the fair or market values of the assets. Once approved, the depreciation applied to depreciable assets must be based on the new tax book values (approved values).

The revaluation is made in accordance with prevailing market values for the assets, and may not be conducted if those assets have been revaluated within five years. The difference between the new market value and the old book value will be taxed at 10 per cent. After revaluating fixed assets, the calculation for the depreciation expense of the revaluated assets will be based on the new market value. Subject to DGT approval, taxpayers facing financial difficulties may pay this tax in instalments over 12 months.

If the taxpayer transfers the revaluated fixed assets before the new useful life elapses, an additional income tax at the highest corporate income tax rate minus 10 per cent will be imposed.

Listed shares

Sales of shares in companies listed on an Indonesian stock exchange are subject to final withholding income tax at 0.1 per cent of the gross transaction value. Once an initial public offering takes place, additional income tax is also due on founder shares. Founder shareowners have the option of paying final income tax at 0.5 per cent of the company share value within a month after trading has begun in the shares on an Indonesian stock exchange. If the final tax is not paid, the gains from the sales of the founder shares are assessable in accordance with the general income tax rates.

Luxurious goods

Under Minister of Finance Decree No. 82/PMK03/2009, the deemed taxable gain derived from the disposal of certain types of assets is at 25 per cent of the transaction value, which effectively subjects non-resident sellers to a final tax of 5 per cent (the 20 per cent capital gains tax rate times 25 per cent) based on the transaction. The regulation entered into force on 22 April 2009. The 25 per cent rate applies to assets located in Indonesia valued at more than 10 million rupiahs, including jewellery, diamonds, gold, luxury watches, antique goods, paintings, cars, motorcycles, cruise vessels and light aircraft.

The tax is based on a deemed gain as stipulated by the Minister of Finance.

Thus, the tax is payable whether or not gain is actually realised. The regulation does not apply if an applicable tax treaty gives the seller's resident country an exclusive right of taxation. Tax is to be withheld by the purchaser of the assets if the purchaser is tax resident in Indonesia.

In addition to the above, the Minister of Finance also issued another regulation regarding income tax of luxurious goods. This Regulation of Minister of Finance of Republic of Indonesia No. 90/PMK.03/2015, amends the previous regulation as stated in Minister of Finance Regulation No. 253/PMK.03/2008. This regulation exempts the imposition of income tax for the purchase of some luxurious goods made by non-tax residents. The exempted goods are:

- private planes and helicopters;
- cruises, yachts, etc;
- houses and land with a sales amount exceeding 5 billion rupiahs – or with a total area of more than 400 square metres;
- apartments, condominiums, or similar with the total purchase amount exceeding 5 billion rupiahs – or with total area of more than 150 square metres;
- four-wheel drive vehicles (eg, saloon, jeep, SUV, MPV, minibus) that carry fewer than 10 people and have a sales value exceeding 2 billion rupiahs – or with an engine capacity of more than 3,000 cc; and
- two and three-wheel vehicles, with the purchase price of 300 million rupiahs – or with an engine capacity of more than 250 cc.

Special purpose vehicle

Based on Minister of Finance Decree No. 258/PMK03/2008, 25 per cent of the transaction value is deemed taxable gain derived from the disposal of shares in a foreign company domiciled in a tax-haven country that acts merely as a special purpose vehicle and holds shares of an unlisted Indonesian company.

As such, the non-resident seller of the shares of the interposing company abroad will be subject to a final effective tax of 5 per cent (that is, 20 per cent multiplied by 25 per cent), based on the transaction value. However, it is not specified how to determine whether a country is a tax haven.

Further, this regulation does not apply if an applicable tax treaty gives the resident country of the seller an exclusive right of taxation.

The tax is based on a deemed gain as stipulated by the Finance Minister.

Thus, it is payable regardless of whether or not the gain is actually realised. It is to be withheld by the purchaser of the shares if the purchaser is a tax resident of Indonesia. If the purchaser is a non-resident, the Indonesian company must account for the tax even if the transaction takes place abroad and may not be disclosed to the Indonesian company (as there is no change in the company's shareholders).

2 Step-up in basis

In what circumstances does a purchaser get a step-up in basis in the business assets of the target company? Can goodwill and other intangibles be depreciated for tax purposes in the event of the purchase of those assets, and the purchase of stock in a company owning those assets?

The purchaser may get a step-up in the business assets of the target company in the form of intangible assets of the target company, such as goodwill, trademarks, or certain licences supporting the line of business of the target company that are no longer issued by the government, etc.

Goodwill and other intangible assets of a company may be amortised, and therefore may be depreciated for tax purposes in the purchase of assets or stocks and shares in a company owning such goodwill or intangible assets.

3 Domicile of acquisition company

Is it preferable for an acquisition to be executed by an acquisition company established in or out of your jurisdiction?

This depends on the location of the ultimate controller of the purchaser. If the ultimate controller of the purchaser is located in Indonesia, it is better if the acquisition is conducted by an entity established in Indonesia. Otherwise, we believe that it is better if the acquiring entity is located in a country that has a tax treaty with Indonesia.

This consideration relates to the distribution of dividends of the target company and the controlled foreign corporation rule, which allows the distribution of dividends to any Indonesian tax resident meeting the required conditions. Pursuant to article 4, paragraph 3(f) of the

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ITL, a dividend or profit share obtained or received by a limited liability company as a resident taxpayer, cooperative, state-owned business enterprise or regional government-owned business enterprise, from capital participation in a business entity incorporated and domiciled in Indonesia is excluded from tax object provided that:

- the dividend originates from a reserve of retained profit; and
- for a limited liability company, state-owned business enterprise or regional government-owned business enterprise that receives the dividend, its share ownership in the entity that distributes the dividend must be a minimum of 25 per cent of the paid up capital.

On the other hand, if the above-mentioned requirements are not fulfilled by the resident corporate taxpayer, the income in the form of dividend distribution will be subject to normal 25 per cent income tax.

Considering the above, if the ultimate controller of the acquiring company is located in Indonesia, the ultimate controller might benefit from article 4, paragraph 3(f) of the ITL (if it fulfils the requirements), so that it does not have to pay tax for the dividend obtained from the target company. Otherwise, it will be better if the acquiring company is located in a low tax jurisdiction that has a tax treaty with Indonesia.

4 Company mergers and share exchanges

Are company mergers or share exchanges common forms of acquisition?

In Indonesia, the regulations regarding acquisition are regulated under Law No. 40 of 2007 regarding Limited Liability Companies (the Company Law) and Government Regulation No. 27 of 1998 regarding Merger, Consolidation and Acquisition of Limited Liability Companies (PP 27). The definition of a merger pursuant to the Company Law and PP 27 is a legal act that is conducted by a company or more to merge itself into another company that has existed previously, where the merging company will then be dissolved. On the other hand, acquisition is defined as a legal act conducted by a legal entity or individuals to acquire either all or most of the shares in a company, which may result in a change of control of such company.

In a merger, as there will be transfer of assets and liabilities of the merging company into the merged company, it will also relate to taxation matters, such as:

- transfer tax, which will be in the form of:
- VAT (in the event that one of the parties of the merger is not a registered taxable entrepreneur); or
- fees for the acquisition of land and buildings (BPHTB) if the transfer relates to property or land. By request of the taxpayer, the Director General of Taxation may grant a BPHTB reduction of up to 50 per cent for land and building rights transfers in business mergers or consolidations at book value; and
- income tax as a result of capital gain by the transfer of assets and liabilities of the merging company to the merged company.

Further, transfer of assets in business mergers, consolidations or business splits must generally be conducted at market value. Gains resulting from this kind of restructuring are assessable, while losses are generally claimable as a deduction from income. However, a tax-neutral merger or consolidation, under which assets are transferred at book value, can be conducted subject to the approval of the Director General of Taxation, in which the merger or consolidation plan must pass a business purpose test by the Director General of Taxation. As for tax driven arrangement, it is prohibited and therefore tax losses from the combining companies may not be passed to the surviving company.

In acquisition, the acquisition can be achieved by means of (i) transfer of majority shares in the target company to the purchaser; or (ii) issuance of new shares in the target company to be subscribed by the new shareholder, which dilutes the share proportion of the previous shareholder in the target company. If the acquisition is achieved by the means as stipulated in point (i), the tax implication will be the same as described above, where the seller will be obligated to pay taxes in relation to the capital gain achieved for the transfer of the shares. On the other hand, if the acquisition is achieved by the means as stipulated in point (ii), the subscription price for such issuance of new shares will not be subject to tax, therefore it will not relate to any tax implication.

5 Tax benefits in issuing stock

Is there a tax benefit to the acquirer in issuing stock as consideration rather than cash?

We believe that there is no implication for the acquirer in issuing stock as a consideration rather than cash, as the acquirer will not be subject to any tax in acquiring shares in a company.

6 Transaction taxes

Are documentary taxes payable on the acquisition of stock or business assets and, if so, what are the rates and who is accountable? Are any other transaction taxes payable?

Even though it will not affect the validity of the agreement, based on the practice in Indonesia, the parties to agreements, including but not limited to the agreement that relates to acquisition of stocks and shares or business assets, usually pay documentary taxes by putting 6,000-rupiah stamp duties in the signatory block of the parties to the agreement.

Aside from the stamp duties or documentary taxes, other transaction taxes will also apply to the seller in the form of income tax, VAT, luxury sales tax or BPHTB (for immoveable properties such as land and buildings), as described above.

7 Net operating losses, other tax attributes and insolvency proceedings

Are net operating losses, tax credits or other types of deferred tax asset subject to any limitations after a change of control of the target or in any other circumstances? If not, are there techniques for preserving them? Are acquisitions or reorganisations of bankrupt or insolvent companies subject to any special rules or tax regimes?

There is no limitation on the net operating losses, tax credits or other types of deferred tax asset after a change of control of the target, or in any other circumstances as long as the transaction is not constituted as a merger transaction. In this regard, there is also no applicable technique for preserving them. We believe that there is also no special rule or tax regime for reorganisation of bankrupt or insolvent companies.

8 Interest relief

Does an acquisition company get interest relief for borrowings to acquire the target? Are there restrictions on deductibility where the lender is foreign, a related party, or both? Can withholding taxes on interest payments be easily avoided? Is debt pushdown easily achieved? In particular, are there capitalisation rules that prevent the pushdown of excessive debt?

Interest tax relief for acquisition can be obtained if the acquisition would result in the acquirer owning under 25 per cent in shares of the target company. However, the withholding of taxes on interest payment cannot be easily avoided. The debt to equity ratio (generally at 4:1) should also be observed in order to enable the interest relief to be obtained.

In relation to debt pushdown, it might be deemed that the target company distributes dividends to the acquiring company or gives gifts to the acquiring company, which results in the acquiring company possibly being subject to income tax.

9 Protections for acquisitions

What forms of protection are generally sought for stock and business asset acquisitions? How are they documented? How are any payments made following a claim under a warranty or indemnity treated from a tax perspective? Are they subject to withholding taxes or taxable in the hands of the recipient?

In the agreement for the sale of stock or business assets, the purchaser usually includes a representations and warranties clause where the seller provides certain representations and warranties to the purchase in relation to the condition of the stock or business asset, such as:

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- the seller or the target company has paid all of its tax obligation to the government as of the execution date of this agreement and will provide the purchaser with a list of outstanding tax obligations that may incur in the future;
- in the event that, after the closing date, the result of the tax correction made by the authorised agency appears to be beyond the reasonable tax propriety, the seller agrees and binds itself to bear all of the payments in connection to such tax correction provided that such tax correction is resulted from the transaction completed by the target company prior to the closing date;
- the seller or the target company has made all returns, given all notices and submitted all computations, accounts or other information required to be made, given or submitted to any tax authority in accordance with the law and all such returns and other documentation were and are true, complete and accurate; and
- the seller or the target company has not carried out, been party to or otherwise been involved in any transaction where the sole purpose was the unlawful avoidance of tax or unlawfully obtaining a tax advantage.

In addition to this, the purchaser could also add a tax covenant from the seller to the purchaser as a schedule to the agreement.

Aside from the representations and warranties clause itself, indemnity or the payment for misrepresentation or incorrect warranties is usually also regulated under the agreement. The parties to the agreement can state a certain amount of money as a remedy for such misrepresentations or incorrect warranties. The payment that relates to a claim for such misrepresentation or incorrect warranties might be subject to income tax aside from the amount of loss suffered by the purchaser due to the misrepresentation or incorrect warranties. For example, if the amount of indemnity stated under the agreement is US$10,000, while the real amount of losses incurred by the target company is only US$8,000. In this regard, the excess amount of US$2,000 may be subject to income tax as it can be considered as a capital gain earned by the purchaser.

Post-acquisition planning

10 Restructuring

What post-acquisition restructuring, if any, is typically carried out and why?

The type of post-acquisition restructuring to be carried out depends on the purpose and the factual condition of the transaction itself. Some examples of the post-acquisition restructuring that might be conducted are, among others:

- transfer of certain assets that are not profitable for the company;
- merger; or
- spin-off.

This kind of post-acquisition restructuring might be conducted for the purpose of reducing the company losses due to bad assets, or by merging or spinning-off of the company with another entity that has lots of profit to balance the losses of the other entity.

11 Spin-offs

Can tax neutral spin-offs of businesses be executed and, if so, can the net operating losses of the spun-off business be preserved? Is it possible to achieve a spin-off without triggering transfer taxes?

Spin-off is not recognised under Indonesian law, as the government regulation regarding spin-off has not yet been issued. Currently, the method of spin-off in Indonesia is conducted by establishing a new subsidiary where the previously established company will inject its assets to the newly established subsidiary.

In addition to this, see question 4 regarding tax-neutral merger or consolidation, which should also apply to the method of spin-off that is usually conducted in Indonesia.

Update and trends

The Minister of Finance recently issued a new regulation concerning the utilisation of book value for the transfer and acquisition of assets in the framework of merger, amalgamation, division or acquisition of business through the issuance of Minister of Finance Regulation No. 52/PMK.010/2017 (PMK 52) which revokes the previous regulation (Minister of Finance Regulation No. 43/PMK.03/2008). Comparing it with the previous regulation, PMK 52 has a new addition relating to the possibility of using book value for the acquisition of business. Nevertheless, it is only limited for the acquisition of business in the form of a merger between a tax subject that is a permanent establishment running banking business with a limited liability company in Indonesia where the surviving entity is the limited liability company. PMK 52 also regulates more detail in the criteria and requirement for the application to the Directorate General of Taxation for this use of book value.

In addition to the above, there is also a plan by the Indonesian government to reform the Income Tax Regulation in Indonesia. The proposed amendments to the current Income Tax Regulation are, among others:

- a decrease in income tax rates for entities;
- abolishment of final income tax calculation for several sectors, including: construction, property, gas station business, and micro/small/medium enterprises; the Directorate of General Taxation proposed that the calculation of income tax for these sectors shall be based on bookkeeping by the taxpayers, instead of stipulating certain figures as a final rate;
- addition of income tax regulation for e-commerce business; and
- revision to the transfer pricing provisions and amendment to the tax facilities.

12 Migration of residence

Is it possible to migrate the residence of the acquisition company or target company from your jurisdiction without tax consequences?

Under Indonesian jurisdiction, it is not possible to migrate the residence of the acquisition company. The only possible way to conduct this is by liquidating the acquisition company in Indonesia and establishing another acquisition company at the other proposed jurisdiction.

13 Interest and dividend payments

Are interest and dividend payments made out of your jurisdiction subject to withholding taxes and, if so, at what rates? Are there domestic exemptions from these withholdings or are they treaty-dependent?

Yes, they are subject to income tax and withholding taxes. The rates are as follows:

	Rate	
	Interest	Dividend
Resident taxpayer	15 per cent	15 per cent
Non-resident taxpayer	20 per cent	20 per cent

In the event that the taxpayer does not have a Taxpayer Identification Number, the rate will be more than 100 per cent, as regulated under article 23 paragraph (1a) of the ITL.

Regarding the 'Dividend' column in the table, see the explanation in relation to dividend in question 3.

Aside from the tax treaty with certain countries, there are several domestic exemptions for the rate of the interest and dividend taxes, including those listed below.

Interest

The following interest is not subject to income tax:

- if the interest is payable to a bank or other financial institution that has a function as loan provider, or financing as regulated under Minister of Finance Regulation No. 251/PMK.03/2008 regarding income of financial services conducted by an entity that has

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a function as loan provider, or financing that is not subject to the withholding as regulated under article 23, namely:
- finance companies aside from banks and non-bank financial institutions that are specially established to conduct activities that are categorised as financing companies and have obtained a licence from the Minister of Finance; and
- a state-owned company or regional government-owned company that is specially established to provide financing facility to micro, small or medium enterprises, and cooperatives, including PT (Persero) Permodalan Nasional Madani; and

- time saving, saving interest (which is obtained from a bank) and SBI (Sertifikat Bank Indonesia) discount.

Dividend

If the shareholder invests in a certain line of business or in certain areas that obtain higher priority on the national scale, it might receive a tax facility in the form of imposition of income tax for dividend in the form of 10 per cent, unless there is a tax treaty that sets out a lower rate.

14 Tax-efficient extraction of profits

What other tax-efficient means are adopted for extracting profits from your jurisdiction?

One of the tax-efficient means adopted for extracting profits from Indonesia is through a services scheme in which the local company in Indonesia will pay for a certain amount of fees as compensation for the services provided by an entity or person in the other jurisdiction. This kind of payment is still subject to income tax, unless the following criteria are met:
- the foreign service provider does not have a permanent establishment in Indonesia in relation to the service provided; and
- there is a tax treaty between the country of origin of the foreign service provider and Indonesia that exempts the service fee obtained by a foreign service provider from tax.

On investment in certain types of industries and investment in certain types of areas and industries, the taxpayer may be given tax incentives under Government Regulation No. 18 of 2015. The tax incentives would include the reduction of net income by 30 per cent of the total investment, deducted for six years, each by 5 per cent. Such investment shall also meet the following criteria:
- high investment value or for export;
- significant labour absorption; or
- high local content.

The government also recently revised the tax holiday regulation by issuing a Minister of Finance Regulation No. 159 of 2015 (amended by Minister of Finance Regulation No. 103/PMK.010/2016), which provides opportunity for new taxpayers running businesses in pioneer industries and satisfying certain requirements to have income tax reductions from 10 per cent to 100 per cent exemption.

Disposals (from the seller's perspective)

15 Disposals

How are disposals most commonly carried out – a disposal of the business assets, the stock in the local company or stock in the foreign holding company?

This depends on the nature of the transaction and the profile of the seller itself. If the seller is a multinational company, it usually prefers to finish the deal outside of Indonesia, in a country that has a favourable tax regime for it. For example, it usually owns the shares in an Indonesian company through its subsidiary in country X (A) which has favourable tax regulations for it. Once it decides to exit from the Indonesian company, it will do the transaction through A so that the sale will be conducted in country X for the purpose of having a lower tax rate, rather than doing the transaction in Indonesia.

However, if country X is a tax haven country, the disposal of shares of A in country X might be subject to tax pursuant to the Regulation of Minister of Finance No. 258/PMK.03/2008 regarding Withholding of Income Tax, article 26 for the Income of Sale or Transfer of Shares as Intended under article 18 paragraph (3c) of Income Tax Law Which is Obtained by Non-resident Taxpayer (PMK 258). Pursuant to PMK 258, the transfer of shares of a company that was established in a tax haven country and has a special relationship with an Indonesian company or permanent establishment in Indonesia is subject to 20 per cent of the estimation of the net amount. The estimation of the net amount will be calculated as 25 per cent from the sale price. However, if the country origin of the seller has a tax treaty agreement with Indonesia, the withholding of income tax for the gains will only be conducted once the treaty provides that Indonesia has the right of taxation for this kind of transaction. We believe that there is no special rule dealing with the disposal of stock in real property, energy and natural resources companies.

16 Disposals of stock

Where the disposal is of stock in the local company by a non-resident company, will gains on disposal be exempt from tax? Are there special rules dealing with the disposal of stock in real property, energy and natural resource companies?

The gains of disposal of stock by a non-resident company in an Indonesian company are subject to 20 per cent income tax from the estimation of the net amount. The estimation of the net amount is calculated as 25 per cent from the sale price. However, if the country origin of the seller has a tax treaty agreement with Indonesia, the withholding of the income tax for the gains will only be conducted once the treaty provides that Indonesia has the right of taxation for this kind of transaction. We believe that there is no special rule dealing with the disposal of stock in real property, energy and natural resources companies.

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17 Avoiding and deferring tax

If a gain is taxable on the disposal either of the shares in the local company or of the business assets by the local company, are there any methods for deferring or avoiding the tax?

See question 15.

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