
Tax and Customs

A New Rule To Determine Permanent Establishment

In recent years, there had been a development of cross-border business models created by offshore parties in Indonesia. These business models may involve the establishment of a Permanent Establishment (“PE”) (“*Bentuk Usaha Tetap*”/“BUT”).

Article 2 paragraph (5) of Law No. 8 of 1983 as amended lastly by Law No. 16 of 2009 on General Tax Provisions and Procedures (“*Ketentuan Umum dan Tata Cara Perpajakan*”/“KUP Law”) basically provides a delegation rule to MoF by which under this article requires MoF to issue a regulation related to the due date for registration and for reporting, the procedures for issuing or cancelling tax identity number (“*Nomor Pokok Wajib Pajak*”/“NPWP”) and the confirmation and revocation as taxable enterprises (“*Pengusaha Kena Pajak*”/“PKP”) for Value Added Tax (“VAT”) purposes.

Based on this delegation rule, there is an implementing regulation issued by MoF and the existing positive law is MoF Regulation No. 147/PMK.03/2017 concerning the procedures for issuing or cancelling NPWP and the confirmation and revocation as PKP (“PMK-147/2017”).

From tax perspective, the obligation to obtain NPWP and to report the taxpayer’s business to be confirmed as PKP is a very critical and subject to a time limit due to those obligations are related to the date of the taxes payable and the obligation to impose tax payable.

For income tax purposes, the taxpayer is obliged to register itself to the Tax Office to obtain their NPWP if they already fulfilled the subjective and objective requirement as stipulated by Law No. 7/1983 as amended several times lastly by Law No. 36/2008 concerning the Income Tax (“Income Tax Law”) whereas for VAT purposes, the taxpayer as an enterprise whose subject to VAT is obliged to report its business to the Tax Office to be confirmed as a PKP for VAT purposes.

Even though PMK-147/2017 already provides the detail procedures for an entity (“*Badan*”), PMK-147/2017 does not provide a specific guidance for BUT. As consequence of this situation, we understand that the issuance of MoF Regulation No. 35/PMK.03/2019 (“PMK-35/2019”) on the Determination of BUT was intended to provide further guidance specifically for BUT so that it can be interpreted that this regulation is a supplement to PMK-147/2017.

Notwithstanding PMK-35/2019 was issued based on the delegation of Article 2 paragraph (5) of KUP Law (formal law), PMK-35/2019 also elaborated some definitions of a BUT which already stipulated in the elucidation of Article 2 paragraph (5) of Income Tax Law.

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Some of the key elements confirmed under PMK-35/2019 are as follows:

Obligation for the Non-Residents to Register and Report to the Tax Office

Non-resident individuals or corporates who carry out business or conduct activities in Indonesia through a BUT are obliged to:

- 1 Register itself to the Tax Office for an NPWP no later than one month as of the date of commencement of the business or the activities; and
- 2 Register itself to the Tax Office for a PKP no later than by the end of the following month when the non-resident's turnover from its business or activities in Indonesia exceed IDR 4.8 billion.

The Definition of BUT

A form of business used by the non-resident may trigger a BUT if the following conditions are met:

- a. There is a place of business in Indonesia;
- b. The place of business is permanent; and
- c. The place of business is utilised by the non-resident to carry out its business or conduct its activities.

PMK-35/2019 confirms that the following form of business, which in nature is not a "place", will be considered as a part of a place of business:

- 1) a construction, installation, or assembly project;
- 2) any kind of services provided by employee or any other person, provided that the service is conducted for more than 60 days within a 12-month period;
- 3) an individual or a company acting as a dependent agent; and
- 4) an agent or an employee of an insurance company established outside of Indonesia and is not domiciled in Indonesia who receives insurance premium or insures certain risks in Indonesia;

A BUT can exist through various form of place of business, either owned, rented, or legally having the right to be used, by the non-residents to carry out business or conduct activities in Indonesia, which may in the following form:

- (a) a place of management;
- (b) a branch;
- (c) a representative office;
- (d) an office;
- (e) a factory;
- (f) a workshop;
- (g) a warehouse;
- (h) a space for promotion and selling;
- (i) a mine and a place of extraction of natural resources;
- (j) an area of oil and gas mining;

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- (k) a fishery, animal husbandry, agriculture, plantation, or forestry;
- (l) computer, electronic agent or automatic equipment owned, rented, or used by non-residents to conduct business through the Internet.

PMK-35/2019 defines permanent place of business as continuously utilised and located in a certain geographic location. Further, a place of business will be deemed to be utilised to carry out a business or conduct certain activities if the non-residents:

- a. have unlimited access to carry out its business or conduct activities; and
- b. carry out its business or conduct its activities through such place of business.

However, a non-resident will not be deemed as utilising a place of business if the non-residents:

- a. utilises such place of business only for data storage and/or electronic data processing; and
- b. have limited access to operate such place of business.

In addition, PMK-35/2019 also provides definition of preparatory and auxiliary activities, which are excluded from the scope of BUT based on some applicable tax treaty provisions.

Conclusion

After the issuance of PMK-35/2019 which became effective on 1 April 2019, offshore parties must now consider carefully the business model that it intends to utilise in doing cross border business or activities.

Key documents in respect of the arrangement with the Indonesian party must also be carefully prepared in case the tax office requests a review of such documents.

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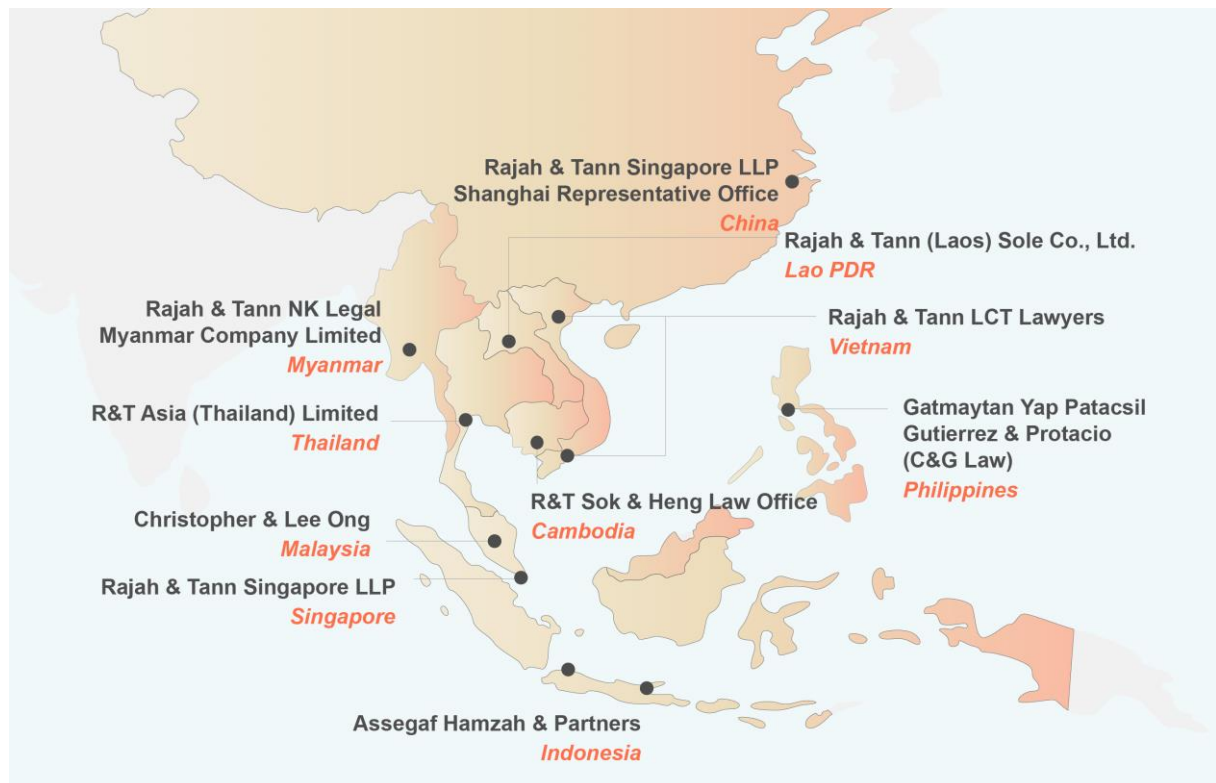
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