

Regulation Affirmed, Four Business Types Automatically Pes

The government affirms the provision of Permanent Establishment (PE) through Minister of Finance (MoF) Regulation No. 35/PMK.03/2019, issued and effective per 1 April 2019. The target of this regulation is foreign individuals or corporates doing business permanently without access limitation to 12 types of business place in Indonesia.

The policy signed by Finance Minister Sri Mulyani Indrawati is an elaboration of PE regulation that was briefly explained in Taxation General Provisions and Procedures (KUP) Law and Income Tax Law. The issuance of the MoF Regulation is aimed at giving legal certainty to Non-resident tax subjects doing businesses or activities through their PEs in Indonesia. Furthermore, this regulation defines the business as all activities performed to obtain, collect, or maintain income in Indonesia.

There are several important points related to the PE regulation affirmation in PMK No. 35/PMK.03/2019. *First*, each foreign individual or corporate doing business in Indonesia through a PE is obliged to have a Tax Identification Number (Tax ID Number) at maximum one month after their business activities are running. If they do not make any registration, a Tax ID Number may be issued ex-officio by the Director General of Taxes.

Second, the MoF Regulation also affirms the definition and the criteria of the PE. PE is a type of business in Indonesia used by foreign individual or corporate under criteria that the place used to run the business is permanent.

The place of business as referred to in the PE regulation covers rooms, facilities and installations—including machines or equipment—used for doing business in Indonesia. Meanwhile, the permanent business place means a business place continuously used and located in a certain geographical location.

Besides, a place of business is deemed a PE if the foreign individual or corporate can limitlessly access the place. Whereas, if the foreign individual or corporate has limited access to the place of business or it is only used to electronically store or manage data, it is not categorized as a PE.

Moreover, the permanent business place included in the PE category covers:

1. Management location;
2. Company branch;
3. Representative office;
4. Office building;
5. Factory;
6. Workshop;
7. Warehouse;
8. Promotional and sales rooms;
9. Mining and natural resource boring;
10. Oil and gas mining work area;
11. Fishery, farming, agriculture, plantation, or forestry; and
12. Computer, electronic agent, or automatic equipment owned; rented; or used by the foreign individual or corporate to run a business using internet.

Automatically a PE

The Minister of Finance through this policy also affirms the definition of business performed by the PE as all activities conducted to obtain, collect, or maintain income. She also stipulates four business

criteria automatically becoming a PE—even though they do not meet the permanent business place criterion and have limited accessibility.

The following are four business activities automatically categorized as PEs:

1. Construction, installation, and assembly projects;
2. Provision of service in any form by employee(s) or other person(s) for more than 60 days within a year;
3. Individual or corporate acting as limited agent; and
4. Agent(s) or employee(s) of an insurance company not established and domiciled in Indonesia.

Exclusion

In connection with Double Taxation Avoidance Agreement (DTAA), the foreign individual or corporate whose business is categorized as a preparation or an auxiliary—to smoothen essential and significant activities—is excluded from PE criterion although their place of business is permanent and they have full access to the place.

The essential and significant activities mentioned in the regulation comprise:

1. Foreign individual or corporate's main activities;
2. Inseparable part(s) of main businesses or activities;
3. Activities generating direct income for foreign individual or corporate; and
4. Activities using significant number of property or human resource.

Over the Top

In fact, Directorate General of Taxes (DGT) has issued Circular No. SE-4/SE.PJ/2017 on the Determination of PE for Non-resident Tax Subject Providing Application Service and/or Internet-based Content Service. However, the Circular was partial and only a guidance for internal DGT to determine the status of internet-based digital companies (Over the Top/OTT) in Indonesia.

SE-4/SE.PJ/2017 was issued when OTT existence was under public spotlight and debate, especially related to the status of global giant digital companies operating and profiting in Indonesia.

In DGT's perspective, the existence of OTT can be categorized as a PE, especially referring to the content of SE-4/PJ/2017. Similar to MoF Regulation No. 35/PMK.03/2019, the Circular was also explaining the provisions stated in Income Tax Law and KUP Law.

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