

Client Alert

April 2019

New Regulation on Determination of Permanent Establishment

Recent Development

The Government of Indonesia recently issued a new regulation on determination of a permanent establishment. In the new regulation, the government provides details to determine whether a foreign individual/body has a permanent establishment in Indonesia.

Implications for Taxpayers

The new regulation provides details on how to determine whether a foreign individual/body has a permanent establishment in Indonesia. Therefore, now there is a clearer guideline for a foreign individual/body to determine whether it has permanent establishment or not.

If a foreign individual/body in Indonesia meets the criteria of a permanent establishment, the foreign individual/body is required to obtain a tax ID number. In addition, if it meets the criteria of a taxable entrepreneur for VAT purposes, the foreign individual/body must register itself to be a taxable entrepreneur for VAT purposes.

What the Regulation Says

On 1 April, the Government of Indonesia issued Minister of Finance Regulation No. 35/PMK.03/2019 on Determination of Permanent Establishment ("**MoF Regulation 35**"). The regulation came into force on the issuance date.

Important definitions under MoF Regulation 35 are as follows:

- A Foreign Individual is an individual who does not reside in Indonesia, or is present in Indonesia for not more than 183 days within any 12-month period.
- A Foreign Body is an entity that is established outside Indonesia and is not domiciled in Indonesia.

In addition, MoF Regulation 35 stipulates that a permanent establishment is a form of business used by a Foreign Individual/Body to conduct business or activities in Indonesia that meets the following criteria:

- There is a place of business in Indonesia.
- The place of business is a fixed place.
- The place of business is used by the Foreign Individual/Body to conduct business or activities.

For More Information:

Ponti Partogi

Partner
+62 21 2960 8888
ponti.partogi@bakermckenzie.com

Ria Muhariastuti

Senior Tax Specialist
+62 21 2960 8574
ria.muhariastuti@bakermckenzie.com

Marvin Octavdio

Tax Specialist
+62 21 2960 8888
marvin.octavdio@bakermckenzie.com



Even if the above criteria are not met, the following can also be deemed as a permanent establishment:

- construction project, installation or assembly project
- furnishing of services in any form by employees or any other persons, provided that the services are done on more than 60 days within a period of 12 months
- an individual or an entity acting as a dependent agent
- an agent or an employee of an insurance company that is established outside Indonesia and is not domiciled in Indonesia that receives insurance premiums or insures risk in Indonesia

A permanent establishment is required to obtain a tax ID number. The requirement starts when it conducts business or activities in Indonesia, and it must be obtained at the latest one month after the business or activities are started in Indonesia. If the requirement is not fulfilled, the Director General of Tax can issue a tax ID number on an ex-officio basis.

In addition, if the permanent establishment meets the criteria of a taxable entrepreneur for VAT purposes as stipulated by the Minister of Finance, it must register itself to be a taxable entrepreneur for VAT purposes. It must register itself at the latest at the end of the month after the gross turnover and/or gross income exceeds the amount stipulated by the Minister of Finance.

Place of Business

MoF Regulation 35 stipulates that the definition of place of business includes any kind of place, space, facility or installation, including machinery or equipment, used by a Foreign Individual/Body to conduct business or activities. The definition of business or activities to determine a permanent establishment includes all things that are conducted to obtain, collect or maintain income. A place is deemed as a place of business notwithstanding whether it is owned or leased, and notwithstanding whether a Foreign Individual/Body has a legal right over the place.

To be deemed as a permanent establishment, the place of business must be a fixed place and must be used to conduct business or activities. MoF Regulation 35 stipulates that a place of business is a fixed place if it is used continuously and it is located in a certain geographical location. In addition, it is deemed to be used to conduct business or activities if it is available to be used by a Foreign Individual/Body with unlimited access and the Foreign Individual/Body conducts business or activities through the place of business.

However, if the place is only used to store data and/or manage data electronically and a Foreign Individual/Body only has limited access, the place is not deemed as a place of business to conduct business in Indonesia.



Place of business can be in the following forms:

- a place of management
- a branch
- a representative office
- an office
- a factory
- a workshop
- a warehouse
- a space for promotion and selling
- a mine and a place of extraction of natural resources
- an area of oil and gas mining
- a place to conduct fishery activities, animal husbandry activities, agriculture activities, a plantation or a place to conduct forestry activities
- computer, electronic agent or automatic equipment owned, rented, or used by any electronic transaction provider to conduct business through the internet

MoF Regulation 35 stipulates that for tax treaty application purposes, preparatory or auxiliary activities are exempted from the definition of permanent establishment. Preparatory activities are preliminary activities that are conducted so that essential and significant activities can be conducted, while auxiliary activities are additional activities that facilitate essential and significant activities.

Construction Projects, Installations or Assembly Projects

Construction projects, installations or assembly projects that are the business or activities of a Foreign Individual/Body in Indonesia may be deemed as a permanent establishment. To be deemed as a permanent establishment, it must meet one of the following requirements:

- The work is conducted outside Indonesia.
- The work is forwarded to subcontractors, either onshore or offshore.

If there is an applicable tax treaty, a construction project, installation or assembly project may be deemed as a permanent establishment if it is conducted for a period longer than the period set out in the tax treaty. The time period calculation is started from the start of the project, and it ends when the work is finished or delivered, or when the project is stopped before it is finished. A temporary termination does not suspend the calculation of the time period. In addition, the time of work conducted by a subcontractor (if any) is calculated in the time period.

For the application of a tax treaty, in a case in which the time period is calculated based on the number of days, a part of a day is calculated as one full day. In a case in which the time period is calculated based on the number of months, a part of a calendar month is calculated as one full month.



Furnishing of Services

MoF Regulation 35 stipulates that furnishing of services in any form by employees or other persons provided that it is conducted for more than 60 days within a 12-month period is deemed as a permanent establishment if all of the following requirements are fulfilled:

- The employees or other persons are employed by a Foreign Individual/Body or a subcontractor of a Foreign Individual/Body.
- The services are performed in Indonesia.
- The services are performed for a party in Indonesia or outside Indonesia.

If there is an applicable tax treaty, the furnishing of services may be deemed as a permanent establishment if it is conducted for a period longer than the period set out in the tax treaty. The time period calculation starts from the start of the service, and ends when the work ends. If part of the work is conducted by a subcontractor, the total time of work conducted by the subcontractor is accumulated in the calculation of the total work time.

For the application of a tax treaty, in a case in which the time period is calculated based on the number of days, a part of a day is calculated as one full day. In a case in which the time period is calculated based on the number of months, a part of a calendar month is calculated as one full month.

Dependent Agent

An individual or a body acting for and on behalf of a Foreign Individual/Body may be deemed as a permanent establishment if it meets one of the following requirements:

- It receives instruction for the interest of a Foreign Individual/Body to conduct its business or activities.
- It does not bear its own risk of the business or activities.

However, if the individual or body is acting in the ordinary course of its business, the individual or body is not deemed as a permanent establishment. In addition, for tax treaty application purposes, if a dependent agent only conducts preparatory or auxiliary activities, it is not deemed as a permanent establishment.

Insurance Company Agent or Employee

Agents or employees of an insurance company that is not established or not domiciled in Indonesia may be deemed as a permanent establishment if the insurance company receives insurance premiums in Indonesia through its agents or employees. An insurance company can also be deemed to have a permanent establishment in Indonesia if it has agents or employees in Indonesia and the insurance company bears the risk of insurance policies of insured parties who are resident, domiciled or located in Indonesia.



For tax treaty application purposes, re-insurance activity is not applicable.

Actions to Consider

MoF Regulation 35 is the first implementing regulation on how to determine a permanent establishment as referred to in the Income Tax Law. It provides clarity on several issues, e.g., time test calculation and requirements to be considered a permanent establishment. Due to this regulation, a Foreign Individual/Body that will conduct or already conducts business or activities in Indonesia should review its current and/or future business structure in Indonesia to determine whether it constitutes a permanent establishment in Indonesia as set out in this regulation.

Further consultation may be required to fully understand the details on determination of whether a Foreign Individual/Body has a permanent establishment in Indonesia.



www.hhp.co.id

HHP Law Firm
Pacific Century Place, Level 35
Sudirman Central Business District Lot. 10
Jl. Jenderal Sudirman Kav. 52-53
Jakarta 12190
Indonesia

Tel: +62 21 2960 8888
Fax: +62 21 2960 8999