



Revision to Regulation regarding Application of Tax Treaties

On 21 November 2018, the Director General of Taxation ("DGT") issued a new regulation, PER-25/PJ/2018 – The Procedure for Application of Tax Treaties ("PER-25"). PER-25 revokes the previous Anti-Abuse Regulation PER-10/PJ/2017 ("PER-10") (*please refer to our Client Alert – July 2017 regarding PER-10/PJ/2017*).

When is PER-25 effective?

PER-25 is effective from 1 January 2019. Any DGT Form or Certificate of Domicile ("COD") that has been validated based on PER-10 that is not yet expired, can still be utilized up to 31 December 2018.

What are the changes between PER-25 and PER-10?

The primary changes between PER-25 and PER-10 are the use of a single DGT Form for all non-resident tax payers, eliminating the requirement to legalize the DGT Form before use, and revisions to the timing and method of submission of the form.

There are also some changes to the tests that were imposed under PER-10 to assess whether there was any abuse of a tax treaty.

The below table provides a comparison between the requirements under PER-10 and PER-25 :

Description	Previous Anti-Abuse Regulation, PER-10 (until 31 December 2018)	New Anti-Abuse Regulation, PER-25 (starting 1 January 2019)
DGT Form	2 types of form i.e. Form DGT-2 to be used for banking institutions, pension funds and parties undertaking capital market transactions in Indonesia through a custodian in Indonesia consisting of two pages, and Form DGT-1 to be used for all other cases, consisting of three pages.	1 type of form for all types of non-resident income recipient, consisting of two pages. Banking institutions and pension funds are only required to fill in the first page.
Legalization by the Indonesian Tax Office	Required.	Not required.
Method to submit DGT Form	Manual using legalized copy.	Electronic using DGT portal.
Submission time of DGT Form	Every month/tax period that has an Article 26 WHT object.	The original DGT Form is only submitted one time (irrespective of the number of Indonesian tax withholders that the non-resident is dealing with) at the first time for the period stated in the DGT Form.
Requirement for non-resident to submit an original DGT Form to each Indonesian tax withhelder	Required.	Not required. After the first submission the Indonesian tax withhelder shall report this to the Indonesian Tax Office and then provide a copy of the lodgement receipt to the non-resident. The non-resident then submits this to future Indonesian tax withholders provided the period is still valid.
Attachment to the Tax Return	The legalized copy of the DGT Form.	The electronic receipt of DGT Form submission. (After receiving the electronic receipt, the Indonesian tax withhelder should perform a check in the DGT portal to confirm the DGT Form has been lodged and is consistent with the regulation.

Description	Previous Anti-Abuse Regulation, PER-10 (until 31 December 2018)	New Anti-Abuse Regulation, PER-25 (starting 1 January 2019)
Validity period for DGT Form	Maximum 12 months, and not able to cross the year (i.e. January – December 2018 only).	Maximum 12 months, and able to cross the calendar year (for example: August 2019 – July 2020).
Title	Form DGT-1 and DGT-2.	DGT Form.
Part I	Details of the non-resident income recipient, consisting of Tax ID number, name, full address, contact number, and email.	Same but also need to include the country of the non-resident income recipient.
Part II	Declaration by the non-resident income recipient.	Certification or legalization by the Competent Authority or his authorized representative or authorized tax officer of the non-resident income recipient's country, including the applicable period and date of issuance – <i>previously Part III in PER-10.</i>
Part III	Certification or legalization by the Competent Authority or his authorized representative or authorized tax officer of the income recipient's country, including the applicable period and date of issuance.	Declaration if the non-resident income recipient is a banking institution or pension fund – <i>previously Part II of Form DGT-2 in PER-10, with two additional points in the new DGT Form.</i>
Part IV	Details of Indonesian withholding agent, consisting of Tax ID number, name, full address, contact number, and email (no longer exists in PER-25)	List of questions to be completed if the non-resident income recipient is an individual – <i>previously Part V of Form DGT-1 in PER-10.</i>
Part V	List of questions to be completed if the income recipient is an individual.	List of questions to be completed if the non-resident income recipient is not an individual – <i>previously Part VI of Form DGT-1 in PER-10, with additional point number 6 (the entity has the same legal form and economic substance) in the new DGT Form.</i>
Part VI	List of questions to be completed if the income recipient is not an individual.	List of questions to be completed as additional information if the income is a dividend, interest, or royalty – <i>previously from Part VII of Form DGT-1 in PER-10 (beneficial owner questions).</i>
Part VII	List of questions to be completed as additional information if the income is in a form of dividend, interest, or royalty (beneficial owner questions).	Declaration by the non-resident income recipient – <i>previously Part II in PER-10.</i>
Part VIII	Details of income earned from Indonesia in respect to which relief is claimed – no longer exists in PER-25.	No longer a requirement to provide details of the income earned.

What are the requirements to use the tax treaty benefit based on PER-25?

The non-resident taxpayer who receives income from Indonesia can use the tax treaty benefit if they fulfill the below requirements:

- a. The income recipient is not an Indonesian taxpayer,
- b. The income recipient is an individual or a corporate who is a tax resident of the tax treaty partner country,
- c. There is no misuse of the tax treaty, and
- d. The income recipient is the beneficial owner, in case it is required in the tax treaty.

When is the new DGT Form required to be provided?

The new DGT Form must be provided to the 1st Indonesian tax withholder before that party is required to lodge the Withholding Tax ("WHT") Return for the relevant month. This also applies if the use of the Tax Treaty would result in no withholding tax being due.

In order to enjoy the tax treaty benefit, the non-resident taxpayer must provide the completed DGT Form to the Indonesian tax withholder, so that it can be submitted to the DGT portal using electronic submission. After obtaining the receipt from the DGT portal, the Indonesian tax withholder must provide the lodgement receipt to the non-resident taxpayer.

The non-resident taxpayer should then provide a copy of this lodgement receipt to any other Indonesian tax withholders that it has transactions with that are subject to withholding tax under the Income Tax Law. The Indonesian tax withholder must check in the DGT portal. Based on the result, if the requirements as mentioned above are not fulfilled, then the Indonesian party must withhold the tax according to the Income Tax Law.

If the submission of the DGT Form is not done before the due date for lodgement of the relevant month's withholding tax return, then the Indonesian party should withhold tax in accordance with the Income Tax Law (typically 20%). However, the non-resident taxpayer can still be granted the tax treaty benefit through a refund of tax which should not be payable in accordance with Minister of Finance Regulation No. 187/PMK.03/2015 concerning Procedures of Refunds of Excess Tax Payments that Should Not Be Payable.

Other matters

- It is still possible to use a Certificate of Domicile/Tax Residence if the foreign tax authority does not wish to sign the DGT Form (e.g. IRS of the United States and, effective 1 February 2019, the Inland Revenue Authority of Singapore also will no longer endorse the DGT Form).
- The period stated in the DGT Form and/or Certificate of Domicile is a maximum of 12 months.
- If a non-resident taxpayer receives income and the relevant tax treaty requires the recipient is the beneficial owner, then the following provisions should be met:
 - a. For an individual non-resident taxpayer, he/she does not act as an Agent or Nominee; or
 - b. For a corporate non-resident taxpayer, it should fulfill all of the following requirements:
 1. Does not act as an Agent or Nominee, or Conduit;
 2. Has control to use or enjoy funds, assets or rights that generate income from Indonesia;
 3. Not more than 50% of its corporate income is used to fulfill obligations to other parties;
 4. Bears risk of its assets, capital, or liabilities; and

- 5. Does not have an obligation, written or unwritten to provide part or all of the income sourced from Indonesia to another party.
- PER-25 has further clarified that "corporate income" per point b.3 above means all the non-resident taxpayer's income from any sources and any form, according to the non-resident taxpayer's non-consolidated financial statements. It further states (as existed in PER-10) that "obligation to other parties" excludes:
 - i. remuneration to employees arising from an employment relationship;
 - ii. expenditures to other parties which are commonly incurred by the non-resident taxpayer to perform its business.

However, PER-25 has removed the sharing of profit in the form of dividends to shareholder as an exception to the obligation to other entities in point 3.

- In relation to the misuse of tax treaty, in the event that there is a difference between the legal form of a transaction structure/scheme and its economic substance, the tax treatment will be applied based on the "substance over form" principle.
- As per PER-10 in the event of errors in the application of a tax treaty, the non-resident taxpayer can still be granted the tax treaty benefits through a refund of tax, which should not be payable in accordance with Minister of Finance Regulation No. 187/PMK.03/2015 concerning Procedures of Refunds of Excess Tax Payments that Should Not Be Payable.

Recommended actions

- Clients should ensure that any DGT Form received after 1 January 2019 is compliant with PER-25.
- Clients are required to prepare a NIL WHT Evidence (Bukti Potong) and report this in the relevant monthly WHT Returns if the use of a tax treaty results in no WHT being due (e.g. for payments of services where there is no Permanent Establishment).
- Clients should consider whether any existing transactions with non-resident taxpayers remain eligible to access tax treaty benefits and who bears the consequences if the rate of WHT increases.

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