

May 2019

- MoF Regulation No. 35/PMK.03/2019



**Permanent Establishment
Criteria**

*MoF Regulation No.
35/PMK.03/2019*

The Minister of Finance issued Regulation No. 35/PMK.03/2019 (“MoF-35”) which provides more detail as to what constitutes a permanent establishment (“PE”). This should offer greater certainty to foreign individuals or foreign entities doing business in Indonesia. MoF-35 came into effect on 1 April 2019.

Criteria for a PE

A PE is defined as a form of business for the use of a foreign individual or foreign entity to conduct its business in Indonesia. The criteria are:

- The place of business is in Indonesia;
- It is permanent in nature; and
- It is used by the foreign entity to conduct its business.

The definition of business covers activities that aim to receive, collect or maintain income.

Consistent with the Income Tax Law, a place of business is any place, space, facility or installation (including machinery and equipment) utilized by a foreign entity in the form of:

- Place of management
- Branch
- Representative office
- Office building
- Factory
- Fishery, stockbreeding, agriculture, plantation or forestry
- Computer, electronic agents, or automatic equipment that is owned, leased or used by a foreign entity to conduct online business
- Warehouse
- Space for promotion and sales
- Mining and excavation of natural resources
- Oil and gas mining area
- Workshop

The foreign entity does not need to own or lease the space used as its place of business.

A place of business is considered “permanent” if it is used continuously and is located in a particular geographical location.

A place is “used for business” if the foreign entity has unlimited access to run the business and the business is run from that place. Note that this is not met if the place is only used for data storage or processing and the foreign entity has limited access to run its business.

A PE which does not require a fixed place of business

Other types of business which constitute a PE, despite not having a permanent place of business, can be in the form of:

- Construction, installation or assembly work
- Services performed by an employee or other person for more than 60 days within a 12 month period
- A dependent individual or an entity acting as an agent
- An agent or employee of an insurance company that is not established or domiciled in Indonesia, that collects premiums and covers risks in Indonesia

These are further elaborated in the regulation as described below.

Construction, installation or assembly

Construction, installation and assembly work includes:

- Construction consultation services that cover assessment, planning, design, supervision, construction management, survey, technical testing or analysis
- Construction work that covers development, operation, maintenance, demolition or rebuilding
- Integrated construction work that covers design or engineering models, procurement and implementation
- Installation or assembly work associated with construction work
- Installation or assembly of machinery and equipment

Construction, installation and assembly work includes work implemented outside Indonesia or work which is subcontracted to a domestic or foreign subcontractor.

Services PE

Services provided by an employee or other person conducted for more than 60 days within a 12 month period are considered as a PE if all of the following exist:

- i. The employee or other person is employed by the foreign entity or by a subcontractor of the foreign entity;
- ii. The services are conducted in Indonesia; and
- iii. The services are conducted for a party in or outside of Indonesia.

Dependent agents

An individual or an entity acting as a dependent agent is classified as a PE if the individual or entity was acting for or on behalf of the foreign entity. The individual or entity is considered to act for or on behalf of a foreign entity if the individual or entity:

- Received instructions for the interest of the foreign entity in conducting its business or activities; or
- Does not bear any risk from the business or activities.

A foreign entity is not deemed to have a PE in Indonesia if it uses independent agents, brokers or middlemen, as long as they are acting in their ordinary course of business.

For implementation of a tax treaty, dependent agents are not considered a PE if they conduct preparatory or auxiliary activities (see below).

Insurance PE

An agent or employee of an insurance company that is not established or domiciled in Indonesia is considered a PE as long as it collects insurance premiums in Indonesia or bears the risk in Indonesia where the insured resides. This regulation does not apply to reinsurance business under a tax treaty.

Time test calculation

Where a tax treaty applies, the time test is as stipulated in the treaty. The time test for a construction, installation or assembly project (“construction”) or the provision of services is calculated as follows:

- The period starts when the construction or provision of service commences.
- The period ends when the construction or provision of service is completed. Note that with respect to construction, a temporary cessation of work does not stop the calculation of the time period.
- Part of one day will count as one full day (if the time test is determined based on the number of days)
- Part of one month will count as one full month (if the time test is determined based on the number of months).
- Any work undertaken by a subcontractor is considered when calculating the time test period.

Preparatory or auxiliary activities

Under a tax treaty, a business that is used by a foreign entity to provide preparatory or auxiliary activities in Indonesia is not deemed a PE. These activities are defined as:

Preparatory activity: preliminary activities to ensure that the essential and significant activities to follow are ready to be performed.

Auxiliary activity: supporting activities for smooth implementation of the essential and significant activities.

Essential and significant activities include:

- The business or core activities of the foreign entity
- A fundamental part of the business or core activities of the foreign entity
- Directly producing income for the foreign entity
- Using significant capital or human resources

Note that this exception does not apply if the preparatory or auxiliary activities are performed for another party – in that case, a PE could exist.

Administrative requirements for a PE

A foreign entity that conducts business through a PE must register to obtain a tax identification number (NPWP) and become a taxable entrepreneur (PKP). Registration for the NPWP must be completed at least one month after the foreign entity starts to conduct business through the PE. Registration to be deemed a PKP must be completed at least one month after the minimum gross sales turnover is surpassed (currently IDR 4.8 billion).

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