

THE ASSOCIATION OF GLOBAL CUSTODIANS

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September 25, 2017

Mr. Arif Yanuar
Head of Directorate of Tax Regulation (PKPI 1)
and
Mr. John Hutagaol
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Indonesia

Re: Request for Clarification on Regulation Number PER-10/PJ/2017 and Director General of Taxation Forms DGT-1 and DGT-2

Dear Mr. Yanuar and Mr. Hutagaol,

We appreciate the opportunity to submit this letter on behalf of the members of the Association of Global Custodians ("AGC" or "Association")¹ to provide comments requesting clarification of Regulation Number PER-10/PJ/2017 and of the application of Directorate General of Taxation ("DGT") Form 1 ("DGT-1") and DGT Form 2 ("DGT-2").

The attached submission sets forth the Association's comments, which focus specifically on requests for clarification related to operational questions that arise in completing DGT-1 and DGT-2.

¹ The Association is an informal group of 12 member banks that provide securities safekeeping and asset serving functions to cross-border institutional investors worldwide, including investment funds.

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Please do not hesitate to contact the undersigned if you have any questions concerning the Association's comments.

Sincerely yours on behalf of the Association,

A handwritten signature in black ink that reads "Mary C. Bennett". The signature is fluid and cursive, with a long horizontal stroke extending to the right from the end of the name.

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cc: Ms. Henny Purwanti (Section Head PKPI I)
Mr. Ramzil Huda (Direktorat Perpajakan Internasional)

COMMENTS OF THE ASSOCIATION OF GLOBAL CUSTODIANS ON REGULATION NUMBER PER-10/PJ/2017, PROCEDURES FOR THE APPLICATION OF DOUBLE TAXATION AVOIDANCE AGREEMENT, AND DGT-1 AND DGT-2

We wish to request clarification on Regulation Number PER-10/PJ/2017, issued on June 19, 2017 and effective on August 1, 2017. We understand that PER-10/PJ/2017 revokes previous regulations that applied to tax treaty relief procedures and prevention of tax treaty misuse (PER-61/PJ/2009, PER-24/PJ/2010, PER-62/PJ/2009, and PER-25/PJ/2010). The regulation updates the requirements that non-residents must meet to qualify for benefits under Indonesia's tax treaties (including reduced withholding tax rates on dividends, interest, and royalties) and provides a new format for DGT-1 and DGT-2. The new procedures present challenges for custodian banks—including that the certificate of residence ("COR") section of the Indonesian form is valid for the duration of the certification but the remainder of the form has to be provided utilizing the new format.

We understand that several local custodian banks have previously provided comments to the DGT and requested formal clarification of the requirements and procedures under PER-10/PJ/2017. We note that the DGT has published official revised forms on its website. We also note that DGT held a meeting on August 25, 2017 that was attended by custodian banks and withholding agents. We are aware that DGT provided some clarification of the coordination of the old and new regulations during that meeting, and that the DGT has indicated that it intends to issue a Circular Letter shortly clarifying some outstanding questions. The Association has identified several specific items where clarification in the Circular Letter would be beneficial.

In sum, we respectfully request that the DGT clarify the following issues in the Circular Letter:

1. Whether a COR without any stated validity period may be used.
2. What the effect is if a tax jurisdiction signs Part III of DGT-1 and DGT-2, page 1 but does not reference the fiscal year due to the jurisdiction's practice of including an issuance date but not a reference to a fiscal year in its confirmations of taxpayers' residence.
3. Whether the validity period of a DGT form or a foreign jurisdiction's certificate of residence (COR) can extend beyond the end of a calendar year (e.g. to the later of the end of the calendar year for which it is issued or a date 12 months from the date of issuance).
4. Application of transition rules, specifically when and which portions of old Format DGT-1 or DGT-2 may continue to be used.
5. Clarify that legalized copies of DGT-2, page 1 and DGT-1, page 1 would be accepted for each payment, rather than requiring an original of the forms for each payment.

6. Clarify the documentation requirements for a Central Bank, Government entity, or for an institution that is clearly named in the Double Taxation Treaty.
7. Clarify whether electronic submission of DGT-1 and DGT-2 is allowed and how that can be done.
8. Clarify the meaning of question #5 in Part VII of DGT-1 regarding beneficial ownership.
9. Clarify whether the forms can be signed by the holder of a power of attorney.
10. Clarify whether a COR with an electronic signature, rather than a “wet” signature, can be treated as valid.
11. Clarify whether the agent can put a group email address and telephone number, instead of an individual email address and telephone number, in the DGT Form Part I.

Discussion

1. Use of a COR without any stated validity period

The new regulations identify requirements that a COR must meet, including that the COR contain the name of the non-resident taxpayer, the date the COR was issued, and the fiscal year of validity of the COR. Some jurisdictions, including Japan, Luxembourg, and others, typically include an issuance date but do not routinely include a fiscal year of validity on the COR. Therefore, we respectfully request that the Circular Letter clarify that a COR that otherwise meets all the requirements identified in the new regulations but does not contain a fiscal year of validity shall be treated as a valid and complete COR.

2. Tax jurisdiction that signs Part III of DGT-1 or DGT-2, page 1 but does not reference the fiscal year due to non-applicability in the jurisdiction

The language in Part III of DGT-1 and DGT-2 is identical and states:

For the purpose of tax relief, it is hereby confirmed that the taxpayer mentioned in Part I is a resident in _____ (11) for the period ____ (12) to ____ (13) of the fiscal year ____ (14) within the meaning of the Double Taxation Convention in accordance with Double Taxation Convention concluded between Indonesia and _____ (15).

The instructions for lines 12, 13, and 14 are as follows:

- Number 12: Please fill in the starting month of the tax year to be covered.

- Number 13: Please fill in the ending month of the tax year to be covered (maximum 12 months from the starting month).
- Number 14: Please fill in the tax year of the income received to be covered.

As indicated under item #1, in some jurisdictions, the information requested in lines 12, 13, and 14 is not routinely included in the Competent Authority's COR and is unlikely also to be included in the certification of the taxpayer's country of residence in Part III of DGT-1 and DGT-2. We respectfully request that the Circular Letter clarify that, when a tax jurisdiction signs and dates Part III of DGT-1 or DGT-2 but does not complete lines 12, 13, and 14 because that information is not included in CORs in that jurisdiction, Part III will be treated as valid and complete.

3. Whether the validity period of a form or COR can extend beyond a calendar year

The new regulations and DGT-1 and DGT-2 do not specifically indicate whether a new form must be completed each year, regardless of whether the information has changed, or whether a completed form remains valid after the conclusion of the calendar year in which it is completed. The same issue arises with respect to a COR provided separately from a DGT-1 or DGT-2.

We respectfully request that the Circular Letter clarify the length of time for which a completed DGT-1 or DGT-2 or a COR is valid. Specifically, we request confirmation that a completed DGT-1 or DGT-2 or a COR will be treated as valid until at least the later of:

- (i) 12 months from the date of completion of the DGT-1 or DGT-2 or from the date of issuance of the COR, and
- (ii) the end of the fiscal year for which the DGT-1 or DGT-2 or the COR was issued (and which was specifically referenced therein).

We further request consideration of a grace period after the end of a calendar year for the validity of a DGT-1 or DGT-2 or a COR. Some tax authorities do not issue certifications of residence until the early part of the calendar year for which they are intended to be valid. This means that it is often difficult for new certifications to be obtained and provided to a withholding agent before the initial receipt of withholdable payments during that year. To address this problem, a number of governments, including France, Italy, and Poland, allow their withholding agents to continue to treat a certification of residence which was valid for one calendar year as still valid during the first calendar quarter of the following taxable year. For example, they authorize the use of CORs issued in the year N until March 31st of the year N+1, provided that a new original certificate of residency is received by the paying agent before the end of March N+1. This provision allows the entities and financial intermediary to have sufficient time to collect the new attestations from the different tax authorities at the beginning of each year. Bearing in mind the fact that some of the tax authorities take between 6 to 12 weeks to provide the CORs, we would like to request an extension to the validity of the documentation so our clients don't lose the entitlement to the tax benefits. We therefore respectfully request that

Indonesia similarly provide such a grace period, and that the Circular Letter confirm that a DGT-1 or DGT-2 or a COR, the validity of which would otherwise expire at the end of a calendar year, shall be treated as valid until the end of the first quarter of the following calendar year.

4. Application of transition rules, specifically when and which portions of old format DGT-1 or DGT-2 may continue to be used

Chapter X, Article 13 of the new regulation provides transitional provisions, which state that DGT forms that were authenticated based on the previous regulation (in other words, authenticated before August 1, 2017) may continue to be used until their expiration date.

Since the authentication in Part III of the DGT forms can be replaced by COR, this is also applicable to COR. It is our understanding that the market has interpreted this to mean:

- Any COR issued before August 1, 2017 is valid for one year starting from the issuance date of the COR. For example, if the COR is dated July 1, 2017, the COR may be used until June 30, 2018.
- Any COR issued on or after August 1, 2017 must follow the provisions in the new regulation. Based on discussions with the Indonesian Tax Officer, we understand that new CORs must follow the Indonesian fiscal year (January 1-December 31). For example, a COR issued on August 2, 2017 may be used until December 31, 2017. However, this is not clearly stated in the regulation.

We respectfully request that the Circular Letter clearly state whether the market's interpretation of the transition provision is correct.

In addition, it is our understanding that market participants need to receive valid and correct information and confirmation from DGT about the ability to use DGT-1 and DGT-2 dated prior to August 1, 2017. It is not clear whether, for DGT-1 and DGT-2 dated prior to August 1, 2017, only the first page of the form may be used until the expiration date or whether all the pages of the form may be used until the expiration date. Some of the information that market participants have received appears to be inconsistent with the transitional provisions in the new regulations. Therefore, we respectfully request that the Circular Letter clarify that all pages of DGT-1 and DGT-2 that were authenticated before August 1, 2017 may be used until their expiration date.

5. Clarify that legalized copies of DGT-2, page 1 and DGT-1, page 1 would be accepted for each payment, rather than requiring an original of the forms for each payment

Under the previous regulations, the DGT-2 form could be provided once by an investor for the duration of the validity period to the local subsidiary. The local subsidiary would arrange for legalized copies to be made and issued to the withholding agents. Regulation Number PER-10/PJ/2017 states that an original DGT-2 is needed for each payment.

We respectfully request that the Circular Letter clarify that, identical to the procedures under the previous regulations, the DGT-2 form can be provided once by an investor for the duration of the validity period to the local subsidiary and, instead of an original DGT-2 being required for each payment, a legalized copy of DGT-2, page 1 would be acceptable. We request that the Circular Letter also clarify that legalized copies of DGT-1, page 1 would be accepted.

6. Clarify the documentation requirements for a Central Bank, Government entity, or for an institution that is clearly named in the Double Taxation Treaty

The new regulation confirms that a COR or statement letter from the investor's tax authority may be used for a Central Bank, Government entity, or for an institution that is named in the Double Taxation Treaty (usually, for purposes of an exemption under the Interest Article). However, we request that the answers to the following questions be clarified in the Circular Letter:

- We request confirmation that a period of validity is not required for the COR or statement letter stating that the Central Bank, Government entity, or named institution is entitled to an exemption under the interest article under the Double Taxation Treaty.
- We request that confirmation that it is sufficient to obtain one original document (with legalized copies to be made for each withholding agent) be sufficient.
- If the Government entity is not specifically named, but may be eligible for exemption under the treaty, is the entity required to seek written confirmation of eligibility from the DGT? If the entity is required to seek written confirmation and written confirmation is granted, may the entity provide a COR or statement letter?
- What requirements apply when the Central Bank, Government entity, or institution named in the Double Taxation Treaty wishes to claim relief from withholding tax on dividend income, but there is no specific exemption in the Dividend Article of the treaty? In such a case, will the COR or statement letter be acceptable to claim the standard treaty rate? If not, is the Central Bank, Government entity, or named institution required to provide the DGT forms?

7. Clarify whether electronic submission of Forms DGT-1 and DGT-2 is allowed and how that can be done

The new regulations reference the possibility of electronic submission of DGT-1 and DGT-2, but no further guidance has been provided. In general, the Association supports electronic filing and would appreciate further clarification on whether and how the DGT-1 and DGT-2 may be submitted electronically.

8. Clarify the meaning of question #5 in Part VII of DGT-1 regarding beneficial ownership.

Where an entity receives dividend, interest, or royalty income, Question 5 in Part VII of DGT-1 asks the entity to indicate whether the entity "has contract/s which obliges the entity to transfer the income received to resident of third country". We understand that this inquiry relates to the

issue under Chapter VIII, Article 10 of the regulations as to whether the entity is the “beneficial owner” of the income.

The concept of beneficial ownership of income for treaty purposes has been usefully clarified by Commentary on the OECD Model Tax Convention. In particular, paragraph 12.4 of the Commentary on Article 10 (Dividends) of the OECD Model Tax Convention provides as follows:

12.4 In these various examples (agent, nominee, conduit company acting as a fiduciary or administrator), the direct recipient of the dividend is not the “beneficial owner” because that recipient’s right to use and enjoy the dividend is constrained by a contractual or legal obligation to pass on the payment received to another person. Such an obligation will normally derive from relevant legal documents but may also be found to exist on the basis of facts and circumstances showing that, in substance, the recipient clearly does not have the right to use and enjoy the dividend unconstrained by a contractual or legal obligation to pass on the payment received to another person. This type of obligation would not include contractual or legal obligations that are not dependent on the receipt of the payment by the direct recipient such as an obligation that is not dependent on the receipt of the payment and which the direct recipient has as a debtor or as a party to financial transactions, or typical distribution obligations of pension schemes and of collective investment vehicles entitled to treaty benefits under the principles of paragraphs 6.8 to 6.34 of the Commentary on Article 1. Where the recipient of a dividend does have the right to use and enjoy the dividend unconstrained by a contractual or legal obligation to pass on the payment received to another person, the recipient is the “beneficial owner” of that dividend. It should also be noted that Article 10 refers to the beneficial owner of a dividend as opposed to the owner of the shares, which may be different in some cases.

Similar language can be found at paragraph 10.2 of the Commentary on Article 11 (Interest) and paragraph 4.3 of the Commentary on Article 12 (Royalties) of the OECD Model. It would be helpful if the Circular Letter could confirm that question #5 in Part VII of DGT-1 should be interpreted consistently with the principles stated in paragraph 12.4 of the Commentary on Article 10 of the OECD Model Tax Convention.

9. Clarify whether the forms can be signed by the holder of a power of attorney

It is frequently the case that investors, including non-individual investors, will have provided a power of attorney to an intermediary (e.g., a custodian bank) to sign documents on their behalf for purposes of claiming entitlement to treaty benefits on the income they receive. While DGT-1 and DGT-2 indicate that they may be signed by “the income recipient or individual authorized to sign for the income recipient”, their instructions do not specifically indicate that a person holding a power of attorney from the income recipient may sign on the income recipient’s behalf. It would be useful if the Circular Letter could confirm that DGT-1 and DGT-2 may be signed on an income recipient’s behalf by a person holding a power of attorney

authorizing, in general or specific terms, such signature (including, where the holder of the power of attorney is an entity, the relevant management individual with authority to sign for that entity).

10. Clarify whether a COR with an electronic signature, rather than a “wet” signature, can be treated as valid.

We understand that the DGT typically requires a “wet” signature on a tax document (i.e., which has been hand-signed by an individual using an ink pen). A number of tax authorities produce CORs which bear only an electronic signature (e.g., an image of a wet signature). We respectfully request that the Circular Letter confirm that a COR bearing an electronic signature will be considered valid.

11. Clarify whether the agent can put a group email address and telephone number, instead of an individual email address and telephone number, in DGT-1 and DGT-2.

Part I of DGT-1 and DGT-2 calls for insertion of the income recipient’s contact number and contact email address. Similarly, Part IV of DGT-1 calls for insertion of the Indonesian withholding agent’s contact number and contact email address.

In many cases, entities will wish to provide a group contact number and group email address, rather than the telephone number and email address of a specific individual, in order to allow for successful contact in the event of staff turnover. We therefore respectfully request that the Circular Letter confirm that insertion of a group contact number and group email address will be acceptable in Part I of DGT-1 and DGT-2 and in Part IV of DGT-1.