

THE ASSOCIATION OF GLOBAL CUSTODIANS

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6 January 2010

Mr. DR. Achmad Sjarifuddin Alsah  
Director, Directorate of Tax Regulations II  
Head Office of Directorate General of Taxes  
Building B 3rd Floor  
Jl. Jenderal Gatot Subroto Kav 40-42  
Jakarta 12190  
Indonesia

**RE: Regulations PER-40/PJ/2010, PER-61/PJ/2009 and PER-62/PJ/2009**

Dear Mr. Alsah:

We write on behalf of the members of the Association of Global Custodians (the "Association") to convey members' views regarding tax relief procedures and forms in Indonesia, which present challenges that materially affect non-resident investors' ability to obtain the due tax treaty entitlement. As you may know, the Association is an informal group of ten global banking institutions, listed on the letterhead above, that conduct significant custodian services and related asset-servicing functions on behalf of cross-border institutional investors worldwide, including non-resident institutional clients investing in Indonesian markets.

The Association is aware that many other industry groups whose members are adversely affected by the Indonesian regulations have submitted extensive comment letters to you. Many of the concerns expressed by these other groups are shared by Association members, and we agree with many of the suggestions and ideas highlighted in their letters to date. For purposes of this comment letter, members thought it would be most useful to focus on key issues that uniquely impact global custodian banks and their clients.

With particular reference to the forms required to seek such relief, members highlight the following points:

1. Association members provide global custody services to a wide variety of client types, including, for example, pension schemes, charities and insurance

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companies. Global custodians bear responsibility for safekeeping client securities and various financial assets, and members facilitate settlement of client trades and collection of income entitlements resulting from assets in custody. To support clients' tax compliance and enable custodians to provide intermediary tax services, clients typically provide the global custodian with a power of attorney. This enables the global custodian to complete tax documentation for the client in a timely and efficient manner based on standing data provided by clients. The Association believes that the ability of the investor or its custodial agent to complete the forms within the strict deadlines currently set in Indonesia for securing tax relief at source cannot be achieved. As a consequence tax reclaims will inevitably arise, along with the associated POA challenges to processing such requests, as set out in further detail below.

We strongly encourage the Directorate General of Taxation ("DGT") to respect the use of such powers of attorney for both tax relief at source and tax reclaims. Indeed, in the case of reclaims this would eliminate the need for form DGT4. Recognition of powers of attorney will introduce efficiencies into the tax relief process and minimize tax reclaims in the future. A copy of the power of attorney could be provided to the local custodian in order to evidence its authenticity.

2. We are aware that the DGT responded to a letter submitted by the Indonesian Custodian Bank Association (ABKI), stating that a Trustee entity is not considered as a Beneficial Owner and, accordingly, is not eligible to enjoy special tax rate based on Double Treaty Agreement (DTA) with Indonesia. Specifically, the DGT letter stated:
  - A Trustee which is officially recognised as the Legal Owner of particular assets/income, and which accordingly has the full authorisation by the Beneficial Owner to perform all administrative activities (inclusive of the tax aspects), is not considered a Beneficial Owner and not eligible to enjoy special tax rate based on DTA; and
  - An entity that officially is Legal Owner of particular assets/income having limited functions, such as fiduciary or administrator, and which is merely acting for another party, is also not considered a Beneficial Owner and therefore not eligible to enjoy special tax rate based on DTA.

Association members are concerned that the role of the Trustee has not been properly understood. Specifically in a legal sense, a trustee operates within the dictates and guidelines of a trust. A Trustee holds title to the property of the trust for the benefit of the underlying beneficiary, and in this capacity it acts as administrator and custodian pursuant to the Trust Charter. In many instances,

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pension schemes are only permitted pursuant to a trust arrangement, and the beneficiary is the pension scheme itself. A trust has no legal form by which to execute documents other than through representatives. As a result, under the DGT letter, the pension scheme would apparently lose entitlement to tax relief under the applicable DTA.

The Association requests that the DGT reconsider its view and provide explicit guidance that recognizes the entitlement status of pension schemes and other entities that are duly organized under a trust arrangement and the ability of the trustee to claim tax relief on behalf of such entities in accordance with the authority granted to it under the trust arrangement.

3. The Association believes that the requirement to provide one form DGT1, page two, per tax withholder-per income event is unnecessary and administratively burdensome for every non resident investor and should be eliminated. Members encourage the DGT to modify the form to enable it to serve as a one-time authorization document or eliminate it altogether and extend form DGT2 to all types of non-resident investor.
4. The Association welcomes the introduction of the new tax reclaim procedures under regulation PER-40/PJ/2010. Members have the following comments with respect to forms DGT3 and DGT4, however.
  - Members note that the DGT3 form is required for any tax claim per withholding agent. However, it is not clear whether this means reclaim filings are to be restricted to one asset per year/per withholding agent or whether they can be grouped together, i.e. multiple assets per withholding agent. Members' preference is to allow multiple claims per year per withholding agent. Otherwise a restrictive approach will result in a time delay in submitting reclaims, which will have a time-value of money ramification for investors. Additionally, the global custodian that prepares the form for the investor would not necessarily know who the relevant withholding agent is. The Association is concerned that the ability to group claims per withholding agent is not feasible as a practical matter for foreign investors and their global custodians and will likely require the intervention of the local custodian to assist with such grouping, which will add a further administrative layer and delay to the process.
  - Members note that form DGT3 requires details concerning the withholding tax agent, including its tax identification number and address, together with details regarding the withholding tax slip number and date. From a practical perspective, an end investor cannot know how to obtain this information or how to populate this information in the form. The Association requests guidance

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about how this information can be obtained and verified in a practical and cost effective way.

- Members note that the reclaim form must be supplemented by supporting documents. The Association believes that numerous legal and administrative barriers exist that inhibit provision of the required documentation, including issues associated with client privacy and data protection. Thus, collecting and transmitting the required information are impractical, and the barriers effectively will prevent any entity from being able to obtain the benefits of the DTA.
- Finally, members note the requirement to provide a power of attorney relative to each withholding agent using form DGT4. Absent a relaxation in the terms of this requirement, it is possible that the number of forms DGT4 required would be vast and potentially unachievable in practice. As you know, there are approximately 600 withholding agents in Indonesia.

Accordingly, we strongly encourage the DGT to consider relaxing these requirements and, supplementally, provide needed guidance with respect to treaty-entitled parties, thereby ensuring that only valid claims will be submitted. To that end, it may help DGT to consult with the appropriate foreign competent authority to confirm the entity, or class of entity, entitled under the respective tax treaties.

5. The Association seeks clarification from DGT regarding the applicable Indonesian statute of limitations as it applies to treaty claims. In addition, we would welcome DGT clarification as to whether investors can utilise the reclaim process for tax treaty claims arising in income years 01/01/2007 - 31/12/2009 and all income paid in 2010, prior to the issuance of regulation PER-40/PJ/2010 – assuming, of course, that at the time of income payment the non-resident investor complied with Regulation PER-61/PJ/2009 and Regulation PER-62/PJ/2009 -- i.e., that the assets giving rise to the income were deposited in a segregated account.

\* \* \* \*

The Association greatly appreciates the opportunity to provide the comments and requests set forth above. Members stand ready to confer with you if that would be

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useful. If you have questions concerning the foregoing or would like to discuss any of these issues further, please feel free to contact the undersigned as an initial matter or Lorraine White, Northern Trust, on +442079822949 [LW42@NTRS.COM](mailto:LW42@NTRS.COM).

Sincerely yours,

A handwritten signature in black ink, appearing to read "Dan W. Schneider", with a long horizontal flourish extending to the right.

Dan W. Schneider  
Baker & McKenzie LLP  
Counsel to the Association