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October 2020 | NEWSLETTER

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BRIEF OVERVIEW ON LAND TRANSACTION IN INDONESIA: Types of Transactions to Consider

In our previous newsletter, we discussed on things to consider when purchasing land in Indonesia. In essence, it is important to conduct a land due diligence before purchasing land in order to be able to mitigate risks that may harm the land acquisition transaction and/or the purchaser. As the continuation of the previous newsletter, we will now discuss more on the transaction phase of land acquisition in Indonesia.

A land transaction process requires the assistance of a Land-Deed Official ("**PPAT**" – *Pejabat Pembuat Akta Tanah*). By formality, the PPAT is statutorily required to verify the status of the land title certificate to the local land office before the PPAT may facilitate the transaction. A good PPAT will also ensure if the transacting parties would require spousal consent or other form of consent in entering the land sale and purchase deed, after which the purchaser and the seller may proceed to enter into the Land Sale and Purchase Deed ("**AJB**" – *Akta Jual Beli*) facilitated by their appointed PPAT.

The AJB has to be signed by both parties (purchaser and seller) before the PPAT (as regulated in Article 38 Jo. 37 Paragraph (1) Government Regulation No. 24 of 1997 on Land Registration ("**GR 24/1997**") along with the payment of the agreed price of the land; after that, the process is followed with (i) the transfer of land title ownership (*balik nama*) processed by the PPAT and the Local Land Office; and lastly (ii) land title certificate handover to the purchaser. Please note that the original AJB will be kept by the PPAT to be recorded at the Land Office, while the purchaser will get an original duplicate (*turunan akta*) of AJB. The land transaction matters are generally regulated under Law No. 5 of 1960 on Basic Regulation on Agrarian Principles ("**Agrarian Law**") and GR 24/1997.

The above illustrates the ideal/straightforward land transaction steps. However, subject to the findings of the due diligence, the transaction may not be as simple. There may be:

i. a need for conditional land sale and purchase agreement first before entering into an AJB;
ii. conversion of land title; or
iii. other issues to be considered such as the land transfer taxes.

We will discuss these issues below.

A. Land Title Conversion by Seller or by Purchaser?

Land title conversion is a legal action to convert a land title so the purchaser could use the land in accordance with the purchaser's interest. From several land title as acknowledged in the Agrarian Law (e.g. Right of Ownership (Hak Milik – "**HM**"), Cultivation Right (*Hak Guna Usaha* – "**HGU**"), Right to Use a Building (*Hak Guna Bangunan* – "**HGB**")), the Agrarian Law and Government Regulation No. 40 of 1996 on HGU, HGB, and Right to Use Land (*Hak Pakai atas Tanah*) also regulate the party who can hold each of the land title (for example, an Indonesian citizen (individual) can hold HM and HGB, while Indonesian company (limited liability company) can hold HGB but not HM). In this case, if the purchaser is a company and the land title to be purchased is owned by an individual and is under HM, then ideally it should be converted first to the appropriate land title that may be held by a company, such as HGB.

The party who will bear the responsibility for doing the land title conversion is subject to the commercial decision of the seller and the purchaser. In general, the conversion of land title may be carried out by (i) the seller before land sale and purchase transaction; or (ii) by the purchaser after the transaction. The difference lies in the transaction document used.

If the land title conversion is done before the transaction, then the parties may use AJB for the transaction. However, if after, then a Land Title Relinquishment Deed (*Akta Pelepasan Hak* – "**APH**") is required for the transaction (because the land title recipient (the purchaser) does not yet meet the requirement to hold the relinquished land title and therefore the land title needs to be relinquished first to the state in order to then be applied new land title by the purchaser which fits the purchaser's statutory requirement).

In connection with the above, the APH requirement to relinquish the land title is set out under Article 131 of Agrarian Minister/Head of the National Land Agency Regulation No.3 of 1997 on the Implementation Provisions of GR 24/1997 on Land Registration. APH or the land title discharge letter is a mandatory supporting document for an application from land title owner (seller) to release its ownership of the land title so that unto that land can be applied a new land title (and in the APH it is usually expressly mentioned for the sole and exclusive benefit of the purchaser).

B. The difference between APH and AJB

APH

APH is an agreement between the seller and the purchaser containing the seller's statement that it is willing to relinquish its rights over the land title (for a compensation paid the purchaser to the seller)

LEGAL UPDATE CORNER

OMNIBUS LAW PASSED

- *The Omnibus Law Bill (or the Omnibus Bill on Job Creation) was passed by the Indonesia's House of Representatives on 5 October 2020. It is now awaiting the President's signature for enactment.*
- *The Omnibus Law is voluminous and amends various existing laws from company law, employment law, housing law, intellectual property law, and many others. Expect various new implementing regulations to be issued as well.*
- *Solis will be reviewing the key aspects of the amended laws under the Omnibus Law in a series of newsletters when the Omnibus Law is officially effective.*

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to the state (for the sole and exclusive benefit of the purchaser) in order for a new land title to be applied by the purchaser. APH is required to be made before a PPAT.

As explained in AJB section below, an AJB must follow a standard statutory format and therefore the substance of AJB (such as the representations and warranties of the seller to the purchaser) may not deviate very much from the standard format. This is not the case with APH since APH's format is not statutorily regulated. Therefore, the substance of an APH may be populated heavily (particularly the representations and warranties of the seller) by the parties.

AJB

As for AJB, this document is an authentic deed for the transfer of rights of the land title and signed by purchaser and seller before the PPAT. AJB must also be made according to the certain standard format as set out in the Head of the National Land Agency Regulation No.8 of 2012.

Given the above, APH and AJB are not the same documents and the legal consequence is different for each document. However, they have the same purpose of transferring the land title from the seller to the purchaser.

C. Conditional Land Sale and Purchase Agreement (*Perjanjian Pengikatan Jual Beli* "PPJB" *atas Tanah*)

PPJB is made because there are issues to be resolved first before AJB is carried out for example the building/house over the land is still in development process by the developer, or the land title conversion is still in process by the seller, or issues with payment terms, but the purchaser or the seller intends to complete the transaction and therefore binds the other party to satisfy the pending issues before finally entering into the AJB. In practice, the purchaser may enjoy the benefit/occupy the land or the house following a PPJB transaction, but it is important to note that before an AJB is made and executed between the seller and purchaser, the land title still belongs to the seller.

A PPJB may be made privately without the involvement of a Notary/PPAT. However, after the issuance of Minister of Public Works Regulation No.11/PRT/M/2019 of Systems for Preliminary Sales and Purchase Agreements for Houses ("**MOPW Regulation No.11/2019**"), PPJB for houses (therefore, arguably for land only is **not** included) is required to be made before a notary. This is regulated under Article 12 Paragraph (2) of MOPW Regulation No.11/2019. In addition, MOPW Regulation No. 11/2019 also regulates the minimum content of a PPJB which must contain among others: identity of purchaser and seller, object description, price and payment method, developer guarantee, rights and obligations of both parties, handover timeline, transfer of right, PPJB termination, etc. Therefore, any PPJB for houses must adhere to these provisions.

D. General Taxation on Land Transaction

Tax is one of the important aspects in land sale and purchase transaction. Before AJB signing by purchaser and seller, PPAT must make sure that the taxes arising from the transaction is fully settled. If not, PPAT has right to refuse to facilitate the AJB signing.

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Taxes to be paid before AJB is Income Tax ("**PPh**" – *Pajak Penghasilan*) and Land and Building Acquisition Tax ("**BPHTB**" - *Bea Perolehan Hak atas Tanah dan Bangunan*). Following are the further explanation:

<u>PPh</u>

PPh is imposed from income or proceeds received by the seller from the transaction/transfer of land title, that must be paid by the seller. The elucidation of Article 39 Paragraph (1) letter g. of GR 24/1997 states that if PPh is not paid, then PPAT has right to refuse to facilitate the AJB signing.

Under Government Regulation No. 34 of 2016, the PPh rate is 2,5% (or lower subject to certain conditions) from the gross transaction amount of the land and/or building title transfer.

<u>BPHTB</u>

BPHTB is regulated in Law No.20 of 2000 on the Amendment of Law No.21 of 1997 on BPHTB, also local regional regulation. BPHTB is imposed from the acquisition of land title, that must be paid by the purchaser.

Under Law No. 28 of 2009, the tax rate for BPHTB for each region may be up to 5% and the tax base is (i) the Tax Object Purchase Value (NPOP/Nilai Perolehan Objek Pajak) or (ii) the Tax Object Sale Value (Nilai Jual Objek Pajak/NJOP), whichever is higher. The BPHTB payable is calculated by deducting the NPOP or the NJOP (whichever is higher) with an allowable non-taxable threshold and then multiplying the resulting deducted NPOP/NJOP with the applicable tax rate. The non-taxable threshold varies by region, but may not exceed Rp. 60 million.

E. Land-Deed Official (*PPAT*)

The appointment of a reputable and competent PPAT is important to ensure that the appointed PPAT is impartial and will treat any payments relating to the transaction, whether it be the purchase price or the taxes, in accordance with the law.

The above is brief overview on the key aspects of land transaction that interested parties should be aware of. In short, land due diligence is especially important and scrutinizing land documents before entering the transaction goes a long way. In addition, the due diligence result may also determine the steps of the transaction phase.

Lastly, as observed in the Omnibus Law draft, some provisions of housing law under Law No.1 of 2011 and vertical housing (apartments) law under Law No. 20 of 2011 are amended and we may expect new implementing regulations as well. How will these impact land/house transactions in Indonesia? We will see soon enough.

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