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MORE NON-TAX STATE REVENUE CHANGES – INCREASED RATES FOR CERTAIN MINERAL PRODUCERS [1][2][3][4][5]

INTRODUCTION

Non-Tax State Revenue or "PNBP" is a hugely important contributor to the Government's overall tax collections from the mining industry.

Having earlier in 2022 increased the rates of PNBP applicable to Indonesia's largest coal producers, the Government has now significantly increased the rates of PNBP applicable to other coal producers, as well as to producers of gold, with effect from 15 September 2022.

The Government is also introducing a highly concessional PNBP rate for certain nickel sales in an endeavour to promote new domestic manufacturing initiatives.

The changes in PNBP rates are to be found in a newly issued Government Regulation which also gives a much clearer "picture" of the overall PNBP regime than was previously the case.

Continuing high mineral commodity prices, as well as the Government's increased expenditure burdens, are unquestionably the main catalysts for the increased rates of PNBP.

In this article, the writer will review the latest changes to the PNBP regime from the perspective of how they affect various categories of mineral producers.

BACKGROUND

The recently increased PNBP burden for certain coal producers, as well as for producers of gold and various other minerals, has been a "work in progress" for a long time.

Since at least 2011 successive Governments have sought to collect more tax revenue from the local mining industry as a whole.

In October 2011, former President Yudhoyono delivered an important speech in which, among other things, he outlined Indonesia's then new Energy Security Policy. The President's speech set out a number of objectives of the Energy Security Policy which, in the case of the local mining industry, were clearly intended to ensure that, going forward, the mining industry made a greater contribution, than it had done in the past (at least as far as the former President was concerned), to the economic development of Indonesia.

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[2] Bill Sullivan is the author of "*Mining Law & Regulatory Practice in Indonesia – A Primary Reference Source*" (Wiley, New York & Singapore 2013), the first internationally published, comprehensive book on Indonesia's 2009 Mining Law and its implementing regulations.

[5] An earlier version of this article appeared in the September - October 2022 issue of Coal Asia Magazine.

A "fair" tax for the State from mining was expressed by former President Yudhoyono to be one of the objectives of the Energy Security Policy without, however, any guidance being provided as to how "fair" should be defined. It was abundantly clear, though, that a "fair" tax did not mean the same or less tax than the mining industry had been paying but, rather, a "fair" tax meant more tax; indeed, much more tax than the mining industry had been paying.

When Joko Widodo became President in 2014, the new Government was not shy in making it clear that it "expected" ("desperately hoped" might have been a more accurate term) to be able to use increased revenue collection from the mining industry as one of the principal means of offsetting the projected decline in the Government's revenue from oil & gas sales as a result of falling domestic oil production and lower oil prices.

Given coal is Indonesia's most important mineral export and the coal industry has long been the mainstay of Government tax revenue collection from the local mining industry, it was always likely that any increased tax burden for the local mining industry would fall most heavily upon coal producers. In April 2022, Government Regulation No. 15 of 2022 re Treatment of Taxes and/or Non-Tax State Revenue in the Coal Mining Business Sector ("**GR 15/2022**") was issued. GR 15/2022 significantly increased the PNBP rates applicable to Indonesia's largest coal producers, being former holders of Coal Contracts of Work ("**CCoWs**"), which received Special Mining Business Licenses ("**IUPKs**") at the time of the expiry of their CCoWs ("**Coal Continuation IUPKs**"). GR 15/2022, however, left unchanged the PNBP rates applicable to other coal producers which had been in place since 2019.

Acceptance of the increased PNBP rates, applicable to holders of Coal Continuation IUPKs, was essentially the "price" that CCoWs holders had to "pay" for the very favourable 2020 amendments to the 2009 Mining Law that provided, among other things, for CCoW holders to receive Coal Continuation IUPKs upon the expiry of their CCoWs in circumstances where the contractual entitlement of CCoW holders to Continuation IUPKs or any other type of continued operating right was, at best, very unclear. Readers interested in knowing more about GR 15/2022 and the increased PNBP rates applicable to holders of Coal Continuation IUPKs are referred to the writer's earlier article, "*Paying the Price for Government Support – Big Tax Increases for Coal Continuation IUPK Holders*", which appeared in the May – June 2022 issue of Coal Asia Magazine.

Notwithstanding the special circumstances of Coal Continuation IUPK holders, it was almost inevitable that the increased PNBP rates applicable to the largest coal producers would, sooner or later, be followed by increases in the PNBP rates applicable to other coal producers as well as in the PNBP rates applicable to at least some metal mineral producers. This has now happened in the form of the issuance of Government Regulation No. 26 of 2022 re Types and Rates of Non-Tax State Revenue Applicable to Activities Administered by the Ministry of Energy & Mineral Resources ("**GR 26/2022**").

ANALYSIS AND DISCUSSION

1. Overview of GR 26/2022

GR 26/2022 deals with PNBP in respect of all activities/revenue sources administered by the Ministry of Energy & Mineral Resources ("**ESDM**"). As such, GR 26/2022 covers far more than just PNBP in respect of mining activities. More particularly, GR 26/2022 also deals with PNBP payable by participants in the biofuel, electricity, geothermal and oil & gas industries.

GR 26/2022 replaces Government Regulation No. 81 of 2019 re Types and Rates of Non-Tax State Revenue Applicable to Activities Administered by the Ministry of Energy & Mineral Resources ("**GR 81/2019**") which has been revoked.

2. <u>GR 26/2022 in Detail</u>

2.1 **Greater Specificity of PNBP Sources**: GR 26/2022 highlights that there are two distinct categories of PNBP, in respect of activities/revenue sources administered by ESDM, being:

(a) PNBP, the rates or amounts of which are set out in the Appendix to GR 26/2022 ("**Appendix**"); and

(b) PNBP, the rates or amounts of which have to be found elsewhere.

The PNBP rates, set out in the Appendix, relate to the following activities/revenue sources administered by ESDM:

(a) utilization of natural resources;

(b) provision of services in the field of energy and mineral resources, being:

(i) mineral and coal sub-sector services;

(ii) electricity sub-sector services;

(iii) geological sub-sector services; and

(iv) oil and gas sector services;

(c) use of certain facilities and infrastructure for human resources development and training;

(d) administrative fines applicable to biofuel business entities; and

(e) guarantee placements within the energy and mineral resources sector, with specific reference to:

(i) drilling of geothermal exploration wells; and

(ii) implementation of joint studies in the oil and gas sector (Article 1 of GR 26/2022).

The Appendix is some 50 pages in length.

The other activities/revenue sources, administered by ESDM and in respect of which PNBP is levied but where the applicable rates are not specified in the Appendix, are also described in some detail (Article 2 of GR 26/2022). The reason why the applicable rates of PNBP, in the case of these other activities/revenue sources, are not specified in the Appendix may be because they are not fixed but, rather, vary depending upon the particular circumstances of the relevant activity/revenue source. That said, the most important of these other activities/revenue sources is undoubtedly the Government's entitlement to what is apparently meant to be a fixed 4% share of the net profit of holders of IUPKs issued to major coal and metal mineral producers at the time of the expiry of their CoWs/CCoWs (**i.e.**, Coal Continuation IUPKs and Metal Mineral Continuation IUPKs).

GR 26/2022's setting out of all the different types of PNBP, in respect of activities/revenue sources administered by ESDM, is to be compared with the approach previously taken in the now revoked GR 81/2019 which simply referred to PNBP by way of listing the individual ESDM departments responsible for administering activities/revenue sources that were liable to PNBP. As such, GR 26/2022 facilitates a much better understanding than was previously possible of just why PNBP, in respect of activities/revenue sources administered by ESDM, is so important to the Government.

For the purpose of the balance of this article, the writer will confine himself to those provisions of GR 26/2022 and its Appendix that are directly relevant to the mining industry.

2.2 **Provision for Possible 0% PNBP Rate for Certain Coal Producers**: Express provision is made for the possibility of a 0% PNBP rate in the case of certain coal producers, including holders of Coal Continuation IUPKs, which are able to promote energy independence of domestic demand for industrial raw materials as a result of carrying out local value-added activities. The details of what is required in order to qualify for the 0% PNBP rate will be set out in a subsequent Minister of Energy & Mineral Resources ("**MoEMR**") regulation and involve approval from the Minister of Finance ("**MoF**") (Article 3 of GR 26/2022).

The availability of a 0% PNBP rate, in the case of certain coal producers, was originally foreshadowed in the 2020 amendments to the 2009 Mining Law which, like GR 26/2022, did not provide any details as to when or how the 0% PNBP rate is to be applied to certain coal producers.

2.3 **Provision for PNBP in respect of Services**: Provision of services in the field of energy and mineral resources, which services involve accommodation, consumption and transportation, are highlighted as being subject to PNBP without, however, specifying the applicable rates (Article 4 of GR 26/2022).

2.4 **Provision for Possible 0% PNBP Rate for Other Parties**: Interestingly, provision is also made for the possible more general availability of a 0% PNBP rate in the case of (i) utilization of natural resources and (ii) provision of services in the field of energy and mineral resources (Article 5 of GR 26/2022). In other words, it would seem that the Government does not intend to necessarily restrict the availability of the highly preferential 0% PNBP rate to only coal producers carrying out local value added activities in respect of part or all of their coal production.

The possible availability of a 0% PNBP rate to parties other than coal producers is **not** expressly tied to those other parties undertaking activities that promote energy independence. This is to be contrasted with the position in the case of coal producers.

Again, the circumstances, in which a 0% PNBP rate will be available to mining industry participants, other than certain coal producers, are to be dealt with in a subsequent MoEMR regulation and involve MoF approval.

There was always something inequitable about only allowing certain coal producers to enjoy a 0% PNBP rate in return for promoting energy independence. As such, making it possible for other parties, including metal mineral producers and service providers, to also enjoy a 0% PNBP may be seen as creating a more "level playing field" as between coal producers and other mining industry participants. Much will depend, however, upon what other parties have to do in order to qualify for the 0% PNBP rate.

2.5 **Introduction of New PNBP Rates**: The PNBP rates applicable to the sale of many mineral commodities remain unchanged from GR 81/2019. However, the applicable PNBP rates have been significantly increased in the case of:

(a) coal sales **other than sales of coal produced by holders of Coal Continuation IUPKs** (which are dealt with in GR 15/2022 that has **not** been amended or revoked by GR 26/2022); and

(b) gold ore sales.

The relevant changes only are summarized in the following table:

Mineral Commodity	**Old PNBP Rate as Percentage (%) of Selling Price[6]**	**New PNBP Rate as Percentage (%) of Selling Price[7]**
1. **Coal**		
1.1 **Open Pit Mining**	(a) **≤ 4700 Kka1**[8] : 3%	(a) **≤ 4200 Kka1**
		(i) HBA[9] < USD70[10] : 5%
		(ii) HBA ≥ USD 70 to ≤ USD 90 : 6%
		(iii) HBA > USD90 : 8%

6 GR 81/2019.
7 GR 26/2022.
8 Calorific Value on Air Dried Basis.
9 Coal Benchmark Price.
10 Per ton.

Mineral Commodity	Old PNBP Rate as Percentage (%) of Selling Price[6]	New PNBP Rate as Percentage (%) of Selling Price[7]
	(b) > **4700 to ≤ 5700 Kka1** : 5%	(b) **> 4200 – 5200 Kka1**
		(i) HBA < USD70 : 7%
		(ii) HBA ≥ USD 70 to ≤ USD 90 : 8.5%
		(iii) HBA > USD90 : 10.5%
	(c) > **5700 Kka1** : 7%	(c) **≥ 5200 Kka1**
		(i) HBA < USD70 : 9.5%
		(ii) HBA ≥ USD 70 to ≤ USD 90 : 11.5%
		(iii) HBA > USD90 : 13.5%
1.2 **Underground Mining**	(a) ≤ **4700 Kka1** : 2%	(a) ≤ **4200 Kka1**
		(i) HBA < USD70 : 4%
		(ii) HBA ≥ USD 70 to ≤ USD 90 : 5%
		(iii) HBA > USD90 : 7%
	(b) > **4700 to ≤ 5700 Kka1** : 4%	(b) > **4200 — 5200 Kkal**
		(i) HBA < USD70 : 6%
		(ii) HBA ≥ USD 70 to ≤ USD 90 : 7.5%
		(iii) HBA > USD90 : 9.5%

Mineral Commodity	Old PNBP Rate as Percentage (%) of Selling Price[6]	New PNBP Rate as Percentage (%) of Selling Price[7]
	(c) **> 5700 Kka1** : 6%	(c) **≥ 5200 Kka1**
		(i) HBA < USD70 : 8.5%
		(ii) HBA ≥ USD 70 to ≤ USD 90 : 10.5%
		(iii) HBA > USD90 : 12.5%
2. **Gold**	(a) ≤ USD1300[11] : 3.75%	(a) ≤ USD1300 : 3.75%
	(b) > USD1300 to ≤ USD1400 : 4%	(b) > USD1300 to ≤ USD1400 : 4%
	(c) > USD1400 to ≤ USD1500 : 4.25%	(c) > USD1400 to ≤ USD1500 : 4.25%
	(d) > USD1500 to ≤ USD1600 : 4.50%	(d) > USD1500 to ≤ USD1600 : 4.50%
	(e) > USD1600 to ≤ USD1700 : 4.74%	(e) > USD1600 to ≤ USD1700 : 4.74%
	(f) > USD1700 : 5%	(f) > USD1700 to ≤ USD1800 : 5%
		(g) > USD1800 to ≤ USD1900 : 6%
		(h) > USD1900 to ≤ USD2000 : 8%
		(i) > USD2,000 : 10%
3. **Nickel**	(a) **Nickel Ore** : 10%	(a) **Nickel Ore**
		(i) Nickel ore : 10%
		(ii) Nickel ore content of Ni ≤ 1.5% as raw material for battery-based electric motor vehicle industry : 2%

[11] Per ounce.

GR 26/2022's differentiation between (i) the PNBP rate of 10% applicable to nickel ore sales generally and (ii) the much lower PNBP rate of 2% applicable to sales of nickel ore to be used as raw material input for electric battery manufacturing is of particular interest. The introduction of a highly concessional PNBP rate for nickel ore, as an input material for electric battery manufacturing, is clearly intended to encourage nickel ore producers to prioritize the raw material needs of domestic electric battery manufacturers over both the raw material needs of other domestic users of nickel ore as well as export sales. This may be seen as a very tangible sign of the Government's commitment to promoting the development of an electric battery industry in Indonesia.

2.6 **No Increases in PNBP for Other Metal Mineral Producers**: GR 26/2022 leaves unchanged, **<u>for now</u>**, the rates of PNBP applicable to sales of other metal minerals including (i) bauxite, (ii) copper, (iii) iron ore, (iv) iron sands, (v) lead, (vi) manganese, (vii) silver, (viii) tin and (ix) zinc. Given, however, the Government's pressing need to raise additional revenue, it would be hardly surprising to see the rates of PNBP applicable to sales of some or all of these other metal minerals also raised sooner rather than later.

With the approaching 2024 Presidential Election, there will be a strong incentive for the Government to do everything possible to maintain, if not expand further, its social welfare expenditure commitments. The perception that the mining industry has benefited greatly from continuing high mineral commodity prices makes it probable that the Government will continue to view mineral producers as being an obvious potential source of additional revenue in the form of PNBP rate increases for other metal mineral producers and not merely gold producers as well as coal producers.

2.7 **Effective Date**: GR 26/2022 came into effect on 15 September 2022 and relevant mineral producers are obliged to pay the greater PNBP rates applicable to sales of their production as of that date.

<u>CONCLUDING REMARKS</u>

GR 26/2022 provides a comprehensive overview of the numerous sources of PNBP which extend far beyond the mining industry.

Using a concessional PNBP rate, to ensure nickel producers prioritize the raw material needs of the electric battery manufacturing industry, is a positive development and reflects a welcome move away from a "sticks" only approach to a more nuanced, combined "carrots" and "sticks" approach to downstream industry development.

Increased PNBP rates for small and medium coal producers should have been expected in light of the prevailing historically high coal prices.

The justification for an increase in PNBP rates for gold producers is less obvious given the extended weakness in gold prices.

GR 26/2022 represents the latest move by the Government to collect more PNBP from the mining industry. It is not, however, likely to be the last such move as the Government's growing expenditure commitments, especially in terms of social welfare and electricity/fuel subsidies, mean that the Government will always be on the lookout for ways to raise additional revenue to fund these commitments.

The concern must be that, at some point, the ever-increasing tax burden faced by mineral producers in Indonesia will mean the net returns, from investment in the Indonesian mining industry, are no longer sufficiently attractive to ensure continued new investment at the level required for the optimal development of the country's mineral resources. Striking the right balance between this longer-term concern and the Government's shorter term need for additional revenue is going to be difficult to achieve when political considerations around social stability and keeping the voters on-side are likely to be seen to be of paramount importance in the run-up to the 2024 Presidential Election.

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