

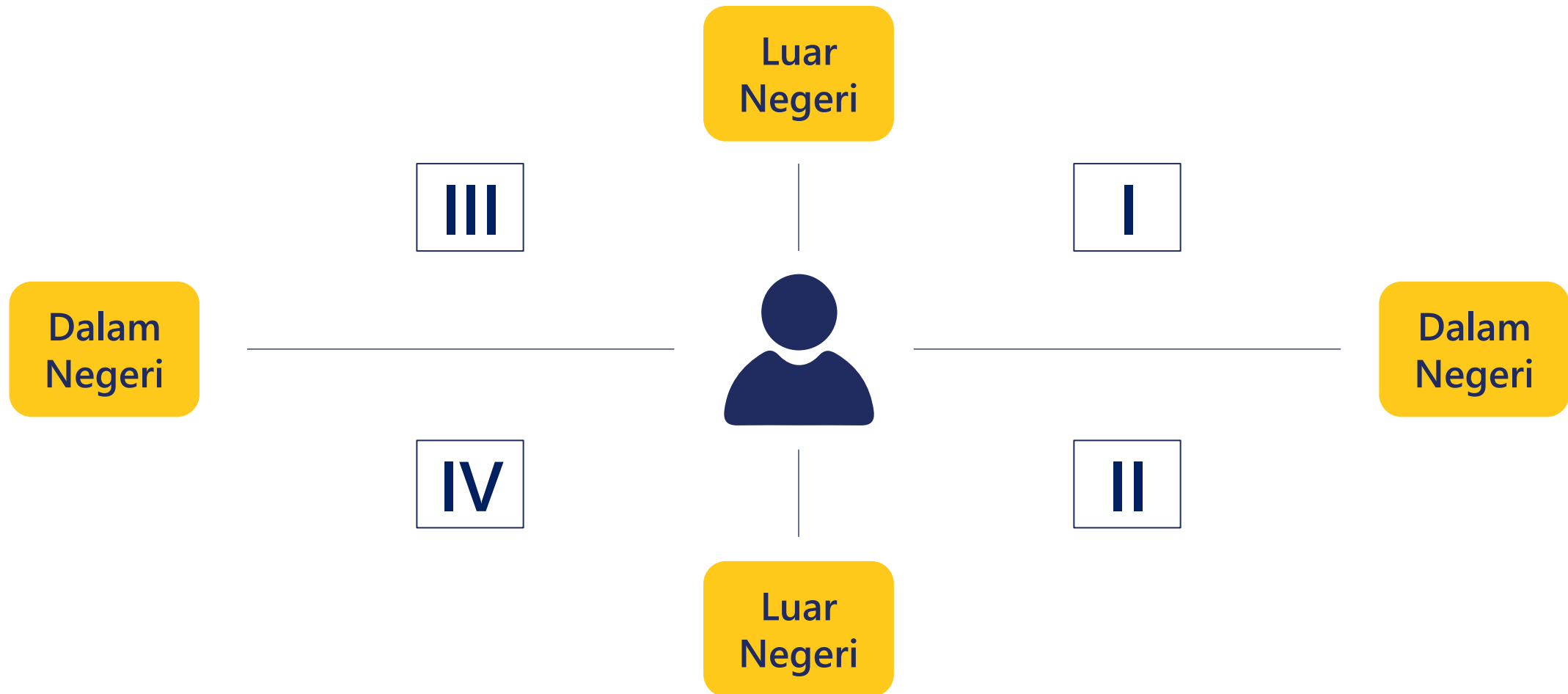
# Dasar-Dasar P3B dan Instrumen Multilateral (MLI)





## **Dasar – Dasar P3B dan Instrumen Multilatera (MLI)**

# Nexus: Residen atau Penghasilan

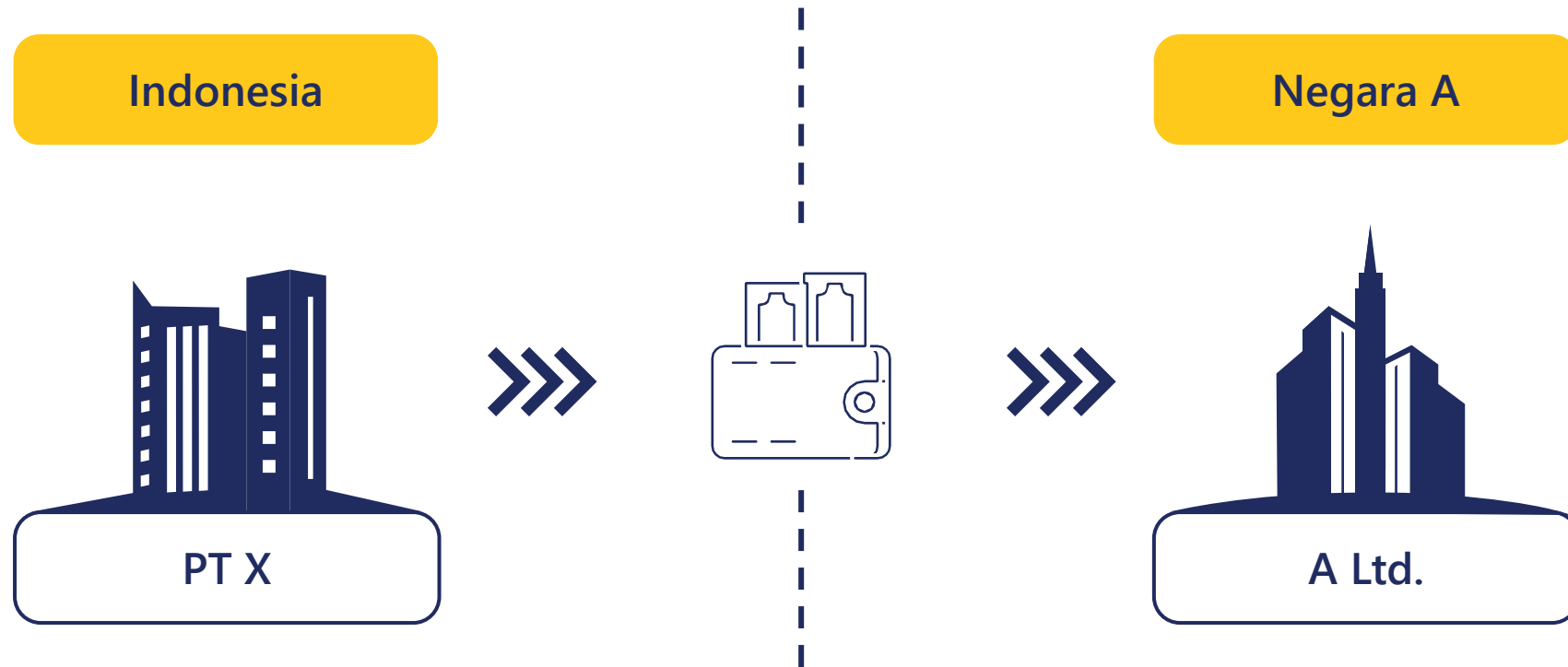


# Hak Pemajakan Suatu Negara (1)



- Apakah Indonesia dapat memajaki penghasilan yang dibayarkan PT X kepada A Ltd?
- Apa yang menjadi dasar pemajakannya?

# Hak Pemajakan Suatu Negara (2)



- Apakah yang menjadi dasar Indonesia untuk mengenakan pajak pada contoh di atas?
- Apakah Negara A dapat memajaki penghasilan yang dibayarkan kepada Pak Eko?

# Menghilangkan Pajak Berganda

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**Foreign tax  
credit**



**Deduction**



**Exemption**



# Tujuan P3B

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# Manfaat P3B

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Pengecualian  
dari pengenaan  
pajak

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Pembebasan  
pengenaan pajak  
di negara tertentu

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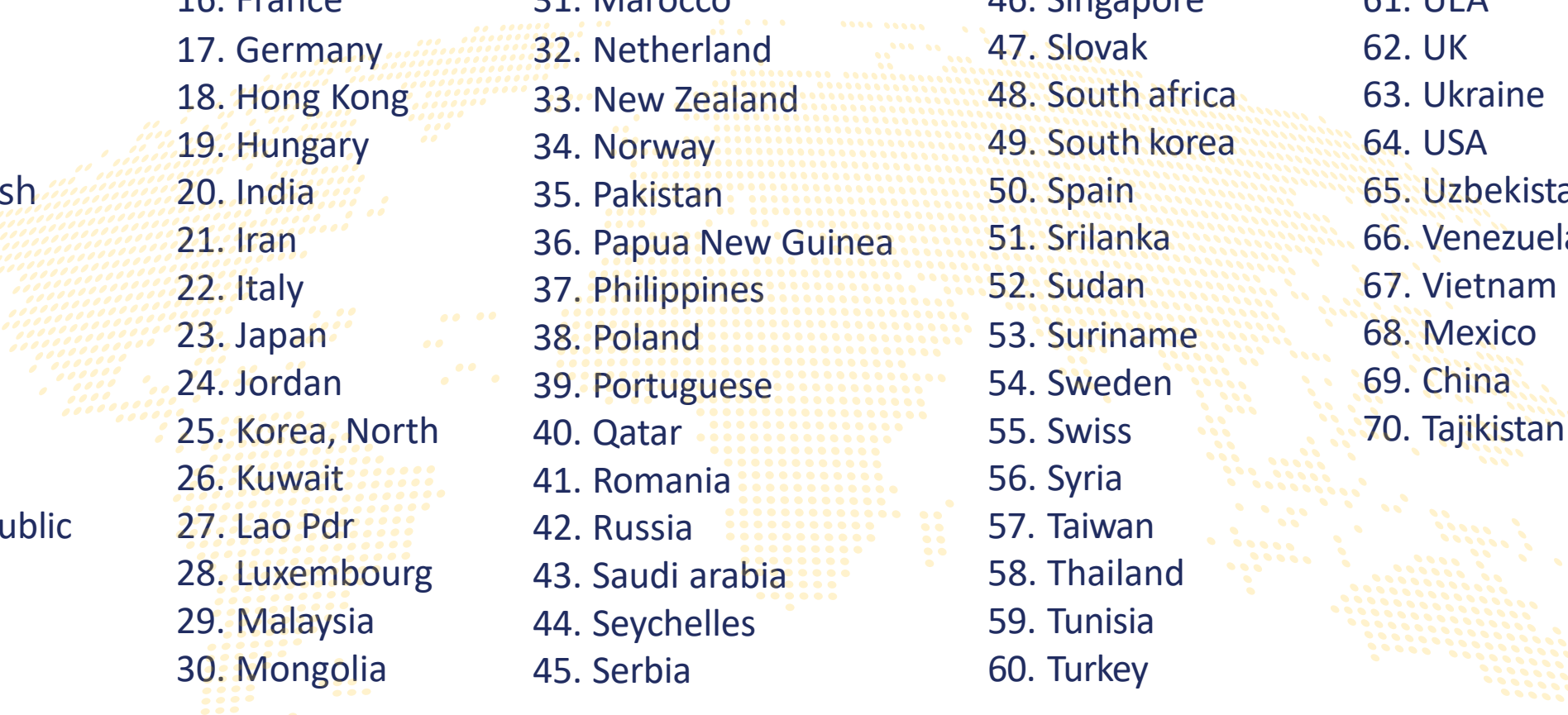
Pengurangan  
tarif pajak

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Hak pengajuan MAP  
atas pengenaan pajak  
yang tidak sesuai P3B

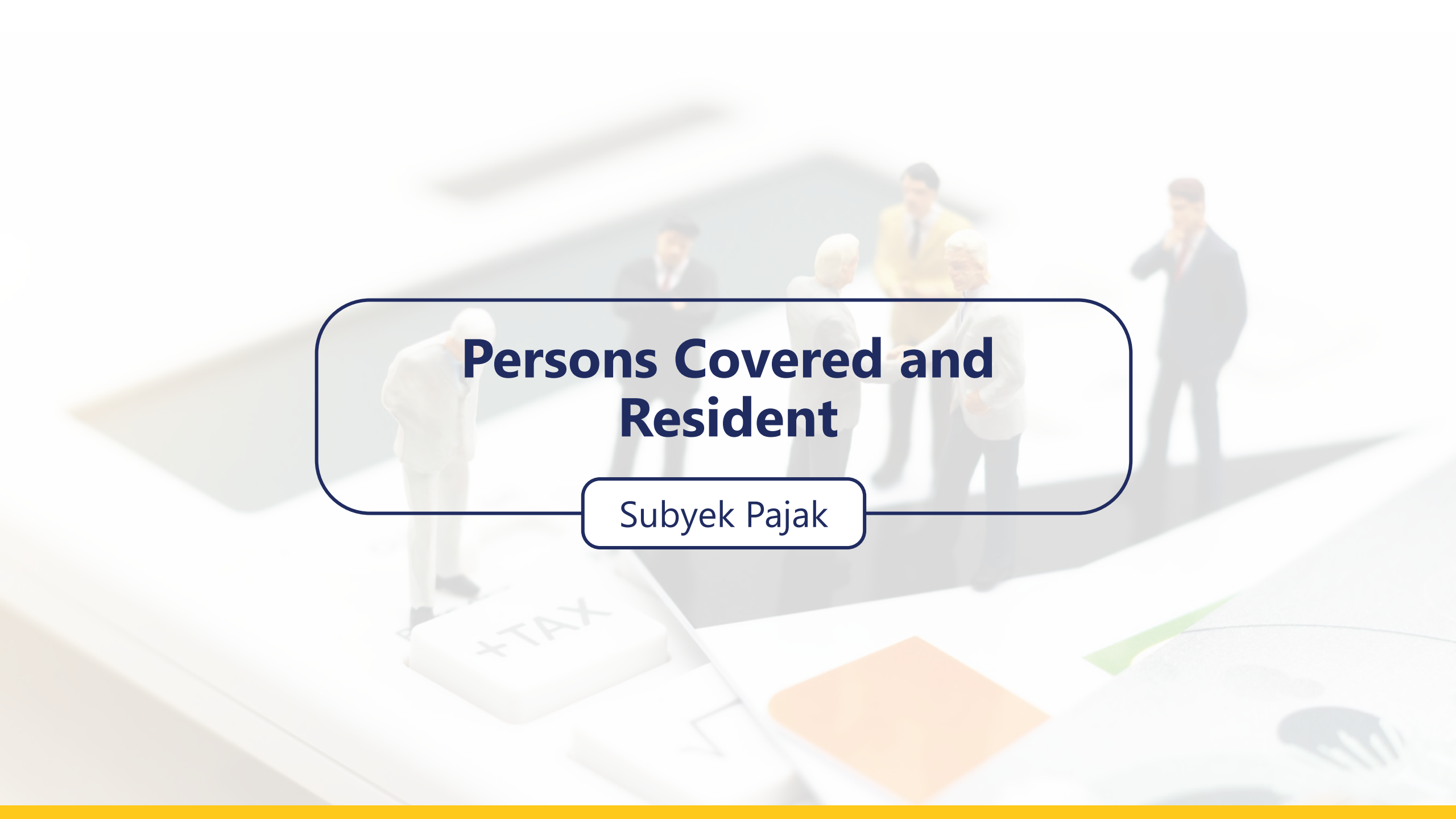
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# Indonesia's Tax Treaty Network

- 
1. Algeria
  2. Armenia
  3. Australia
  4. Austria
  5. Bangladesh
  6. Belarus
  7. Belgium
  8. Brunei
  9. Bulgaria
  10. Canada
  11. Croatia
  12. Czech Republic
  13. Denmark
  14. Egypt
  15. Finland
  16. France
  17. Germany
  18. Hong Kong
  19. Hungary
  20. India
  21. Iran
  22. Italy
  23. Japan
  24. Jordan
  25. Korea, North
  26. Kuwait
  27. Lao Pdr
  28. Luxembourg
  29. Malaysia
  30. Mongolia
  31. Morocco
  32. Netherland
  33. New Zealand
  34. Norway
  35. Pakistan
  36. Papua New Guinea
  37. Philippines
  38. Poland
  39. Portuguese
  40. Qatar
  41. Romania
  42. Russia
  43. Saudi arabia
  44. Seychelles
  45. Serbia
  46. Singapore
  47. Slovak
  48. South africa
  49. South korea
  50. Spain
  51. Srilanka
  52. Sudan
  53. Suriname
  54. Sweden
  55. Swiss
  56. Syria
  57. Taiwan
  58. Thailand
  59. Tunisia
  60. Turkey
  61. UEA
  62. UK
  63. Ukraine
  64. USA
  65. Uzbekistan
  66. Venezuela
  67. Vietnam
  68. Mexico
  69. China
  70. Tajikistan

# Struktur P3B

| UN MTC                                                                        | OECD MTC                                                     |
|-------------------------------------------------------------------------------|--------------------------------------------------------------|
| Chapter I SCOPE OF THE CONVENTION                                             | Chapter I SCOPE OF THE CONVENTION                            |
| Article 1 Persons Covered                                                     | Article 1 Persons Covered                                    |
| Article 2 Taxes Covered                                                       | Article 2 Taxes Covered                                      |
| Chapter II DEFINITIONS                                                        | Chapter II DEFINITIONS                                       |
| Article 3 General Definitions                                                 | Article 3 General Definitions                                |
| Article 4 Resident                                                            | Article 4 Resident                                           |
| Article 5 Permanent Establishment                                             | Article 5 Permanent Establishment                            |
| Chapter III TAXATION OF INCOME                                                | Chapter III TAXATION OF INCOME                               |
| Article 6 Income From Immovable Property                                      | Article 6 Income From Immovable Property                     |
| Article 7 Business Profits                                                    | Article 7 Business Profits                                   |
| Article 8 International Shipping And Air Transport (Alternative A and B)      | Article 8 International Shipping and Air Transport           |
| Article 9 Associated Enterprises                                              | Article 9 Associated Enterprises                             |
| Article 10 Dividends                                                          | Article 10 Dividends                                         |
| Article 11 Interest                                                           | Article 11 Interest                                          |
| Article 12 Royalties                                                          | Article 12 Royalties                                         |
| Article 12A Fees For Technical Services                                       |                                                              |
| Article 13 Capital Gains                                                      | Article 13 Capital Gains                                     |
| Article 14 Independent Personal Services                                      | Article 14 [Deleted]                                         |
| Article 15 Dependent Personal Services                                        | Article 15 Income From Employment                            |
| Article 16 Directors' Fees and Remuneration Of Top-Level Managerial Officials | Article 16 Directors' Fees                                   |
| Article 17 Artistes and Sportspersons                                         | Article 17 Entertainers and Sportspersons                    |
| Article 18 Pensions and Social Security Payments (Alternative A and B)        | Article 18 Pensions                                          |
| Article 19 Government Service                                                 | Article 19 Government Service                                |
| Article 20 Students                                                           | Article 20 Students                                          |
| Article 21 Other Income                                                       | Article 21 Other Income                                      |
| Chapter IV TAXATION OF CAPITAL                                                | Chapter IV TAXATION OF CAPITAL                               |
| Article 22 Capital                                                            | Article 22 Capital                                           |
| Chapter V METHODS FOR ELIMINATION OF DOUBLE TAXATION                          | Chapter V METHODS FOR ELIMINATION OF DOUBLE TAXATION         |
| Article 23 A Exemption Method                                                 | Article 23 A Exemption Method                                |
| Article 23 B Credit Method                                                    | Article 23 B Credit Method                                   |
| Chapter VI SPECIAL PROVISIONS                                                 | Chapter VI SPECIAL PROVISIONS                                |
| Article 24 Non-Discrimination                                                 | Article 24 Non-Discrimination                                |
| Article 25 Mutual Agreement Procedure (Alternative A and B)                   | Article 25 Mutual Agreement Procedure                        |
| Article 26 Exchange of Information                                            | Article 26 Exchange of Information                           |
| Article 27 Assistance in the Collection of Taxes                              | Article 27 Assistance in the Collection of Taxes             |
| Article 28 Members of Diplomatic Missions and Consular Posts                  | Article 28 Members of Diplomatic Missions and Consular Posts |
| Article 29 Entitlement to Benefits                                            | Article 29 Entitlement to Benefits                           |
|                                                                               | Article 30 Territorial Extension                             |
| Chapter VII FINAL PROVISIONS                                                  | Chapter VII FINAL PROVISIONS                                 |



# **Persons Covered and Resident**

Subyek Pajak

# Resident (OECD MTC 2017)

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## Article 1 (Persons Covered), para 1

1. This Convention shall apply to persons who are **residents** of **one** or **both** of the Contracting States.

## Article 4 (Resident), para 1

1. For the purposes of this Convention, the term “**resident** of a Contracting State” means any **person** who, **under the laws of that State**, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature, and also includes that State and any political subdivision or local authority thereof as well as a recognised pension fund of that State. This term, however, does not include any person who is liable to tax in that State in respect only of income from sources in that State or capital situated therein.

# Resident (UU PPh)

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▣ Pasal 2 ayat (3), Pasal 2A UU PPh      ▣ PER-43/2011

## **Residen Individu | Orang Pribadi yang**

- ✓ bertempat tinggal di Indonesia,
- ✓ orang pribadi yang berada di Indonesia lebih dari 183 (seratus delapan puluh tiga) hari dalam jangka waktu 12 (dua belas) bulan, atau
- ✓ orang pribadi yang dalam suatu tahun pajak berada di Indonesia dan mempunyai niat
- ✓ untuk bertempat tinggal di Indonesia;

## **Residen Badan | Badan yang**

- ✓ mempunyai tempat kedudukan berada di Indonesia sebagaimana tercantum dalam akta pendirian badan,
- ✓ mempunyai kantor pusat di Indonesia,
- ✓ mempunyai tempat kedudukan pusat administrasi dan/atau pusat keuangan di Indonesia,
- ✓ mempunyai tempat kantor pimpinan yang berada di Indonesia yang melakukan pengendalian,
- ✓ pengurusnya melakukan pertemuan di Indonesia untuk membuat keputusan strategis, atau
- ✓ pengurusnya bertempat tinggal atau berdomisili di Indonesia.

# Resident

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- | P3B tidak mengatur definisi residen. Definisi residen diatur di domestic law masing-masing negara.
- | P3B mengatur apabila terjadi permasalahan dual resident (tie breaker rule):
  - ✓ Residen individu: permanent home, centre of vital interest, habitual abode, dan nationality
  - ✓ Resident corporate: ~~place of effective management~~\* → MAP

# Resident (OECD MTC 2017)

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## Article 4 (Resident), para 2 and 3

2. Where by reason of the provisions of paragraph 1 an individual is a resident of both Contracting States, then his status shall be determined as follows:
  - ✓ he shall be deemed to be a resident only of the State in which he has a permanent home available to him; if he has a permanent home available to him in both States, he shall be deemed to be a resident only of the State with which his personal and economic relations are closer (centre of vital interests);
  - ✓ if the State in which he has his centre of vital interests cannot be determined, or if he has not a permanent home available to him in either State, he shall be deemed to be a resident only of the State in which he has an habitual abode;
  - ✓ if he has an habitual abode in both States or in neither of them, he shall be deemed to be a resident only of the State of which he is a national;
  - ✓ if he is a national of both States or of neither of them, the competent authorities of the
  - ✓ Contracting States shall settle the question by mutual agreement.
3. Where by reason of the provisions of paragraph 1 a person other than an individual is a resident of both Contracting States, the competent authorities of the Contracting States shall endeavour to determine by mutual agreement the Contracting State of which such person shall be deemed to be a resident for the purposes of the Convention, having regard to its place of effective management, the place where it is incorporated or otherwise constituted and any other relevant factors. In the absence of such agreement, such person shall not be entitled to any relief or exemption from tax provided by this Convention except to the extent and in such manner as may be agreed upon by the

The background of the slide is a blurred image of a business meeting. Several men in suits are standing and talking. In the foreground, there is a large white calculator with the text '+TAX' on one of its buttons. Next to the calculator are some papers and a green pen. The overall scene suggests a professional or financial context.

# **Permanent Establishment**

Bentuk Usaha Tetap (BUT)

# Permanent Establishment (OECD MTC 2017)

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## ■ Article 5 (Permanent Establishment), para 1-3

1. For the purposes of this Convention, the term “permanent establishment” means a fixed place of business through which the business of an enterprise is wholly or partly carried on.
2. The term “permanent establishment” includes especially:
  - a) a place of management;
  - b) a branch;
  - c) an office;
  - d) a factory;
  - e) a workshop, and
  - f) a mine, an oil or gas well, a quarry or any other place of extraction
  - g) of natural resources.
3. A building site or construction or installation project constitutes a permanent establishment only if it lasts more than twelve months.

# PE (BUT)

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## Dasar Hukum:

Pasal 5 dan Pasal 2 ayat (1), (1a), dan (5) UU PPh,  
Pasal 5 P3B (Permanent Establishment) dan Pasal 7 P3B (Business Profit)

Fixed place

Dependent  
agent

Service PE

Insurance PE

Construction PE

# PE Exemption (OECD MTC 2017)

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## Article 5 (PE), para 4

1. Notwithstanding the preceding provisions of this Article, the term “permanent establishment” shall be deemed not to include:
  - a) the use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise;
  - b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery;
  - c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;
  - d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise or of collecting information, for the enterprise;
  - e) the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity;
  - f) the maintenance of a fixed place of business solely for any combination of activities mentioned in subparagraphs a) to e),provided that such activity or, in the case of subparagraph f), the overall activity of the fixed place of business, is of a preparatory or auxiliary character.

# PMK 35/2019

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## Pasal 5 ayat (1)

Bentuk usaha tetap merupakan bentuk usaha yang dipergunakan oleh Orang Pribadi Asing atau Badan Asing untuk menjalankan usaha atau melakukan kegiatan di Indonesia, yang memenuhi kriteria sebagai berikut:

- a. adanya suatu tempat usaha (*place of business*) di Indonesia;
- b. tempat usaha sebagaimana dimaksud pada huruf a bersifat permanen; dan
- c. tempat usaha sebagaimana dimaksud pada huruf a digunakan oleh Orang Pribadi Asing atau Badan Asing untuk menjalankan usaha atau melakukan kegiatan.

## Pasal 6

mengatur mengenai pengecualian sebagai berikut:

- 1) Untuk penerapan P3B, bentuk usaha yang memenuhi kriteria sebagaimana dimaksud dalam Pasal 4 ayat (1) tetapi hanya melakukan kegiatan yang bersifat persiapan (*preparatory*) atau penunjang (*auxiliary*) dikecualikan dari pengertian bentuk usaha tetap.
- 2) Kegiatan yang bersifat persiapan (*preparatory*) sebagaimana dimaksud pada ayat (1) merupakan kegiatan pendahuluan agar kegiatan yang esensial dan signifikan siap untuk dilakukan

# Pengenaan PPh atas *Digital Economy*



## Pasal 7 ayat (1)

Laba yang diperoleh WPLN dari penjualan barang/jasa di Indonesia hanya dapat dikenai pajak di Indonesia apabila terdapat Bentuk Usaha tetap (BUT) di Indonesia

Nexus  
Rule



Physical presence  
(BUT or PE)



### **BUT untuk Digital Economy**

BUT berupa tempat tetap: kantor, cabang, server

BUT dependent agent: agen, distributor

BUT jasa: pegawai yang melakukan jasa di Indonesia melebihi time test

Profit  
Allocation  
Rules



Berdasarkan ALP



### **Pengalokasian laba BUT**

Berdasarkan fungsi, asset, dan risiko yang dijalankan BUT

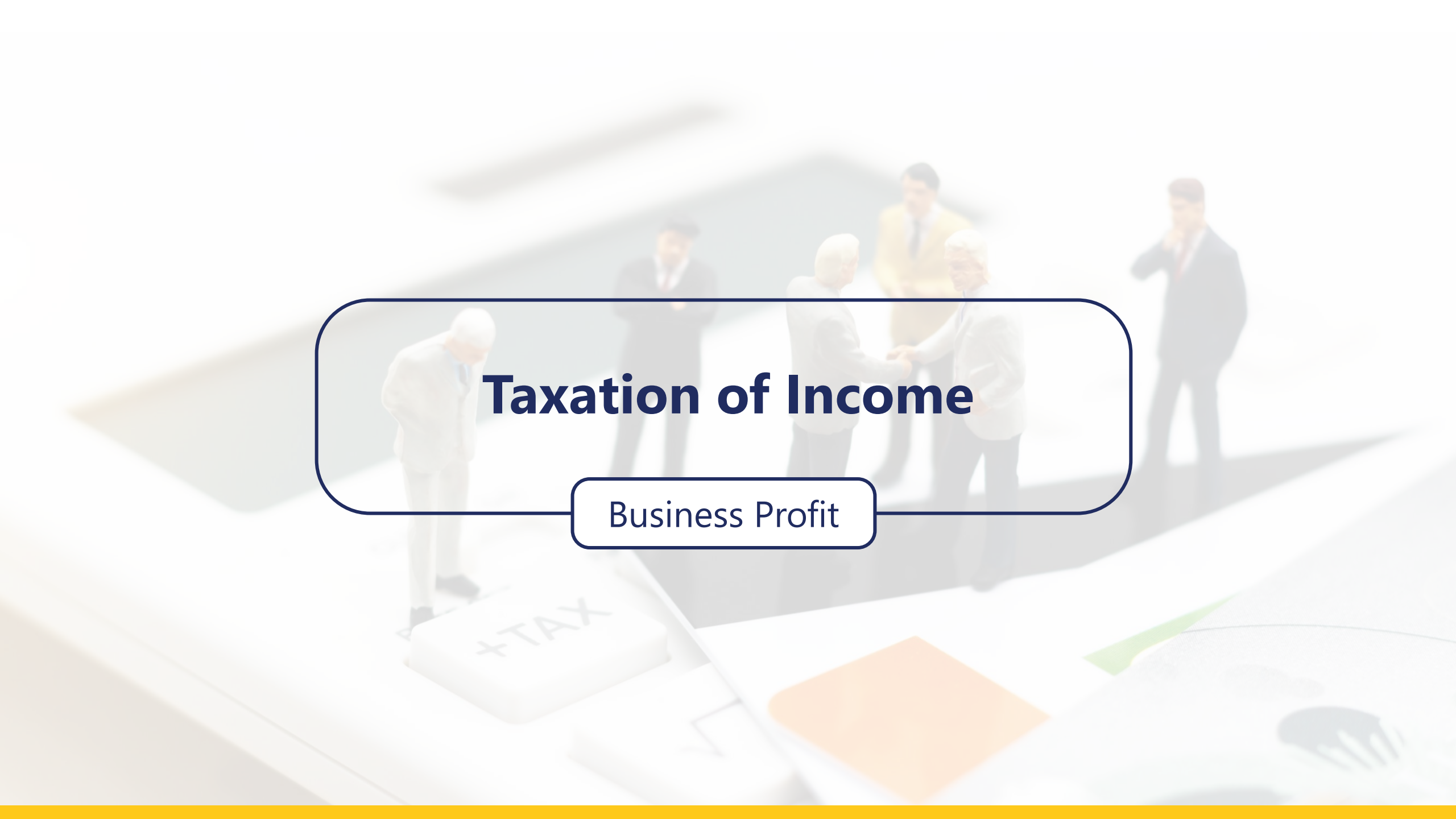


**Bisakah PPh dikenakan berdasarkan ketentuan saat ini?**

# International Work On Digital Economy

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The background of the slide is a blurred image of a business meeting. Several men in suits are standing and talking. In the foreground, there is a large white calculator with a button labeled '+TAX'. Next to it are some papers, including one with an orange square and another with a green arrow pointing upwards. The overall scene suggests a professional or financial context.

# **Taxation of Income**

Business Profit

# Business Profit (OECD MTC 2017)

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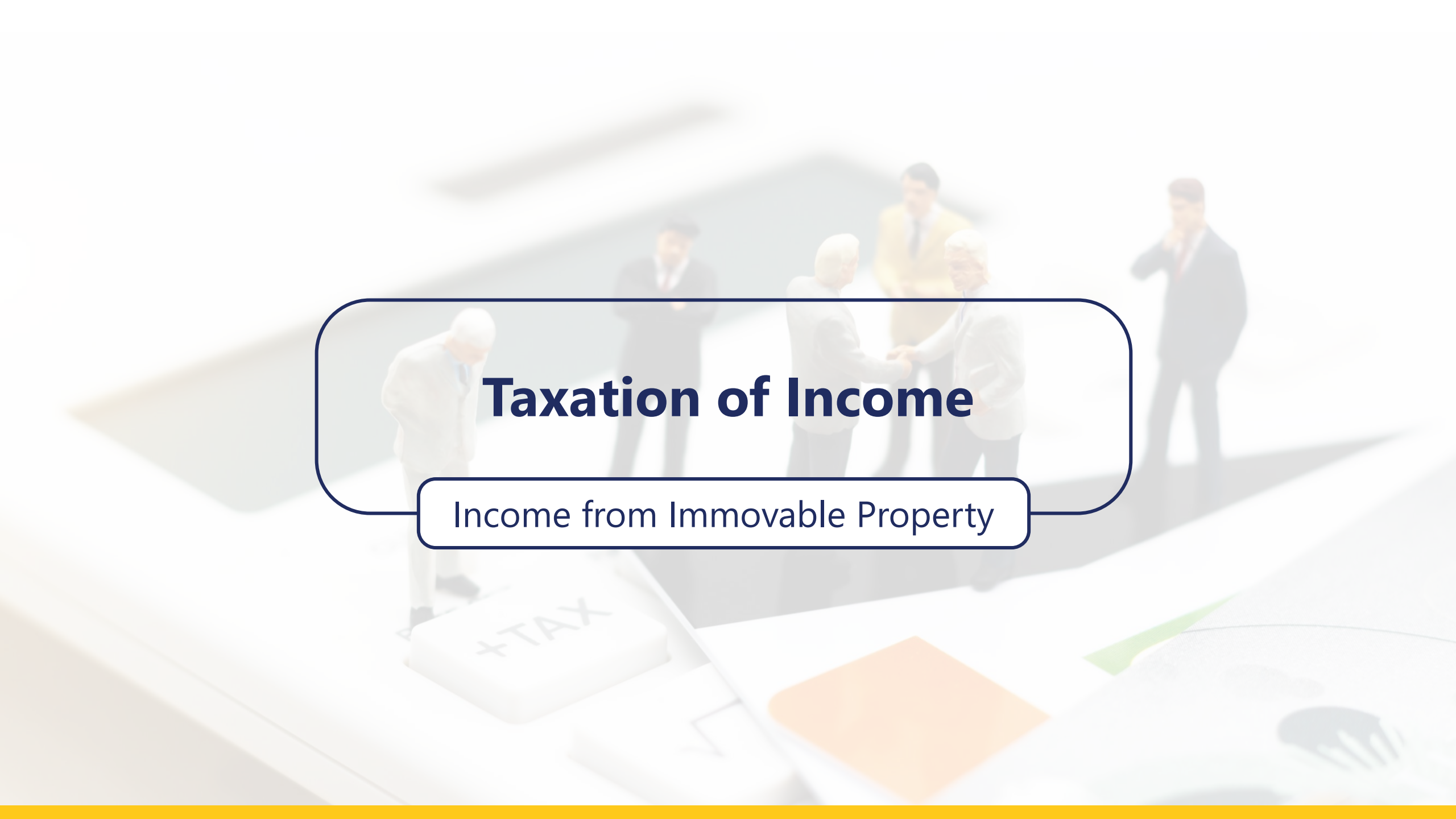
## Article 7 (Business Profit)

1. Profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits that are attributable to the permanent establishment in accordance with the provisions of paragraph 2 may be taxed in that other State.
2. For the purposes of this Article and Article [23 A] [23 B], the profits that are attributable in each Contracting State to the permanent establishment referred to in paragraph 1 are the profits it might be expected to make, in particular in its dealings with other parts of the enterprise, if it were a separate and independent enterprise engaged in the same or similar activities under the same or similar conditions, taking into account the functions performed, assets used and risks assumed by the enterprise through the permanent establishment and through the other parts of the enterprise.
3. Where, in accordance with paragraph 2, a Contracting State adjusts the profits that are attributable to a permanent establishment of an enterprise of one of the Contracting States and taxes accordingly profits of the enterprise that have been charged to tax in the other State, the other State shall, to the extent necessary to eliminate double taxation on these profits, make an appropriate adjustment to the amount of the tax charged on those profits. In determining such adjustment, the competent authorities of the Contracting States shall if necessary consult each other.
4. **Where profits include items of income which are dealt with separately in other Articles of this Convention, then the provisions of those Articles shall not be affected by the provisions of this Article.**

# Pasal 7 Business Profit

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- | **Profit** didefinisikan sebagai laba dari suatu entitas (Badan/OP)
- | Laba usaha hanya dipajaki di negara domisili, kecuali terdapat bentuk usaha tetap di negara sumber (**No PE No Tax**). Terdapat time test BUT jasa dalam P3B.

The background of the slide is a blurred image of a business meeting. Several men in suits are standing and talking. In the foreground, there is a large, semi-transparent calculator. A white button with the text '+TAX' is visible on the calculator. There are also some colorful sticky notes (orange and green) and a pen on the calculator's surface.

# **Taxation of Income**

Income from Immovable Property

# Income from Immovable Property (OECD MTC 2017)

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## **Article 6 (Income from Immovable Property)**

1. Income derived by a resident of a Contracting State from immovable property (including income from agriculture or forestry) situated in the other Contracting State may be taxed in that other State.
2. The term “immovable property” shall have the meaning which it has under the law of the Contracting State in which the property in question is situated. The term shall in any case include property accessory to immovable property, livestock and equipment used in agriculture and forestry, rights to which the provisions of general law respecting landed property apply, usufruct of immovable property and rights to variable or fixed payments as consideration for the working of, or the right to work, mineral deposits, sources and other natural resources; ships and aircraft shall not be regarded as immovable property.
3. The provisions of paragraph 1 shall apply to income derived from the direct use, letting, or use in any other form of immovable property.
4. The provisions of paragraphs 1 and 3 shall also apply to the income from immovable property of an enterprise.

# Income from Immovable Property

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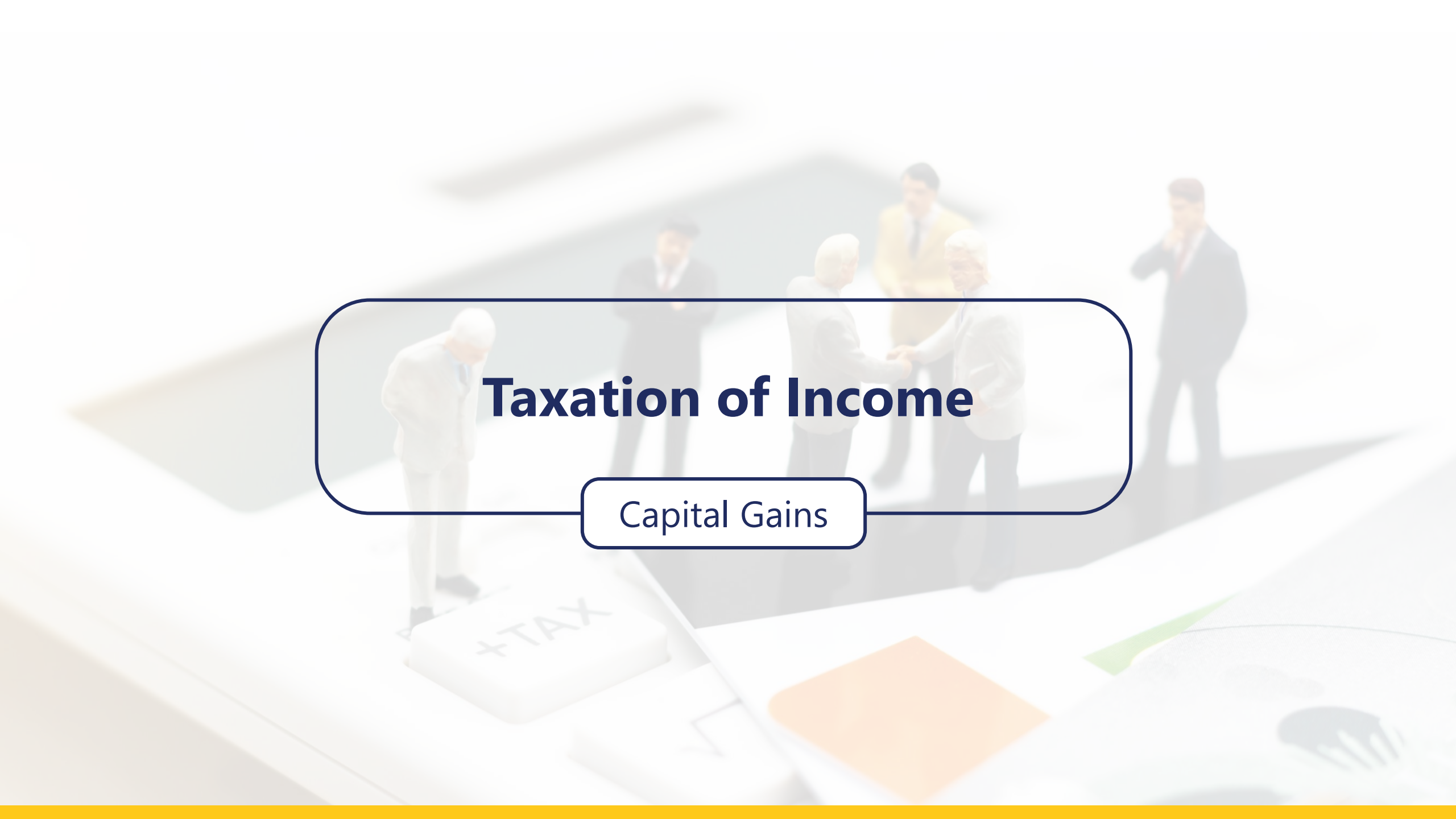


## **Dasar Hukum:**

Pasal 5 dan Pasal 2 ayat (1), (1a), dan (5) UU PPh,  
Pasal 5 P3B (Permanent Establishment) dan Pasal 7 P3B (Business Profit)

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- ✓ Terkait penggunaan harta tak gerak
- ✓ Secara langsung maupun tidak langsung
- ✓ Definisi harta tak gerak mengacu pada ketentuan domestik
- ✓ Hak pemajakan berada di negara tempat harta tak berada.

The background of the slide is a blurred image of a business meeting. Several men in suits are standing and talking. In the foreground, a large, semi-transparent calculator is visible. One of the buttons on the calculator is clearly marked with '+TAX'.

# **Taxation of Income**

## Capital Gains

# Capital Gains (OECD MTC 2017)

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## Article 13 (Capital Gains)

1. Gains derived by a resident of a Contracting State from the alienation of immovable property referred to in Article 6 and situated in the other Contracting State may be taxed in that other State.
2. Gains from the alienation of movable property forming part of the business property of a permanent establishment which an enterprise of a Contracting State has in the other Contracting State, including such gains from the alienation of such a permanent establishment (alone or with the whole enterprise), may be taxed in that other State.
3. Gains that an enterprise of a Contracting State that operates ships or aircraft in international traffic derives from the alienation of such ships or aircraft, or of movable property pertaining to the operation of such ships or aircraft, shall be taxable only in that State.
4. **Gains derived by a resident of a Contracting State from the alienation of shares or comparable interests, such as interests in a partnership or trust, may be taxed in the other Contracting State if, at any time during the 365 days preceding the alienation, these shares or comparable interests derived more than 50 per cent of their value directly or indirectly from immovable property, as defined in Article 6, situated in that other State. • *[Indirect Transfer of Assets]***
5. Gains from the alienation of any property, other than that referred to in paragraphs 1, 2, 3 and 4, shall be taxable only in the Contracting State of which the alienator is a resident.

# Indirect Transfer of Assets

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## I Pengalihan harta secara tidak langsung melalui pengalihan saham



### Dasar Hukum:

- ✓ Pasal 26 ayat (2) UU PPh
- ✓ Pasal 18 (3c) UU PPh
- ✓ KMK 434/KMK.04/1999
- ✓ Pasal 13 ayat (4) P3B

# Capital Gain

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## **Pasal 26 ayat (2) UU PPh**

Atas penghasilan dari penjualan atau pengalihan harta di Indonesia, kecuali yang diatur dalam Pasal 4 ayat (2), yang diterima atau diperoleh Wajib Pajak luar negeri selain bentuk usaha tetap di Indonesia, dan premi asuransi yang dibayarkan kepada perusahaan asuransi luar negeri dipotong pajak 20% (dua puluh persen) dari perkiraan penghasilan netto.

## **KMK 434/KMK.04/1999**

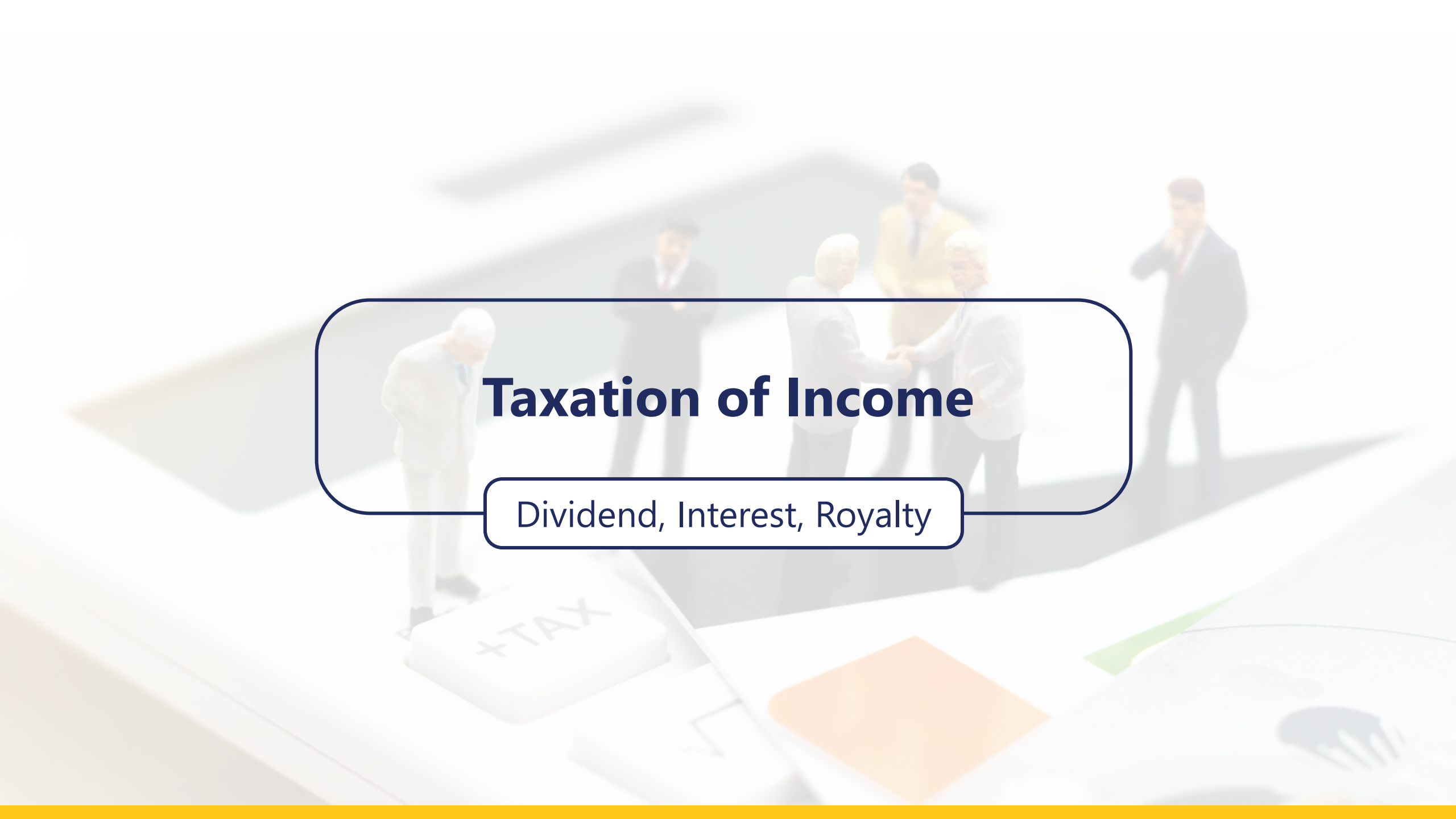
Atas penghasilan dari penjualan saham Perseroan yang diperoleh WPLN selain Bentuk Usaha Tetap (BUT) dipotong pajak sebesar 20% (dua puluh persen) dari perkiraan penghasilan netto.

# Ketentuan Anti Stepping dalam UU PPh

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## Pasal 18 ayat (3c) UU PPh

Penjualan atau pengalihan saham perusahaan antara (conduit company atau special purpose company) yang didirikan atau bertempat kedudukan di negara yang memberikan perlindungan pajak (**tax haven country**) yang mempunyai **hubungan istimewa** dengan badan yang didirikan atau bertempat kedudukan di Indonesia atau BUT di Indonesia **dapat ditetapkan** sebagai **penjualan atau pengalihan saham badan** yang didirikan atau bertempat kedudukan di Indonesia atau BUT di Indonesia.

The background of the slide is a blurred image of a business meeting. Several men in suits are standing and talking. In the foreground, there is a large white calculator with the text '+TAX' on one of its buttons. Next to the calculator are some papers and a green pen. The overall scene is brightly lit and has a professional, corporate feel.

# **Taxation of Income**

Dividend, Interest, Royalty

# Taxation of Dividend, Interest, and Royalty

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## Dasar Hukum:

Pasal 4(1), Pasal 26(1) UU PPh,  
Pasal 10 P3B (Dividend)  
Pasal 11 P3B (Interest)  
Pasal 12 P3B (Royalty)

- 
- ✓ Source country taxation (UN Model).
  - ✓ Terdapat definisi "dividend", "interest", "royalty". Jika tidak ada definisi tersebut, maka menggunakan definisi berdasarkan *domestic law*.
  - ✓ Terdapat klausul "beneficial owner".
  - ✓ Di beberapa P3B terdapat mini PPT (P3B HK, Serbia, Inggris, dll).
  - ✓ Untuk dividen, beberapa P3B menerapkan 2 lapis tarif, untuk portofolio dividend dan FDI.

**PAJAK KUAT**  
**INDONESIA**  **MAJU**



**Terima kasih**  
*Pajak Kita, Untuk Kita*



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