Understanding an Objection as Quasy/Pseudo Judicial in Indonesian Tax Court System: Notes for Current and Incoming Investors from Asia Pasific Regions and Western Countries.

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Abstract

Bureaucrats, government tax officials, as well as observers always claim that the wave of Tax Reform in Indonesia was firstly started in year 1983/84. This was followed by the second reform, which was launched around 1994. This has been experiencing more than 25 years. But the very simple question frequently asked by ordinary people, is why the tax ratio and the participation of the people so extremely low. These are indicated not only by the unrealistic comparison between the population and the amount identity tax number as a measurement of tax involvement, but also by the facts that even the holders of identity tax number were not willing to pay and file tax return, an indication of mass reluctance in social participation. During almost three decades, the government of Indonesia failed to produce policies that attract the majority to participate in the economic development particularly in tax matters. Many factors can be diagnosed and analyzed. But for sure is, because a lack of sensitiveness among the government policies makers, on formulating the tax laws that can invite every single citizen to join hand in hand developing this archipelago through mechanism of tax, as an indication of democratic state. This lack of sensitiveness can be traced back through formal and material tax laws implemented during more than 25 years recently.

Tax objection, as a step toward justice for taxpayers, is only pseudo judicial in Indonesia. The majority of tax objection are rejected by officials. The taxpayers see this as in justice.

This paper will explore firstly the division of formal and material tax laws in Indonesia, and then will analyze the topic step by step. At the end, suggestion will be made, addressed to the government. Between them, notes for current and potential investors in Indonesia will be given, so that they can anticipate their business in Indonesia proportionally.

INTRODUCTION

In every single tax judicial practice within a country, historical point of view is always critical for analysis. Tax Regulation and Provision in Indonesia, can be traced back to the time after Indonesia became independent in 1945, tax provisions can be divided in two periods: (a) Ordonance Period (referring to the term “ordonance” used

by the colonial government for tax laws) and (b) Tax Reform Period, starting from 1983. During the ordonance period, the central government collected taxes through provisions. Before 1945, central government collected 3 types of taxes using corporate tax-based on Corporate Ordonance Tax 1925, wealth tax-based on Wealth Tax 1932, and income tax-based on Income Tax Ordonance Tax 1944. Corporate Ordonance Tax 1925 was for the imposition on corporate tax, while Income Ordonance Tax 1944 was implemented for individual income and withholding *(Brotodiharjo, p 233).*

In 1967, Government made significant changes on tax collection affecting Corporate Ordonance Tax 1925, Wealth Tax 1932 and Income Tax Ordonance 1944. This was a quite big change at that time, which was popular with the term One-Tax Collection and Other-Tax Collection. A little progress made again, the Government passed the law concerning tax imposition on dividend, namely Dividend Tax Law 1959. This law was amended and added later on by Law of interest, Dividend and Royalty in 1970. In the same year (1970), three tax laws were amended. Ordonance Tax Law 1925 amended and added by Law Number 8/1970, Ordonance Tax Law 1944 amended and added by Law Number 10/1970, and finally Ordonance Tax Law 1959 amended and add by Law Number 10/1970 *(Soemitro, Rochmat, 198).*

On consumption tax side, there was the Consumption Tax ruled out by Development Tax in 1947. This tax collected from restaurant, hotels, and services provided by restaurants or hotels. This was previously was central tax, which then delegated to local governments.

Table 1

Tax Simplification Periods

Before 1983	After 1983
Corporate Tax	Income Tax
Income Tax	
Wealth Tax	
Tax on Interest, Dividend and Royalty	
Sales Tax	Value Added Tax on Goods and Services and Sales Tax on Luxury Goods
Tax on Land	Tax on Land and Building
Verponding	Stamp Tax
Indonesian Verponding	
Regional Development Contribution	

Through the National Tax System, Indonesian Tax Reform was initiated in 1983. This reform yielded two original Indonesian Tax Law Packages. Package one consisted three laws, which were (a) the Law Number 6/1983, concerning General Provisions and Tax Procedure, (b) Law Number 7/1983, Income Tax Law, (c) Law Number 8/1983, Value added Tax on Goods and Services and Sales Tax on Luxury Goods. Package two, comprised two laws: (a) Law Number 12/1985, Tax on Building and Land Law, and Law Number 13/1985 on Tax on Stamp Duty. *(Poernomo Hadi, 267)*

But if we trace back to the time after Indonesia became independent in 1945, tax provisions can be divided in two periods: (a) Ordonance Period (referring to the term "ordonance" used by the colonial government for tax laws) and (b) Tax Reform Period, starting from 1983. The simplification of tax laws can be viewed from this table below.

Tax Court Before 1983

During the colonial era, tax disputes settlement was organized by Ordonance Number 29/1927 about Regeling van het Beroep in Belastingzaken. This regulation then was modified with the State Letter 1959 Number 13, dated March 9, 1959. This modification was actually the initiation of one tax dispute institution, called as tax Judgment Council. This was an administrative court institution (outside civil court) and located in Jakarta. *(Brotodiharjo, 288)*

Under the Law Number 6 of 1983 on General Provisions and Procedure of Taxation, which actually has been amended and modified three times-the last by Law Number 28 of 2007, there are alternative to overcome irregularities (temporarily the writer use the term "irregularities" not using tax dispute), which happens to both Taxpayers and the DGT. Irregularities may arise intentionally or unintentionally. These alternative are (1) correction of monthly and or annual tax return by Taxpayers initiative or by official initiative, (2) upon Taxpayers request or because of his position, the DGT may correct legal product made by the DGT, (3) upon Taxpayers request or because of his position, the DGT can reduce or eliminate or cancel tax legal products which previously made by the DGT himself, (4) objection by Taxpayers, and (5) appeal and lawsuit to tax court. Of the five settlement s, there are only appeal and lawsuit process of which are settled out of the DGT, i.e. Tax Court. *(GPPT, article 16, 36, 25, 27)*

Laws Applied Now

The government is now applying 9 tax laws as follows : General Provisions and Procedure of Taxation (GPPT), Tax Collection Using Coercive Warrant (TCUCW), Tax Court (TC), income tax law (ITL), value added tax law (VAT), land and building tax law (L&B), the acquisition of right on land and building (RL&B), regional tax law (RTL), and

Customs. GPPT, TCUCW and TC are purely formal tax laws which have function to make the material laws become real in practice. While ITL, VAT are material laws and the rests are combination between formal and material laws *(Erly, S 205).*

Tax Audit as Trigger of Tax Law Products

There are two majors Tax Laws Products that can issued by Director General of Taxes (DGT). First is what taxpayers call as *a Notice of Tax Underpayment Assessment (NTUA).* A Notice can be Notice of Tax Underpayment Assessment (NTUA), Notice of Additional Tax Underpayment Assessment (NTAUA), Notice of Nil Tax Assessment (NNTA), Notice of Tax Overpayment Assessment (NTOA), or tax withholding or collection by third parties. This notice is caused by the following matters: (a) if, based on audit result or other information, tax that payable was not paid or underpaid; (b) if the Tax Return is not submitted within a limited period, and after being warned in written is not submitted on time as specified in Warning Letter; (c) if, based on audit result or other information regarding Value Added Tax (VAT) and Sales Tax on Luxury Goods apparently was not supposed to be compensated an excess of tax overpaid or should not be subjected to the rate of 0%; (d) if the obligation in bookkeeping or tax audit are not fulfilled so that the amount of tax payable could not be known; and (e) if toward a Taxpayer is issued a Taxpayer identification Number and or confirmed as a Taxable Entrepreneur (TE). *(GPPT, article 13).* Second is what they call as a Tax Collection Letter (TCL). The DGT may issue TCL if: (a) Income Tax within a current year (this commonly refers to Article 25) is not paid, or underpaid; (b) from verification result is found there is underpayment of tax as a result of write error and or miscalculation; (c) a Taxpayer subject to the administrative sanctions in the form of fines and or interest; (d) an entrepreneur who has been confirmed as a Taxable Entrepreneur, but did not make a VAT invoice, or make VAT invoice but not on appropriate time; (e) an entrepreneur who has been confirmed as a TE who did not fill VAT Invoice completely; (f) a Taxable Entrepreneur reports as VAT Invoice inappropriate to the issuance of tax invoice, or (g) a Taxable Entrepreneur who fail to produce and has been given the Input Tax Refund. *(GPPT, Article 13, 15 and 17)*

Reducing, Eliminating, and Cancelling

Related with 2 major tax laws products mentioned above, and others, there are 3 ways, Taxpayers may resolve. First, Correction. *(GPPT, article 16)* This is related with correction of a notice of tax assessment (4 items), Tax Collection Letter, Notice of Tax Correction, Notice of Tax Objection, Notice of Administrative Sanction Reduction, Notice of Administrative Sanction Abolition, Notice of Tax Assessment Reduction, Notice of Tax Assessment Cancellation, Notice of Preliminary Refund of Tax Overpayment, or Notice of Interest Granting. The scope of correction will be write errors, miscalculation, and errors in implementing certain provisions of tax legislation.

This correction mostly will be real only upon taxpayer request. Of course this can be applied by the position of DGT, but this is very rare event, official make correction because of his position.

Second. Reducing, eliminating, and canceling. Reducing or eliminating the administrative sanctions in the form of interest, fines, and increase which are payable, that are caused by Taxpayers errancy or did not because of their mistakes. A notice of tax assessment or a tax collection letter that is incorrect can be reduced or canceled. The tax audit result or a notice of tax assessment from the audit result that are carried without (a) delivering a notification letter of audit result, or (b) final discussion of audit results with the Taxpayer, can be cancelled. Reducing, eliminating, cancelling, unfortunately only can be applied if there is a request from a Taxpayer, or if it is the initiative from DGT which is very rare in real practice. Third is Tax Objection as described below.

Pseudo Objection

What make a Notice of Tax Assessment (NTA) differs from a Tax Collection Letter is that NTA already contain disputes between Taxpayer and DGT. In many cases, even though tax comply of taxpayers were already handled carefully and thoroughly, notification letter of audit result portrait differences (some times in a very huge amount) compared to the Annual Tax Return or Monthly Tax Return. A Taxpayer can file an objection to the DGT for a : (a) NTUA, (b) NATUA, (c) NNTA, (d) NTOA, and (e) tax withholding or collection by third party. The objection must be filed within 3 month since the date sent of the notice of tax assessment or the date of tax withholding or collection by third party. *(GPPT, article 25)* But why it is said to be pseudo? An objection, which is Taxpayer right, must wait 12 month. The DGT within 12 month since date of an objection letter must set a decision on the objection filed. *(GPPT, article 26)* This is too long, and arise uncertainty, while certainty in every single tax system is very crucial. The decision upon an objection may be (1) accept entirely, or (2) partially, (3) reject or (4) add the amount of taxes accrued. This is called as pseudo because, by fact, this is a real tax dispute between Taxpayer and the DGT. Each party has its own perspective and argument. There is no attorney. The DGT become party which freely acts as conflicting party, prosecutor and judge at the same time, while the Taxpayer act without attorney. This is not a surprise if 80 to 90 percent of objections are rejected. *(Kompas, February 25 page 16).* This of course affects the financial ability toward the business. In case the Taxpayer objection is rejected or partially accepted, the Taxpayer is subjected to an administrative sanction in the form of a fine 0f 50% of the tax amount based on the objection decision subtracted by taxes paid before filing the objection, meaning that the Taxpayer must expend 50% additional financial burden. This financial burden only can be avoided if the objection

is rejected or partially accepted, the Taxpayer file an appeal. But the tax appeal itself is a long road to follow.

If it is said that TCL differs from NTA, this does not mean that TCL cannot become a source of dispute between a Taxpayer and the DGT. Indonesian tax system consider that a tax collection letter, notice of tax underpayment assessment, appeal decision and other are the basis of tax collection. As basis of tax collection, these have limited time. As basis which causes the amount of taxes accrued increase, the Taxpayer must pay within a period of 1 (one) month from the date of issuance. If the Taxpayer cannot pay lately one month from the date of issuance, then a tax collection shall be executed using a Coercive Warrant, in accordance with the provisions and regulations of tax legislation. *(GPPT, article 3 and 3A)*

The decision upon an objection which accept (1) partially, (2) reject or (3) add the amount of taxes accrued pose *financial burden* and *unsatisfied condition* toward the Taxpayer. Related with those decisions, a Taxpayer can file an appeal only to the tax court institution. A tax court verdict is a verdict of a special court within the scope of administrative courts of the state.

Tax Court System

Even in real practice tax dispute start arising during tax audit, Indonesian court tax system formally recognize in its law concerning tax court. This is clear by quoting its definition. Tax dispute is a dispute arising in the field of taxation between a Taxpayer or Tax Bearer and the authorized officer as a result of a decision issuance that can be lodged an Appeal or Lawsuit to the Tax Court based on the regulation of taxation legislation, including a Lawsuit upon the implementation of tax collection based on the law concerning Tax Collection Using Coercive Warrant. (TC, Article 1) Indonesian Tax Court System actually only serves two kinds of tax dispute, which are Appeal and Lawsuit. *(TC, article 1)* Appeal as legal action that can be done by a Taxpayer or Tax Bearer against a decision that can be lodged a Appeal, based on the applicable of taxation legislation, refers to the continuation of “legal tax battle” as results of an objection which accept (1) partially, (2) reject or (3) add the amount of taxes accrued, employed by Taxpayer. The writer use the term of “legal tax battle”, since actually during the process of an objection, the Taxpayer did not get the appropriate treatment.

On the other side, Lawsuit, as a legal action that can be done by Taxpayer or Tax Bearer against the implementation of tax collection or against a decision that can be lodged a Lawsuit based on the applicable regulations of taxation legislation, refers to the continuation of “legal tax battle” as results of the implementation of tax collection or against a decision that can be lodged a lawsuit. *(TCUCW, article 8).* Tax collection against Taxpayer using Coercive Warrant inherently pose injustice towards

Taxpayers. The collection process which started with reprimand letter/warning letter, collection immediately and at once, coercive warrant, warrant to execute confiscation, taking into custody and so on, will only hurt the sense of justice, which is very important in taxation. For this reason, Taxpayer has a right to address Lawsuit.

Indonesian Tax system, in its tax court law definition, acknowledges that tax court is a judicial body that implement the judicial authorities for Taxpayer or Tax Bearer who seeks justice against Tax Dispute. By this definition, is it an indication that there is no justice in Indonesian tax system toward tax dispute?

The Power of The Tax Court

Since the tax court serves only two kinds of tax disputes, the power of the tax court are related with these strongly. Tax court has duty and authority to examine and decide Tax disputes. *(TC article 31* in term of Appeals, the Tax Court only examine and decide disputes upon a Notice of Tax Objection, unless determined otherwise by the applicable regulations. And in term of Lawsuit, the Tax Court examine and decide disputes upon the implementation of tax collection or Notice of Correction or other decisions.

Not like General Court, the Tax Court is the first level court and the last in examining and deciding Tax Disputes. This means that as the first level court and the last, Tax Disputes examination shall only be done by the Tax Court. Therefore, upon the Tax Court verdict cannot be lodged a lawsuit to General Court, the State Administrative Court, or other Court Agency, unless verdict in the form of "unacceptable" related to the authority competence. The Tax Court Verdict which may be in the form of (a) reject, (b) accept partially or wholly, (c) increase the tax accrued, (d) unacceptable, (e) correcting write error and or miscalculation, and (f) cancel can no longer lodged a Lawsuit, Appeal or Cassation. This means that Tax Court should be viewed as final "battle" against injustice towards Taxpayers.

Even, it has been understood well, that the Tax Court Verdict is a final verdict and has a permanent legal force, there is still a chance that the Tax Court may issue an Interstice Verdict on Lawsuit related to the request from plaintiff. This is about proposing a request so that the follow up to tax collection implementation or tax obligation, postponed during the Tax Dispute examination ongoing. As the last fight, disputant parties may lodge judicial review upon the Tax Verdict to the Supreme Court. Petition for judicial review can only be lodged 1 (one) time to the Supreme Court through the Tax Court. Unfortunately, the petition for judicial review does not postpone or stop the execution of the Tax Court Verdict. If the Taxpayer think it will be fruitless, the petition for judicial review may be revoked before it is decided, and in case it had been revoked, the petition for judicial review cannot be lodged again.

Judicial Review Basis

What should be studied well is that petition for judicial review may only be lodged based on the following reasons (a) the Tax verdict was based on a lie or deception of the opponent which known after the case has been decided or based on evidence which then declared false by a criminal judge, (b) there is any new written evidence which important and prescriptive, which if it was known at the trial stage in the Tax Court will produce a different verdict; (c) it has been accepted a thing that was not claimed or more than which it was claimed, (d) a part of claim has not been decided without considered its causes, or (e) there is a verdict that obviously not in accordance with the applicable provisions and regulations of legislation. *(TC article 80.)*

Based on theory and provision, the Supreme Court examine and decide the petition for judicial review will be within a period of 6 (six) month since the petition for judicial review received by the Supreme Court has taken verdict, in case the Tax Court made the verdict by examination in a regular trial or 1 (one) month in a speedy trial. In most cases, the disputants should wait until more than one year. *(TC article 89 and Cases)*

Indonesian Tax System Need Arbitrator

If it is said that more than 80 to 90 percent of Objection filed by Taxpayers rejected, and then more 70% tax battles were won by Taxpayers, this portraits an indication of a contrary toward Indonesian tax court system, and the tax compliance factors, which is related with tax audit strongly.

Ones cannot make analysis deeply, why Objection is badly rejected without getting the spectrum of tax audit practices in Indonesia. Philosophically, authorization given to DGT to conduct audit is devoted for two most urgent goals: (a) to test the compliance with the fulfillment of tax obligation of a Taxpayer, and (b) for other purposes in order to implement the provisions and regulations of tax legislation. In relation with the compliance, this is done by tracing the correctness of the Tax Return, bookkeeping or recording, and the fulfillment of the other tax obligation, compared with the actual condition or business activity of the Taxpayer.*(GPPT, article 29)* While, in addition, the audit for other purposes, may include: (a) giving a Taxpayer Identification Number (TIN) officially, (b) deletion of a TIN, (c) affirmation or revocation of a Taxable Entrepreneur confirmation, (d) if a Taxpayer file an objection, (e) collecting materials in preparation for the deemed Net Profit, (f) matching data and/or information, (g) determining the Taxpayer located in secluded areas, (h) determining one or more places where VAT are payable, (i) audit in relation with tax collection, (j) determining the time when the star of production in connection with the tax facilities, and (k) fulfilling a request for information from the partner countries of

the Agreement of Avoidance of Double Taxation. The other (hiding) goal which are not disclosed publicly is that tax audit conducted to increase or to save state budget revenues. There are many more complaining voices addressed by Taxpayers against the process of tax audit. Because tax is not viewed objectively, the complaining Taxpayers seems remind silent. If a tax issue arises, people will point directly that taxpayers must have made mistakes. And the media support this view.

The writer sees this as a violation against taxpayer's rights. Study on the right of taxpayers abused during the tax audit can be conducted to support the realities. If the tax audit goal has been deflected to increase or to save the state budgets, then the goals mentioned above were nonsense.

One idea for a fair and vivid solution is setting up a body, which called as a Tax Arbitrator. Tax Arbitrator, as independent body from association of Taxpayers and Officials can bridge the objectiveness if Objection rises. If the Taxpayers and DGT can formulate the role and function of Tax Arbitrator, then Tax Objections raised by Taxpayers can be viewed clearly and objectively, and this will produce a responsible decision. Taxpayers do not need file appeal to Tax Court. This will saves time, money, and resources which are not necessary to be wasted on pseudo judicial system. Even, the idea for setting up is rational; some argues that the most critical point is in its tax audit. Tax audit is starting point resource of tax dispute within Indonesian Tax System.

Audit Team Quality Assurance (ATQA)

The government, through its Financial Minister Regulation No. 82/PMK.03/2011-set up by the DGT-, add the ATQA as assurance unit to produce quality audit. The main role of this team is to discuss conflicting accounts (P/L accounts and or B/S accounts) that have not been agreed by both sides during the closing conference. Closing conference is a conference provided by provision, held to reconcile differences of Annual Tax Return/Monthly Tax Return (by Taxpayer) and audit result by tax auditor from DGT.

Public has been understanding well, that tax audit whether as field audit or as office audit has its target time. It is a common practice, that closing conference be held at the due date time from audit schedule. This causes uneasy situation and sacrifices taxpayer interests financially. ATQA now, is still viewed as a lip service from DGT.

Recent Investment Figures

From recent data collected, five countries investment figures were the highest top investors, which were not the real representation of Asia Pacific Region and Western Countries.

Investment by 5 Countries

No	Country	Investment (US$)	Projects Run
1	Singapore	1,138.70 billion	142 projects
2	United States	359.10 billion	24 projects
3	Japan	345.20 billion	78 projects
4	British Virgin Island	198.30 billion	30 projects
5	British	163.00 billion	36 projects
6	Others	2.191,044 billion	592 projects
	Total	4.395,070 billion	902 projects

*Data processed

Investments in Indonesia usually were taking place in two ways, which are Foreign Direct Investing with maximum shares of 49% (FC) and permanent establishments (PE). Whether acting as FC or PE, both will be considered as corporate resident taxpayers. As (corporate) resident taxpayers, they are taxed on income whether received or obtained from Indonesia and abroad, based on net income with a general rate (25%). They are, of course are obliged to submit both annual income tax return and monthly tax return. As corporate they are require to perform bookkeeping (Indonesian and or English language), which are the basis of tax audit.

The Potential Implications

Foreign companies and Investors are very familiar with the market research, people habits and security conditions as well as social and economic factors, while tax factors was put as fifth or seventh factor. With the current practice of tax audit and its following tax disputes, foreign companies should prepare these factors as follows:

1. Bookkeeping and administrative records should be supported by real documents. Documents should be maintained 10 years. When the tax dispute arises, the truth will be on hand of tax official, and the judge, the documents are important elements;
2. Performing sound practice business with regard to good intention, and recording should express the actual conditions or the business activity;
3. Study carefully cases battled in Tax Court, that are open and cane be taken from business news.

4. Study carefully cases arises from the beginning of tax audit.
5. Study and utilize tax facilities offered by the Government

CONCLUSION

Upholding the principle of legal certainty, justice and simplicity in tax dispute have not been achieved successfully because the DGT still maintained pseudo judicial system if tax dispute arises. The tax dispute actually must be related with the tax audit, which in some cases caused by the poor provisions or and regulations which were grey. Foreign companies will be treated equally in the manner of tax obligations and right. If tax dispute arise, foreign companies will face potential consequences as domestic companies face. There is no preference, meaning that all updating knowledge on tax comply and its related factors must be prepared in accordance with the laws and provisions.

If the tax audit arises, the tax payers have to see this as the starting point of tax dispute, which needs specific treatment from the management.

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