

LEGAL RECONSTRUCTION OF MENS REA OF THE TAX CRIMES IN INDONESIA

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Article	Abstract
<p>Keywords: Legal reconstruction, Tax crime, Tax liability</p> <p>History of Article Received: December 13, 2023; Reviewed: December 15, 2023; Accepted: December 21, 2023; Published: December 31, 2023;</p> <p>DOI: 10.56282/jtlp.v2i1.480</p>	<p>The complexity of handling tax evasion in Indonesia cannot be separated from the criminal law system adopted by Indonesia is monoistic, which is identical with the adage "actus non facit reum nisi mens sit rea". based on normative juridical studies, two conclusions are drawn. First, the criminal provisions in the field of taxation in Indonesia, which still considers a combination of actus reus and mens rea, have ignored justice and the principle of equality before the law, considering that the actual beneficiaries cannot be convicted and their tax criminal liability is not focused on preventing losses to state revenue. Second, the ideal legal concept in criminal provisions in the field of taxation in Indonesia is to regulate criminal offenses that do not require mens rea against one or more elements of actus reus in the field of taxation. One of them regulates strict liability and other tax criminal liability that does not only rely on monoistic liability.</p>

*This article is a private scientific study of the researcher and does not reflect the institution's opinion/policy.

A. INTRODUCTION

Tax evasion often involves fundamental forms of behaviour that are more complex than other forms of criminal acts.¹ One of them is the handling of criminal offences in the field of taxation in Indonesia, which basically always requires the existence of mens rea. This can be seen from the handling of criminal offences in the field of taxation in Indonesia, which is required to look for mens rea, or "guilty mind," to punish someone for their criminal acts,² as traditional crimes are always oriented towards the enactment of the principle of legality based on Article 1 paragraph (1) of the Criminal Code (KUHP) which stipulates that an act cannot be punished, unless it has been regulated in the provisions of criminal legislation that have been in force, and as tax

¹ Stuart P. Green, What is Wrong with Tax Evasion?, Houston Business and Tax Law Journal, Vol. IX, 2009, pp. 220-233.

² Jean Hampton, The Intrinsic Worth of Persons: Contractarianism in Moral and Political Philosophy, Cambridge: Cambridge University Press, 2007, p. 72.

collection must be based on the mandate of Article 23A of the 1945 Constitution of the Republic of Indonesia which stipulates that tax collection must be carried out based on law.³ This is also confirmed by Moeljatno who argues that the Indonesian criminal law system is monoistic, which combines criminal acts with criminal responsibility. That is, a mistake must be considered two things in addition to committing a criminal act, namely the existence of a certain psychological, mental state and a certain relationship between that mental state and the act committed, so as to cause reproach.⁴ It is recognised that it is difficult to understand how the tax system works when taxpayers comply with the law and even more difficult to understand how it works when tax fraud occurs.⁵

This difficulty has been studied in much of the literature. Green argues that the complexity of the actions underlying tax evasion is seen in the event that one tries to assess its adverse impact, which is difficult to identify and difficult to identify victims and losses, just as the difficulty of dealing with white collar crimes tends to be more "morally ambiguous", such as bribery, obstruction of justice, perjury, and insider trading.⁶ Yoserwan criticised the opinion among investigators and prosecutors that corporations cannot be held criminally liable for corporate taxpayers or the reluctance of investigators and prosecutors to handle corporations for tax crimes, due to the difficulty of finding the mens rea of a legal entity even though there are several theories on corporate liability and there have been two court decisions on corporate tax crimes as well as the existence of the Attorney General's Regulation and the Supreme Court Circular Letter.⁷ The adage "actus non facit reum nisi mens sit rea" or "an act does not make a person guilty unless his mind is also guilty" was strongly opposed by Thomas Aquinas because it is very difficult to apply. Aquinas did not believe that mere mortals can determine whether a person has a guilty mind, as only God is authorised to judge the movement of desire in the heart.⁸

The existence of pros and cons in terms of mens rea is the background of this study, so it is necessary and urgent to answer two existing problems. First, how is the applicable regulation of mens rea of a tax offence in Indonesia. Second, what is the ideal legal concept of mens rea of a criminal offence in the field of taxation in Indonesia. to answer the two existing problems. First, how is the applicable regulation on mens rea of a tax criminal offence in Indonesia. Second, what is the ideal legal concept of mens rea of a criminal offence in the field of taxation in Indonesia.

B. ANALYSIS AND DISCUSSION

³ Didit Santoso and Henry D. P. Sinaga, Sentencing Disparity in Taxation and Efforts To Overcome The Consequences (Part 2 of 2), *Scientium Law Review*, Vol. 1, No. 3, 2022, pp. 87–100, DOI: <https://doi.org/10.56282/slr.v1i3.126>.

⁴ Mahkamah Konstitusi, 2020, Risdalah Sidang Perkara Nomor 37/PUU-XVIII/2020, Nomor 42/PUU-XVIII/2020, Nomor 43/PUU-XVIII/2020, Nomor 45/PUU-XVIII/2020, Nomor PERKARA NOMOR 47/PUU-XVIII/2020, Nomor 49/PUU-XVIII/2020, Nomor 75/PUU-XVIII/2020", available at https://www.mkri.id/public/content/persidangan/risalah/risalah_sidang_11104_PERKARA%20NOMOR%2037.42.43.45.47.49.75.PUU-XVIII.2020%20tgl.%2022%20Oktober%202020.pdf (accessed 5 September 2023).

⁵ Stuart P. Green, Loc.cit.

⁶ *Ibid.*, p. 222.

⁷ Yoserwan, Corporate Criminal Liability in Tax Crime: An Effort to Optimize State Revenue from The Tax Sector, *Jurnal Penellitian Hukum De Jure*, Vol. 22, No. 4, 2023, pp. 131-142, p. 140.

⁸ Kevin Jon Heller, The Cognitive Psychology of Mens Rea, 99 *J. Crim. L. & Criminology* 317 (2009), <https://scholarlycommons.law.northwestern.edu/jclc/vol99/iss2/1>, pp.1-64.

1. *Mens Rea* Literature Review

Conventionally, mens rea is a means of linking guilt and suitability to impose punishment and criminal penalties, so conceptually it is part of the crime intended to stigmatise and punish criminals.⁹ This is in line with Hanafi's thinking, which states that the doctrine of mens rea classically refers to every case of violation of the law in a person's inherent evil will, so that the act is considered a sin.¹⁰

Although mens rea has traditionally been characterised as criminal intent and that characterisation can be confusing as it does not fit the usual definition of the word "intent", understanding the traditional understanding of mens rea is useful because it has influenced the evolution of the concept and because the distinction between general and specific intent has implications in certain areas of law and legislation.¹¹ The most basic form of intent is called general intent, which is simply the voluntary intention to perform the bodily movement that is the physical element of the crime. The physical act is done voluntarily without any external physical coercion. General intent is usually a requirement in every crime. The underlying assumption is that humans desire the natural and probable consequences of their voluntary actions and can therefore be held criminally responsible for those voluntary actions. To prove general intent, the prosecution does not need to prove that an individual intended to break a particular law, or intended to cause a particular harm or result. What must be shown is that the individual performed the physical act voluntarily and not by accident or mistake. Specific intent goes beyond voluntary physical behaviour and requires an individual to have the intention to do something prohibited by law. Today, a specific intent crime usually refers to the defendant's intention to commit further acts or achieve additional consequences.¹² An example is robbery, where the standard formulation of the offence is to enter a dwelling by force without permission. If this is done with the intention to commit a crime inside, then it is robbery. The intention to commit a further criminal offence is a specific element of intent required in the criminal offence of robbery. Law enforcement must prove that a person had a specific purpose or intention when committing the prohibited act. Another example of a specific intent crime is theft. Most theft laws require that the suspect took the property with the intent to permanently deprive the rightful owner of the property. A person is not guilty of theft if he or she genuinely intends to return an item or does not realise that the item belongs to someone else. Thus, in the case of theft, law enforcement must prove not only the physical taking, but also that the property was taken with the specific intent to permanently deprive the owner of the property.¹³

There has been a lot of literature, thoughts and ideas that discuss or conclude about mens rea. Finkelstein explains the notion of mens rea in economic terms based on the following two considerations. First, it is the only systematic and detailed attempt to explain the difference between intentional and unintentional harm in economic terms. Secondly, although there are economists who may wish to reject most

⁹ Arthur Leavens, Beyond Blame—Mens Rea and Regulatory Crime, *University Of Louisville La W Review*, Vol. 46, 2007, p. 1.

¹⁰ Hanafi, Reformasi Sistem Pertanggungjawaban Pidana, *Jurnal Hukum* No. 11, Vol. 6, 1999, hlm. 28

¹¹ Paul T. Robertson, "Mens Rea", in Jay S. Albanese(ed.), *The Encyclopedia of Criminology and Criminal Justice*, First Edition, 2014, John Wiley & Sons, Inc., DOI: 10.1002/9781118517383.wbeccj378, pp. 1-5, p. 1.

¹² *Loc.cit.*

¹³ *Loc.cit.*

of the details, economic analyses essentially share the same basic premise in general.¹⁴ Finkelstein asserts that insofar as the criminal category is properly limited by the notion of mens rea, the distinctive nature of criminal liability, as compared to civil, cannot be accounted for in economic terms.¹⁵ The reductionist view of personal responsibility as valuable only insofar as the concepts contribute to the more remote and fundamental value of the concepts is undermined by the irreducibility of the basic requirement of mens rea.¹⁶ Hampton presents four elements as necessary conditions of the culpable mind, namely:¹⁷

“1. Making the decision to choose the action. 2. Choosing it in the knowledge that the action is forbidden by a command. 3. Choosing it in the knowledge that the action is forbidden by a command that is applicable to oneself and authoritative in this situation (i.e., it gives one the best possible reason to act in the situation). 4. Having both the capacity to make choices and the capacity to have knowledge of authoritative commands”.

Then in relation to moral culpability and mens rea, Gardner and Jung argued that one of the difficulties in directly transplanting moral culpability distinctions into law is due to the relative specificity of criminal offences.¹⁸ In principle, the mens rea of an offender must be linked to a specific description of what he did, namely a description that prohibits his actions as criminal offences. The intention that constitutes mens rea, like other mental states, which are description-relative in nature has the property of 'intentionality'. But the individualisation of intention and other mental states, the isolation of the particular description underlying what a person does whether intended or foreseen or known or whatever, will often be very difficult. This is particularly the case with intentions without specific features, which are clearly identified as means or ends as opposed to side effects.

2. The *Mens Rea* of Tax Crime in Prevailing Tax Law in Indonesia and Its Legal Comparisons

Tax criminal provisions in the form of negligence, intentionality, attempt, and repetition are formulated in Law Number 6 of 1983 concerning General Provisions and Tax Procedures as amended several times most recently by Law Number 6 of 2023 concerning Stipulation of Government Regulation in Lieu of Law Number 2 of 2022 concerning Job Creation into Law (KUP Law), Law Number 12 of 1985 on Land and Building Tax as amended by Law Number 12 of 1994 (PBB Law), Law Number 10 of 2020 on Stamp Duty (BM Law), and Law Number 19 of 1997 on Tax Collection by Force as amended by Law Number 19 of 2000 (PPSP Law). In essence, the investigation of criminal acts in the field of taxation does not only aim to punish and deter the perpetrators, but mainly aims to recover losses in state revenue suffered by

¹⁴ Claire Finkelstein, The Inefficiency of Mens Rea, *California Law Review*, Vol. 88, No. 3, The Morality of Criminal Law: A Symposium in Honor of Professor Sandy Kadish (May, 2000), p. 897.

¹⁵ *Ibid.*, p. 918.

¹⁶ *Loc.cit.*

¹⁷ Jean Hampton, *Op.cit.*, p. 90.

¹⁸ John Gardner and Heike Jung, Making Sense of Mens Rea: Antony Duffs Account, *Oxford Journal of Legal Studies*, Vol. 11, 1991, pp. 559-588, p. 579.

the state, as the offenses that contain the element of loss are regulated in Article 38, Article 39, Article 39A, and Article 43 paragraph (1) of the KUP Law.¹⁹

The formulations of criminal offenses in the field of taxation show that criminal offenses in the field of taxation really require mens rea, so it is very difficult to ensnare the perpetrators who receive benefits for the occurrence of a criminal offense in the field of taxation committed by others. In fact, the position of responsibility in terms of taxation provisions in Indonesia is identical to the fulfillment of tax rights and obligations whose mention is adjusted to the relevant laws and regulations. Although the Criminal Code (KUHP) and KUP Law have not regulated the position of mens rea, the understanding of mens rea in criminal offenses committed by corporations can use the formulation contained in Article 48 and Article 49 of Law Number 1 Year 2023 on the Criminal Code (KUHP Law). Article 48 of the Criminal Code Law stipulates that a criminal offense by a corporation can be accounted for, if it is included in the scope of business or activities as specified in the articles of association or other provisions applicable to the corporation, unlawfully benefits the corporation, is accepted as corporate policy, the corporation does not take the necessary steps to prevent, prevent greater impact and ensure compliance with applicable legal provisions to avoid the occurrence of a criminal offense, and/or the corporation allows a criminal offense to occur. Furthermore, Article 49 of the Criminal Code Law confirms that the responsibility for criminal offense by corporation as referred to in Article 48 of the Criminal Code Law shall be imposed on the corporation, the management who has functional position, the commanders, the controllers, and/or the beneficial owners of the corporation.

3. Reconstruction of Mens Rea of Tax Crime in Indonesia

Indonesia's monoistic criminal law system makes it very difficult to handle criminal offenses in the field of taxation in Indonesia, given the "diversity, gaps, and confusion" of the necessary but elusive "mental elements".²⁰ Leavens asserts that traditional mens rea, which is part of common law crimes and its fault-oriented function, is unable to reach the handling of regulatory crimes, considering that the different role of mens rea between regulatory crimes compared to traditional crimes will cause the imposition of mens rea to only produce unclear to incoherent jurisprudence or interpretation.²¹

The necessity to include mens rea in proving criminal offenses in the field of taxation in Indonesia shows that there are at least two major weaknesses in criminalization in the field of taxation, namely the failure to understand the tripartite meaning (in the form of the existence of three independently significant principles of criminal responsibility in the form of proscription, conformity, and function principles of just punishment) behind the concept of mens rea, and the failure to appreciate the relationship between the concept of criminal responsibility and the concept of due process.²² One of the impacts is the failure of the tax criminal regime to understand the criteria in the standards of responsibility objectively to be imposed on the law in the

¹⁹ Rajaguguk, Parluhutan, dan Kuntonegoro, Hariomurti Tri, Tax Bailiff Roles Post Assets Confiscation on Suspect of Tax Crime in Indonesia, *Journal of Tax Law and Policy*, Vol. 1, no. 2, 2022.

²⁰ Kevin Jon Heller, *Op.cit.*, p. 2.

²¹ Arthur Leavens, *Ibid.*

²² Gary V. Dubin, Mens Rea Reconsidered: A Plea for a Due Process Concept of Criminal Responsibility, *Stanford Law Review*, Vol. 18, No. 3 (1966), pp. 322-395, p. 393.

legal process that occurs.²³ This is in line with Romli Atmasasmita's thoughts with Jerome Hall. Atmasasmita who asserts that "mens rea" in a casuistic manner does not need to be proven against offenses that include "welfare offences" or "regulatory offences" which carry a light penalty, because the existence of "mens rea" will hamper the objectives of the applicable legislation.²⁴ While Hall, who criticized the meaning of the mens rea doctrine according to Lord Denning which still emphasizes the principle of guilt on the perpetrator of the crime, expressly emphasizes mens rea on morally prohibited acts by law.²⁵

These failures have ignored the principle of equality before the law that has been guaranteed in the Indonesian Constitution and the General Elucidation of the Criminal Procedure Code (KUHAP).²⁶ Article 27 paragraph (1) of the 1945 Constitution has formulated that "all citizens shall be equal before the law and government and shall uphold the law and government with no exception", Article 28D paragraph (1) of the 1945 Constitution has formulated that "every person shall be entitled to recognition, guarantees, protection and certainty of a just law and equal treatment before the law", and Point 3a of the General Elucidation of the Criminal Procedure Code (KUHAP) has explained "equal treatment of every person before the law with no distinction in treatment".²⁷ Obviously, the principle of equality before the law shows that every citizen, both ordinary citizens and officials, must receive the same treatment in the substance of criminal law (criminal law rules, which are prohibited or required, which have been regulated in law as prohibited acts) and procedurally (procedural law).²⁸

The neglect of the principle of equality before the law in a monoistic criminal law system can be seen from several critical questions, such as "can the absence of mens rea be said not to involve some fault of the parties to the offense?", "does the eventual acceptability of the criminal law depend on the extent to which its principles achieve just results?",²⁹ and "do the offenses contained in the variety of crimes in the modern technological era that are not viewed by society (or at least not by a large part of society) as containing elements of "immorality" include "wrong" in terms of morality or wrong based on the concept of "reproach" which is a fundamental feature of the normative concept of mens rea?".³⁰ In fact, the onset of criminal liability is usually explained as dependent on choice, where the notion of choice lies at the root of "intention" and "recklessness", the minimum content of which is awareness of the risk of prohibited consequences accompanying the violated act.³¹ The positivistic trend in tax law thinking in Indonesia suggests the need to challenge the normative concept of

²³ *Loc.cit.*

²⁴ Romli Atmasasmita, *Perbandingan Hukum Pidana Kontemporer*, (Jakarta: Penerbit Fikahati Aneska, 2009), pp. 102-103.

²⁵ Hanafi, *Ibid.*

²⁶ Didit Santoso and Henry D. P. Sinaga, Sentencing Disparity in Taxation and Efforts To Overcome The Consequences (Part 1 of 2), *Scientium Law Review*, Vol. 1, No. 2, 2022, pp. 23–33. DOI: <https://doi.org/10.56282/slr.v1i2.125>.

²⁷ *Loc.cit.*

²⁸ *Loc.cit.*

²⁹ John Sellers, Mens Rea and the Judicial Approach to "Bad Excuses" in the Criminal Law, *The Modern Law Review*, Vol. 41, No. 3 (May, 1978), pp. 245-265, p. 245-246

³⁰ C. R. Snyman, The Normative Concept of Mens Rea—A New Development in Germany, *International and Comparative Law Quarterly*, Vol. 28, 1979, pp. 211- 220, p. 218.

³¹ John Sellers, *Loc.cit.*

mens rea alone.³² Mens rea is not the whole story of fault, although liability for mens rea violations quite often occurs even in the absence of moral culpability.³³ One example is Director X who signed the VAT Periodic Tax Return (SPT) made by Staff Y, even though Director X did not know that the SPT contained tax invoice credits that were not based on actual transactions in violation of Article 39A of the KUP Law. Of course, the beneficiary of the violation of Article 39A of the KUP Law alleged or charged to Director X is Staff Y who apparently purchased tax invoices but reported to the company as if they had made correct transactions. Another example is Director X who signed the Annual Corporate Income Tax Return with incorrect contents or information, as in violation of Article 39 paragraph (1) letter d of the KUP Law. The filling of the Annual Income Tax Return is based on bookkeeping centered on the parent company (holding company) located abroad. Of course, the beneficiaries of the violation of Article 39 paragraph (1) letter d of the UU KUP alleged or charged to Director X are shareholders or holding companies registered abroad. These examples show that the mens rea attached to Director X has ignored justice and the principle of equality before the law, because the actual beneficiaries cannot be proven based on the mens rea mechanism.

Then, in the event that there are great difficulties in treating the company as a suspect or defendant in the traditional criminal concept with the argument of the absence of mens rea of a legal entity, the handling of the criminal offense can be done by treating Article 48 and Article 49 of the Criminal Code Law. In addition, it is necessary to regulate special provisions on the criminalization of taxpayers by adopting certain ideas contained in the Corporate Manslaughter and Corporate Homicide Act 2007 in the UK. One of the provisions of the Manslaughter and Corporate Homicide Act 2007 regulates the offense of corporate manslaughter, namely "*An organisation to which this section applies is guilty of an offence if the way in which its activities are managed or organised - (a) causes a person's death, and (b) amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased*".³⁴

The provisions contained in the tax law in Indonesia show that there are still many crimes in it that do not require mens rea, where it is very necessary to regulate criminal liability that focuses on preventing certain losses from occurring rather than having to impose moral guilt.³⁵

One form of liability is strict liability, which is used to refer to criminal offenses that do not require mens rea for one or more elements of *actus reus*.³⁶ One of the justifications for strict liability is to protect the general public. All the state needs to do to establish a case is prove that the suspect or defendant acted in a certain way, where the defendant or suspect knew certain facts making the case more complicated.³⁷ The application of strict criminal liability in criminal offenses in the field of taxation lies in its criteria related to public welfare activities,³⁸ risk assessment that is highly

³² Winnie Chan and A.P. Simester, Four Functions Of Mens Rea, Cambridge Law Journal, Vol. 70, No. 2, July 2011, pp. 381–396, pp. 381-382, doi: 10.1017/S0008197311000547.

³³ *Loc.cit.*

³⁴ Jonathan Herring, *Criminal Law*, Hampshire: Palgrave Macmillan, 2011, p. 93.

³⁵ *Ibid.*, p. 67.

³⁶ *Ibid.*, p. 87.

³⁷ *Ibid.*, p. 88.

³⁸ Henry Dianto P. Sinaga, Aditya Wirawan, Rintis N. Pramugar, Reconstruction of Corporate Criminal Liability in Indonesia, *International Journal of Advanced Science and Technology*, Vol. 29, No. 8, 2020, pp. 1231 - 1240.

dependent on information, and the effectiveness of its regulation as mala prohibita so that it is not necessary to prove mens rea because it can hamper the purpose of the legislation itself.³⁹ In addition, in terms of corporate criminal offenses, there is a theory of vicarious liability that unites the mens rea of people who have employment relationships or other relationships other than worker relationships as corporate mens rea.⁴⁰ This theory is reinforced by the culture model and aggregation model which embodies The Collective Mens Rea Standard, namely mens rea taken from the knowledge of employees in a corporation at large.⁴¹ The culture model sees that a corporation can be held liable if the criminal offense committed is from the company's daily culture, while the aggregation model looks more at the fault in a balanced manner from the entire business process of the corporation before it can be held liable to the corporation.⁴²

C. CONCLUSION

This study resulted in two conclusions. First, criminal provisions in the field of taxation in Indonesia still adhere to a monoistic criminal law system, which always combines actus reus and mens rea in handling tax crimes. This ignores justice and the principle of equality before the law, considering that the actual beneficiaries cannot be convicted and their tax criminal liability does not focus on preventing losses to state revenue. Second, the ideal legal concept of mens rea of a criminal offense in the field of taxation in Indonesia is to regulate criminal offenses that do not require mens rea against one or more elements of actus reus in the field of taxation. One example is by regulating strict liability and vicarious liability that does not only rely on monoistic liability. The regulation of the two liabilities in the tax law is expected to assist in assessing mens rea in criminal acts in the field of taxation in Indonesia.

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³⁹ Henry D. P. Sinaga and Benny R. P. Sinaga, *Rekonstruksi Model-Model Pertanggungjawaban di Bidang Perpajakan dan Kepabeanan*, Yogyakarta: PT. Kanisius, 2018, pp. 290-291.

⁴⁰ Lakso Anindito, *Lingkup Tindak Pidana Korupsi dan Pembuktian Kesalahan dalam Sistem Pertanggungjawaban Pidana Korporasi di Indonesia, Inggris, dan Prancis*, *Integritas*, Vol. 3, No. 1, 2017, p. 22.

⁴¹ *Ibid.*, p. 13.

⁴² *Loc.cit.*

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