Scientia pro virtute

Journal of Tax Law and Policy

P-ISSN: 2829-579X E-ISSN: 2829-7636 pp. 1-15

RESTORATIVE JUSTICE ASPECT IN STRENGTHENING PRELIMINARY EVIDENCE AUDIT IN INDONESIAN TAXATION

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Article

Keywords:

Preliminary evidence audit. Restorative justice; Tax;

History of Article
Received: 21 July, 2022;
Reviewed: 22 July, 2022;
Accepted: 22 August, 2022;
Published: August 23, 2022;

DOI:

Abstract

Challenges and problems of justice in handling tax crime cases must be handled by implementing restorative justice in examining preliminary evidence in the field of taxation. This has also been confirmed in the National Medium-Term Development Plan (RPJMN) 2020-2024, which emphasizes that the improvement of the legal system must be realized through one crucial strategy, namely the application of Restorative Justice. Based on a study using a normative juridical method that can answer problem-identification and provide suggestions, this paper produces two conclusions. First, the principle of restorative justice is still very adequate to be adopted in the rules for examining preliminary evidence, as regulated in Number 18/PMK.03/2021, which has amended several provisions in PMK Number 239/PMK.03/2014. Secondly, restorative justice provisions in strengthening preliminary evidence examinations should be based on the following two essential keys. First, preventing tax avoidance and tax evasion is carried out through efforts to obtain consistent benefits rather than punishment. Second, preliminary evidence is examined if tax avoidance and tax evasion have occurred and if efforts are needed to recover state revenue losses from the sector through solutions and support for the state as a victim of active state participation and taxpayers. Thus, producing rules for examining preliminary evidence that reflect the fulfillment of material requirements, formal requirements, and restorative justice mechanisms.

1. INTRODUCTION

Various challenges and problems arise when they occur when investigating tax crimes in Indonesia. These challenges and problems cannot be separated from matters relating to justice, public benefits, and legal certainty regarding handling tax crimes, as the facts have been found recently.

[1] Disclaimer: This article is a private scientific study of the researcher and does not reflect the institution's opinion/policy.

Challenges and problems of justice in handling tax crime cases have been studied in a few pieces of literature. Based on the case study on the decision of the Supreme Court (MA)[2] and the decision of the Palembang District Court[3] found ambiguity (uncertainty, obscurity)[4] of justice and legal certainty in the context of tax law as administrative penal law, as the investigation of tax crimes should be a final remedy (ultimum remedium). Supreme Court cassation decision No. 2583 K/PID.SUS/2016 imposed imprisonment and a fine on the defendant for intentionally using a tax invoice that was not based on an actual transaction for the Periodic Value Added Tax (VAT) Tax Return, resulting in a tax loss of Rp. 15, 13 billion. However, the good faith of the defendant, who had repaid the state loss of Rp. 8.27 billion when the preliminary evidence was being examined should be a mitigating factor for the defendant[5]. This is reinforced by the statement of the Legal Expert on State Budget and Public Finance, who emphasized that the spirit of the state financial regime, including taxes, is an administrative settlement because the state prioritizes state revenue, and the statement of the Criminal Expert who states that at the administrative stage of settlement, there is an installment process, which is a good faith and therefore there is no intention to commit a tax violation, and there is a forgiving reason[6].

Meanwhile, there is the decision of the District Court[7], acquitted the defendant of the claim for loss of state income of Rp. 99.39 billion, which, among other things, is based on the testimony of the Criminal Expert submitted by the defendant. The statement of the Criminal Expert states that a crime is carried out if the administrative element cannot be fulfilled by the Taxpayer (WP) and causes state financial losses, considering the nature of tax law is part of a commercial, civil law, and the nature of the tax authorities (collecting as much tax as possible) and regulates that it can maximize tax collection. In addition, there is a statement from the Expert on Calculating Losses on State Revenue who cannot explain how and how much state loss occurred due to the Defendant's actions[8].

One of the challenges and problems in terms of public benefits is that although the purpose of investigating tax crimes is for a deterrent effect, Article 1 paragraph (1) letter c and paragraph (2) of Government Regulation Number 39 of 2016 concerning Types and Tariffs for Taxation Types of Non-Tax State Revenue Applicable at the Attorney General's Office of the Republic of Indonesia has confirmed that the payment of criminal penalties originating from and or as a result of a judge's determination and or court decisions that have permanent legal force is a type of Non-Tax State Revenue (PNBP), applicable to the

[2] Cassation Decision of the Supreme Court Number 2583 K/PID.SUS/2016.
[3] The decision of the Palembang District Court No. 394/Pid.sus/2015/PN Plg dated December 15, 2015.
[4] Kamus Besar Bahasa Indonesia Daring, available at https://kbbi.web.id/ambiguitas, accessed on June 3, 2022.
[5] Cassation Decision of the Supreme Court Number 2583 K/PID.SUS/2016.
[6] Henry D.P. Sinaga and Anis W. Hermawan. Reconstruction Of The Ultimum Remedium Principle Of Administrative Penal Law In Building A Sociological- Opposed Tax Investigation In Indonesia. *Ayer Journal*, Vol. 27, 2020, pp. 57-58.
[7] The decision of the Palembang District Court No. 394/Pid.sus/2015/PN Plg dated December 15, 2015.
[8] Henry D. P. Sinaga. Reorientation of Tax Legal Certainty in Indonesia: An Exploration of Transcendental Law. *Advances in Social Science, Education and Humanities Research*, Vol. 192, 2018, pp. 282-287.

Prosecutor's Office[9]. Other challenges and problems, among others, are that there are still several pretrial decisions that grant the applicant's request, such as the decision of the Sidoardjo District Court (PN) Number 5/Pid.Pre/2019/PN SDA dated 29 April 2019, the decision of the Sidoardjo District Court Number 03/ Pid.Pra/2020/PN SDA dated 19 October 2020, and pretrial decision Number 15/Pid.Pra/2018/PN.Mdo.

Challenges and problems in the investigation of tax crimes must be minimized by strengthening the examination of preliminary evidence considering that the investigation of tax crimes is the ultimum remedium of finding sufficient preliminary evidence, as stipulated in Article 30 paragraph (1) letter a of the Regulation of the Minister of Finance (PMK). No. 239/PMK.03/2014 dated December 22, 2014, concerning Procedures for Examination of Preliminary Evidence of Criminal Acts in the Taxation Sector[10] (Sinaga & Hermawan, 2020). The existence of challenges and problems of justice, public benefits, and legal certainty in the investigation of tax crimes is the background for the study to answer 2 (two) formulations of the existing problems. First, what are the provisions for restorative justice in the rules for examining preliminary evidence in the field of taxation currently in effect in Indonesia? Second, how ideally is the provision of restorative justice in strengthening the examination of preliminary evidence in the field of taxation in the future?

2. METHODS

In order to answer the two existing problems, this study conducts research using a legal principles approach, a systematic legal approach, a legal synchronization approach, and a legal history approach. The legal principles approach studies the ideal and fundamental elements in the fundamental norms described in positive law[11]. The systematic legal approach seeks to identify the primary meanings in law, such as rights and obligations and legal events. The synchronization approach studies the compatibility of favorable laws, both vertically and horizontally. The legal history approach studies the development of legislation in a certain period[12].

This paper uses the doctrinal method or also known as the normative juridical method. Doctrinal studies that examine legal doctrine, whose concrete objects are but are not limited to legal principles, legal norms, regulations, legal concepts, and legal understanding[13], are expected to be able to answer problem-identification and at the same time to get suggestions in overcome existing problems[14]. Saptomo (2009) asserts that the doctrinal method consists of legal concepts from laws and regulations,

[9]Peraturan Pemerintah Nomor 39 Tahun 2016 tentang Jenis dan Tarif Atas Jenis Penerimaan Negara Bukan Pajak yang Berlaku pada Kejaksaan Republik Indonesia.
[10] Henry D.P. Sinaga and Anis W. Hermawan, *Ibid.*, pp. 57-58.
[11] Sudikno Mertokusumo. 2019. Mengenal Hukum: Suatu Pengantar. Yogyakarta: CV. Maha Karya Pustaka, p. 47.
[12] Muhaimin. 2020. Metode Penelitian Hukum. Mataram: Mataram University Press.
[13]Widodo. 2020. Konstruksi dan Aplikasi Metode Kontemporer Dalam Penelitian Hukum: Kombinasi Analisis Doktrinal dan Non-doktrinal. Yogyakarta: Aswaja, p. 13.
[14] Soerjono Soekanto. 2010. *Pengantar Penelitian Hukum*. Jakarta: Penerbit Universitas Indonesia.

documented cases, administrative rules, and the like, almost all of which take place through library research or secondary data[15]. Secondary data consists of binding legal materials, otherwise known as primary legal materials, legal materials that can explain existing primary legal materials, secondary legal materials, and legal materials that can provide related instructions and explanations for primary legal materials and secondary legal materials, otherwise known as tertiary legal materials[16]. The binding legal materials in this paper still adhere to the types and hierarchies of the laws and regulations in Indonesia, which is in order from the highest to the lowest,[17] includes the 1945 Constitution, Decrees of the People's Consultative Assembly, Laws/Regulations in place of Laws, Government Regulations, Presidential Regulations, Provincial Regulations, and Regency/City. Provisions and Types of Legislation are recognized for their existence and have legal force as long as they are ordered by higher laws and regulations[18]. The secondary data will be read, sorted, selected, analyzed, and concluded[19].

3. ANALYSIS AND DISCUSSION

A. Juridical Aspect of Preliminary Evidence Audit

Article 1 number 26 of KUP Law[20] defines *preliminary evidence examination* as a condition, actions, and or evidence in the form of statements, writings, or objects that can indicate a strong suspicion that a criminal act in the taxation sector is being or has been committed by anyone that can cause losses to state revenues. Then, Article 43A paragraph (1) of the KUP Law stipulates that the examination of preliminary evidence is based on information, data, reports, and complaints.

B. Restorative Justice in Law Enforcement

Given the existence of dualism in tax law enforcement, namely administrative and criminal settlement mechanisms, which potentially cause state losses in the taxation sector, legal certainty is needed in its application, which in this case is closely related to the consistent enforcement of laws and regulations of taxation itself. This consistency must pay attention to equal treatment (equal treatment) in settlement of tax crimes, both by paying attention to legal certainty and income for state finances[21].

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[15] Ade Saptomo. 2009. Pokok-Pokok Metodologi Penelitian Hukum Empiris Murni: Sebuah Alternatif. Jakarta: Penerbit Universitas Trisakti.
[16] *Ibid.*
[17] As regulated in Article 7 of Law Number 12 of 2011 concerning the Establishment of Legislations as last amended by Law Number 13 of 2022.
[18] Henry D. P. Sinaga Reorientation of Tax Legal Certainty in Indonesia: An Exploration of Transcendental Law. *Advances in Social Science, Education and Humanities Research*, Vol. 192, 2018, pp. 282-287.
[19] Ade Saptomo, *Ibid*.
[20] Law Number 6 of 1983 concerning General Provisions and Tax Procedures as amended several times, most recently by Law Number 7 of 2021 concerning Harmonization of Tax Regulations (UU KUP).
[21] Yoserwan. The Secondary Function of Criminal Law in Combating Tax Crime. *Jurnal Penelitian Hukum DE JURE*, Vol. 20. 2020, pp. 165-176.

However, despite the dualism of tax law enforcement, law enforcement with administrative and criminal mechanisms is oriented towards restorative justice, which is related to the recovery of losses incurred[22].

There are several thoughts about restorative justice. Albert Eglash, who criticizes the punishment and treatment model that has focused on the perpetrator's actions, denies the victim's participation in the judicial process, and only requires the passive participation of the perpetrator, thus suggesting the need for restorative justice that focuses on the harmful effects of the perpetrator's actions so that it is necessary to actively involve the victim and actors in the process of reparation and rehabilitation. Howard Zehr, who critiques criminal justice for failing to meet the needs of victims or perpetrators, suggests restorative justice, which views crime as an offense against people and relationships, which in turn leads to an obligation to "make things right" and views justice as a process in which all parties seek reparative, reconciling and practical solutions. Later, Martin Wright argued that criminal justice should be restorative rather than retributive. His argument suggested that the current exclusion of victims from the system could be overcome by expanding the compensation, restitution, and mediation processes to allow the more significant victim and perpetrator participation. Wright suggested the need to create two government departments. The former, responsible for crime prevention, would emphasize prevention through enforcement rather than prevention through punishment. The second department will be responsible for appropriately responding to crimes. This will include victim support, mediation, reparations, and courts that emphasize restitution[23]. Furthermore, Braithwaite argues that one of the reasons for the importance of restorative justice is because of the existence of a democratic mechanism, which gives back some of the power of law enforcement elites through the participation of ordinary people, i.e., victims have the opportunity to participate in justice by getting benefits Who are much more consistent (compared to controls) than perpetrators and victims have stronger feelings about their rights being respected[24].

In Indonesia itself, several state institutions have separately regulated provisions regarding restorative justice, such as the Republic of Indonesia Prosecutor's Regulation (PERJA) Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice and the Circular Letter (SE) of the National Police Chief Number SE/8/VII/2018 concerning the Application of Restorative Justice in settlement of Criminal Cases. Article 1 point 1 PERJA Number 15 of 2020 defines Restorative Justice as "the settlement of criminal cases by involving the perpetrators, victims, families of perpetrators/victims, and other related parties to jointly seek a fair solution by emphasizing restoration back to its original state, and not retaliation," while the

[22] Edward Omar Sharif Hiariej.. Asas Lex Specialis Systematis dan Hukum Pidana Pajak (*Principle of Lex Specialist Systematic and Tax Criminal Law*). *Jurnal Penelitian Hukum De Jure*, Vol. 21, 2021, pp. 1-11.
[23] Daniel W. Van Ness and Karen Heetderks Strong. 2015, Restoring Justice: An Introduction to Restorative Justice, Fifth Edition, Waltham, MA: Elsevier Inc.
[24] John Braithwaite, Encourage Restorative Justice, *Criminology & Public Policy*, Vol. 6, No. 7, 2007, pp. 689-696.

definition of *victim* in Article 1 point 2 PERJA Number 15 of 2020 is "a person who experiences physical, mental, and or economic loss caused by a criminal act." Furthermore, Article 2 of PERJA Number 15 of 2020 formulates five principles in stopping prosecution based on restorative justice: justice, public interest, proportionality, criminal as a last resort, and fast, simple, and low cost.

Indeed, in PERJA Number 15 of 2020, there is no conceptual framework for the five principles, but Article 4-Article 6 of PERJA Number 15 of 2020 regulates the conditions for stopping prosecution based on restorative justice. The consideration of terminating prosecution based on Restorative Justice, as referred to in paragraph (1), is carried out by considering: a) subject, object, category, and the threat of criminal activity; b) the background of the crime being committed; c) the degree of misconduct; d) losses or consequences arising from criminal acts; e) costs and benefits of handling cases; f) restoration back to its original state; and g) there is peace between the victim and the suspect. Termination of prosecution based on Restorative Justice must be carried out by taking into account the interests of the victim and other protected legal interests, avoidance of negative stigma, avoidance of retaliation, response and community harmony, and propriety, decency, and public order. The conditions for termination of prosecution based on Restorative Justice, among others, are (a)The suspect has committed a crime for the first time, (b) Criminal acts are only threatened with a fine or threatened with imprisonment of not more than 5 (five) years, (c) The crime is committed with the value of the evidence, (d) is not a crime committed against a person, body, life, and independence, (e) There has been a restoration to its original condition carried out by the suspect by returning the goods obtained from the crime to the victim, compensating the victim's loss, replacing the costs incurred as a result of the criminal act, and or repairing the damage caused by the criminal act, there has been a peace agreement between the victim and the Suspect, and the community has responded positively, and (f) Is exempted from cases of criminal acts against state security, the dignity of the President and Vice President, friend countries, friendly heads of state and their deputies, public order and morality, criminal acts punishable by a minimum criminal threat, narcotics crime, environmental crime life, and criminal acts committed by corporations.

Meanwhile, the SE of the National Police Chief Number SE/8/VII/2018 confirms that based on several considerations, such as prisons that are over capacity, arrears in cases are increasing, the number of law enforcers is not balanced with the development of cases. Case fees are unable to support the increased case, then the Police, as an institution that is given the authority as investigators, as well as coordinators and supervisors of criminal investigations, need to apply the principles of restorative justice. The concept of restorative justice in the criminal law enforcement system, especially the investigation process, is intended to accommodate the values of justice in society and provide legal certainty, primarily process certainty. Where restorative justice reflects justice as a form of balance in human life which is considered a behavior that eliminates balance, a case settlement model is needed that seeks to restore this

balance by burdening obligations on criminals with their awareness of admitting mistakes, apologizing, and returning damage and losses for the victim as before or at least similar to the original condition that can fulfill the victim's sense of justice.

The SE of the National Police Chief Number SE/8/VII/2018 regulates the uniformity of fulfillment of material requirements, formal requirements, and the mechanism for applying restorative justice. The material requirements of restorative justice are 1) It does not cause public unrest, and there is no community rejection, 2)It does not impact social conflict, 3)There is a statement from all parties involved not to object and relinquish the right to sue before the law, 4)The limiting principle: a) the perpetrators consist of relatively minor errors and are not recidivists, b) in criminal acts in the process of investigation or investigation before the SPDP is sent to the Public Prosecutor.

Formal requirements consist of a letter of request for reconciliation by both parties (the reporting and the reported), a statement of peace and dispute resolution of the litigants known to the investigator's superior, Minutes of Additional Examination of the litigating parties after completion of the case through restorative justice, recommendations for notable case titles who approves the settlement of restorative justice, the perpetrator does not object to responsibility, compensation, or is carried out voluntarily, and all criminal acts can be carried out by restorative justice against general crimes that do not cause human victims. As for the mechanism for applying restorative justice in the police, among others, after receiving a request for reconciliation between the complainant and the reported party, which is signed on stamp duty, administrative research is conducted on the formal requirements for resolving cases through restorative justice, 2) a request for peace that has met the formal requirements is submitted to the superior investigator to obtain approval, 3) after approval, the time for signing the peace statement is determined, 4) conduct a particular case with the reporter, the reported party, representatives of community leaders appointed by investigators, investigators, investigator supervisors, representatives of internal supervisory functions and legal functions , and elements of the government if necessary, 5) compiling administrative documents and documents as well as reports on the results of the case, 6) issuing an Order to Terminate an Investigation/Investigation and a Letter of Decision to Terminate an Investigation/Investigation on the grounds of Restorative Justice.

C. Restorative Justice Provision in Preliminary Evidence Audit

The provisions of restorative justice in the examination of preliminary evidence are implicitly regulated in Article 107 PMK Number 18/PMK.03/2021 concerning the Implementation of Law Number 11 of 2020 concerning Job Creation in the Field of Income Tax, Value Added Tax, and Sales Tax on Luxury Goods, as well as General Provisions and Tax Procedures which amend several provisions in PMK Number 239/PMK.03/2014 concerning Procedures for Examination of Preliminary Evidence of Criminal Acts in the Taxation Sector, as amended by Article 23 PMK Number 239/PMK.03/2014 which reads:

"(1) An individual or entity as a Taxpayer whose Preliminary Evidence Audit is conducted openly may voluntarily reveal the untruth of his/her actions for a criminal act: a. does not submit a Notification Letter so that it can cause a loss to state revenue; or b. submit a Notification Letter whose contents are incorrect or incomplete, or attach information whose contents are incorrect, so that it can cause losses to state revenues, as referred to in Article 38 or Article 39 paragraph (1) letter c and letter d of the KUP Law. (2) The tax return, as referred to in paragraph (1), is a letter used by the Taxpayer to report the calculation and or payment of taxes, tax objects and or non-tax objects, and or assets and liabilities under the provisions of laws and regulations in taxation, including (a) Annual Tax Return as referred to in the KUP Law; (b) Periodic Notification Letter as referred to in the KUP Law; and (c) Tax Object Notification Letter as referred to in the PBB Law. (3) Deleted. (4) An individual or entity as a Taxpayer whose Preliminary Evidence Audit is conducted openly may submit a disclosure of the untruth of the criminal act as referred to in paragraph (1) as long as the notification letter for the commencement of the Investigation has not been submitted to the public prosecutor through an official investigator of the State Police of the Republic of Indonesia. (5) In disclosing the untruth of the criminal act as referred to in paragraph (1), an individual or entity as a Taxpayer whose Preliminary Evidence Audit is conducted openly must: (a) submit a written and signed disclosure of the untruth of his act; and (b) accompanied by: (1) calculation of the underpayment of the amount of tax owed; (2) Tax Payment Letter or other equivalent administrative means as proof of settlement of the underpayment of the actual amount of tax owed; and (3) Tax Payment Letter or other equivalent administrative means as evidence of settlement of administrative sanctions in the form of fines by the provisions in Article 8 paragraph (3a) of the KUP Law. (5a) Payment of the actual amount of tax payable as referred to in paragraph (5) letter b number 2 and payment of administrative sanctions in the form of fines as referred to in paragraph (5) letter b number 3 constitutes recovery of losses in state revenue. (6) An individual or entity as a Taxpayer whose Preliminary Evidence Audit is carried out shall convey the disclosure of the untruth of the act to the head of the Tax Service Office where the Taxpayer is registered or where the Tax Object is administered and a copy thereof to the head of the Preliminary Evidence Audit Implementing Unit".

However, the amendment to Article 23 PMK Number 239/PMK.03/2014 only provides restorative justice in the implementation of an open preliminary evidence examination, considering that the amendment to Article 28 PMK Number 239/PMK.03/2014 confirms that an individual or entity as Taxpayers who, at the time of conducting a tax audit in order to test compliance with the fulfillment of tax obligations, are carried out a closed Preliminary Evidence Audit which will later be followed up with an Investigation, then the tax audit is suspended. In addition, restorative justice related to the examination of preliminary evidence openly is still minimal considering the amendment to Article 25 paragraph (1) of PMK Number 239/PMK.03/2014, which states that if the Preliminary Evidence Examination is

followed up with an Investigation, payment for disclosure of untruths actions that do not meet the provisions as referred to in Article 23 paragraph (4), paragraph (5), and paragraph (6) and or are not following the actual situation, shall be calculated as a deduction from losses in state revenue at the Investigation stage.

Then, the amendment to Article 30 paragraph (1) PMK Number 239/PMK.03/2014 confirms that the Preliminary Evidence Examination Results outlined in the Preliminary Evidence Examination Report are followed up with the following three possibilities. First, it is increased to an investigation if sufficient Preliminary Evidence is found. Second, written notification is made by the head of the Preliminary Evidence Audit Implementing Unit to an individual or entity as a Taxpayer whose Preliminary Evidence Audit is conducted openly that the investigation has not been carried out if the disclosure of untruth actions of an individual or entity as a Taxpayer is following the actual circumstances. Third, the head of the Preliminary Evidence Audit shall be terminated by the head of the Preliminary Evidence Audit Implementing Unit if: a) the individual Taxpayer whose Preliminary Evidence Audit is conducted dies, or b) no Preliminary Evidence of Criminal Acts in the Taxation Sector is found.

D. Critical Review of Restorative Justice in Preliminary Evidence Audit

There is a change in Article 30, paragraph (1), letter (b), and paragraph (2) of PMK Number 239/PMK.03/2014, which formulates that the Preliminary Evidence Examination Results as outlined in the Evidence Examination Report are followed up with the termination of the preliminary evidence examination and written notification by the head of the Implementing Unit for the Preliminary Evidence Audit to an individual or entity as a Taxpayer whose Preliminary Evidence Audit is carried out openly that an investigation has not been carried out if the disclosure of untruth actions of an individual or entity as a Taxpayer is under the actual situation, is one of the legal foundations of restorative justice in the examination of preliminary evidence. However, the legal basis still requires strengthening the true meaning of restorative justice, considering that the punishment model (with very high criminal fines and imprisonment) for the perpetrator's actions does not cause the expected deterrent effect.

Restorative justice in the examination of preliminary evidence as appropriate for a fair settlement with an emphasis on restitution for losses that have occurred and not retaliation is carried out based on the following two crucial keys. First, as those responsible for actively preventing tax avoidance and tax evasion by trying to get consistent benefits (compared to control) from the perpetrators, rather than through punishment (jail). Second, as the person responsible for "making things right" and providing justice to all parties in the event of tax avoidance and tax evasion. This will include providing solutions and support for victims (in this case, the state) through mediation, rehabilitation, reconciliation, reparations, compensation, and administra-

tive sanctions emphasizing restitution as a form of active participation of victims and perpetrators.

The implementation of restorative justice in the examination of preliminary evidence related to obtaining consistent benefits compared to controls from tax avoidance and tax evasion is to examine preliminary evidence to increase voluntary compliance with every taxpayer who is proven to have committed a criminal offense for the first time by correcting all of its SPT (including those that have not expired, examination and prosecution of tax crimes) along with administrative sanctions, and signing an agreement on a stamp duty so as not to repeat acts that are detrimental to state finances from the tax sector.

The implementation of restorative justice in the examination of preliminary evidence in terms of making things right and providing justice to all parties because of the occurrence of tax avoidance and tax evasion is by prioritizing voluntary compliance reparations for taxpayers who are still repeating their actions (a preliminary examination of evidence is carried out for at least the second time) by trying as much as possible to recover the loss of tax revenue that has occurred in order to avoid more significant problems if the Taxpayer must be escalated to punishment, such as consideration of arrears in tax crime investigation cases, problems over the capacity of correctional institutions, costs during the investigation process to coaching in correctional institutions, and consideration of the limited number of PPNS.

The existence of a basic concept of restorative justice in the examination of preliminary evidence in the field of taxation in Indonesia shows that things that are too ideologically ideological to legal positivism have begun to be minimized, considering the place (law) of taxes is always in the community and will always be a social phenomenon in every legal country. This justification is based on the understanding that restorative justice in the examination of preliminary evidence in the field of taxation cannot be separated from the framework of the lex specialist principle and the ultimum remedium principle. Fulfillment of the lex specialis requirements in criminal provisions in the field of taxation is based on three alternative conditions that have been proposed by Hiariej (2021):

> "First, the stand-alone law and its material provisions deviate from the Criminal Code. Second, independent laws and formal provisions deviate from the Criminal Procedure Code. Third, a stand-alone law but it is material and formal provisions deviate from the Criminal Code and the Criminal Procedure Code."

The lex specialist of tax law in its criminal provisions was also stated by Moeljatno (2008) by asserting that fiscal criminal law has its method or system that is different from general criminal law. Fiscal criminal law contains rules and criminal provisions regarding state income, which in determining that if a fine is determined against a convicted person, if he is unable to pay, he is declared executable for the goods contained in the rules for paying the fine or can be digijzeled if not willing to pay[25] .

[25] Moeljatno. 2008. Asas-Asas Hukum Pidana. Jakarta: Rineka Cipta.

Tax criminal law has fulfilled the lex specialis principle, whose main policy orientation is in the context of "saving" state finances, but if the handling is carried out through tax crime investigations, then proving, resolving cases and trials requires time, effort, and cost which quite large, even though criminal sanctions are getting heavier, however, they often do not cause a deterrent effect[26]. Thus, it is necessary to apply the principles of restorative justice and ultimum remedium because of the priority of state tax revenues over punishment (jail) to taxpayers. In addition, restorative justice and ultimum remedium in investigating tax crimes will require a lengthy procedure and involve several agencies. This has been confirmed in Article 44B of the KUP Law and the Regulation of the Minister of Finance Number 55 / PMK.03/2016 concerning Procedures for Requests to Stop Investigation of Criminal Acts in the Taxation Sector for the Interest of State Revenue, which states that in the interest of state revenues, the Minister of Finance, upon a written application submitted by the Taxpayer, submits a request for termination of the Investigation to the Attorney General for criminal acts in the field of taxation committed by the Taxpayer.

E. Ideal Restorative Justice in Strengthening Preliminary Evidence Audit

It is no longer appropriate that every indication of a criminal act in the taxation sector, without taking into account to the escalation of that act, will continue to be rolled out into the realm of the court as if it were only punishment (punishment) as the best solution to resolve legal problems and seek justice. This ignores the active participation of the community, as law enforcement is a process of making legal wishes come true. The wishes of the law in society are to create a balance in a society that has been disturbed because the rule of law has not been implemented or the rule of law has been violated, so it must be restored to its original state to create an orderly, peaceful and secure atmosphere, which as a guarantee for human survival[27].

Ideally, restorative justice will strengthen the examination of preliminary evidence in the field of taxation, considering that several legal institutions in Indonesia, such as the Prosecutor's Office and the Police, have regulated restorative justice within their authority. Restorative justice in the initial examination in the taxation sector will avoid a conflict of authority. A particular lex conflict between the Tax PPNS investigation and the prosecution carried out by the Prosecutor's Office considering that Article 5 paragraph (8) letter e PERJA Number 15 of 2020 has regulated that criminal acts committed by corporations is an assessment of restorative justice in terms of assessment. Of course, this will create uncertainty in the law for corporate taxpayers even though the hierarchy of the law is higher than PERJA, considering that Article 44B of the KUP Law and PMK Number 55/PMK.03/2016 have stated that in the interest of

[26] Sarwini. Implementasi Restorative Justice dalam Hukum Pajak. Yuridika, Vol. 29, No. 3, 2014, hlm. 380-396.

[27]Septa Chandra, 2014. Politik Hukum Pengadopsian Restorative Justice dalam Pembaharuan Hukum Pidana. *Fiat Justi sia Jurnal Ilmu Hukum*, Vol. 8, No. 2, pp. 255-277.

state revenues, the Minister of Finance submits a request to terminate the investigation to the Attorney General. In addition, there are other problems regarding lex specialis regarding an activity regulated by more than one law qualified as a special criminal law. This is emphasized by Hiariej (2001) by assuming the substance of the provisions concerning the dangers of harming state finances or the state economy, which are regulated in at least three laws as special criminal laws, namely the Law on the Eradication of Corruption Crimes, the KUP Law, and the Banking Law. Indeed, this will affect the criminal law because the ceremonial law regulated by the three laws is different. If using the KUP Law, the law enforcement is carried out by tax investigators. If using the banking law, the law enforcement is carried out by the Police, whereas if using the law on the Eradication of Corruption Crimes, the enforcement can be carried out by the Police, Prosecutors, or Corruption Eradication Commission(KPK).

Regarding the philosophy and principles of restorative justice in the examination of preliminary evidence, it is appropriate that the tax examiner and taxpayers still prioritize active participation in the form of proportional, transparent, and accountable dialogue or communication to produce an agreement that recovers the tax revenue losses that have occurred[28]. Thus, preliminary evidence examination must be based on the General Principles of Good Governance and good governance principles in avoiding and preventing opportunities for Collusion, Corruption, and Nepotism among taxpayers and tax officials[29] (Sarwini, 2014). To produce the concept of strengthening the preliminary evidence examination based on the General Principles of Good Governance as well as the principles of good governance, ideally, restorative justice in the rules for examining preliminary evidence must meet material requirements, formal requirements, and mechanisms.

Some suggestions for fulfilling material requirements, among others, do not act in the form of repetition of violations, paying all taxes that are still underpaid (at least by making a payment schedule within a specific time), carried out by Taxpayers in good faith as evidenced by several written statements, such as a statement not to repeat the violation that causes the re-examination of the initial evidence, a statement admitting guilt, a statement from all parties involved not to object and relinquish the right to sue before the law, a statement to correct previous years' tax returns that have not expired for examination and prosecution of taxes criminal acts that are deemed to meet the qualifications of preliminary evidence.

Some suggestions for the fulfillment of formal requirements, among others, a statement of guilt and a request for settlement, Minutes of Additional Examination in terms of settlement of cases through restorative justice, results of recommendations for notable case titles for approval of restorative justice settlements, statements of no objections and not coercion of responsibility/compensation, a clear and detailed calculation of losses that is strengthened by the results of the calculation of the tax examiner who does not have a conflict of interest.

[28]Sarwini. 2014. Implementasi Restorative Justice dalam Hukum Pajak. *Yuridika*, Vol. 29, No. 3, pp. 380-396.
[29] *Ibid*.

The mechanism for the application of restorative justice in the initial evidence examination, among others, after receiving an application signed on a stamp from the Taxpayer, conducting administrative research on the fulfillment of the formal requirements for the completion of the preliminary evidence examination through restorative justice, applications that have met the formal requirements are submitted to the head of the office for approval, determine the approval time for signing the restorative justice agreement, conduct special cases with Taxpayers, preliminary Evidence Examination Team, Head of the related Taxpayer Supervision and Consultation Section, and representatives of internal compliance units and legal assistance, compiling administrative completeness and documents and reports on results title of the case, issue a Warrant of Termination of Preliminary Evidence Examination and a Letter of Decision on Termination of Preliminary Evidence Examination on the grounds of Restorative Justice.

4. CONCLUSION

This study resulted in two main conclusions. First, the provisions of restorative justice in the rules for examining preliminary evidence in the field of taxation that currently apply are still regulated in Article 107 PMK Number 18 / PMK.03/2021 concerning the Implementation of Law Number 11 of 2020 concerning Job Creation in the Field of Income Tax, Tax Value Added and Sales Tax on Luxury Goods, as well as General Provisions and Tax Procedures which amend several provisions in PMK Number 239/PMK.03/2014. Second, ideally, restorative justice provisions in strengthening preliminary evidence examinations in the field of taxation in the future should refer to responsible efforts to actively prevent tax avoidance and tax evasion from obtaining consistent benefits instead of prioritizing punishment and responsible efforts to provide solutions and support for the state as a victim of the state's active participation and taxpayers who are subject to preliminary evidence checks in recovering state revenue losses from the tax sector. Then, the concept of strengthening the preliminary evidence examination must be within the framework of the General Principles of Good Governance and the principles of good governance, which are expected to build ideally restorative justice in the rules of preliminary evidence examination through the fulfillment of material requirements, formal requirements, and mechanisms.

This paper attempts to provide the following suggestions based on the conclusions presented above.

1. Preliminary evidence examination rules require the fulfillment of material requirements based on restorative justice principles.
2. There is a need for rules for examining preliminary evidence that requires fulfilling formal requirements based on the principle of restorative justice.
3. There is a need for rules for examining preliminary evidence that requires fulfilling a mechanism based on restorative justice principles.

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