

## LEGAL RECONSTRUCTION ON TAX INVOICES NOT BASED ON ACTUAL TRANSACTIONS: THE LEGAL MEANING OF THE *ULTIMUM REMEDIUM* PRINCIPLE IN SUSTAINABILITY OF TAXPAYER'S BUSINESS IN INDONESIA

Yuli T. Hidayat,<sup>1</sup> Henry D. P. Sinaga<sup>2</sup>

<sup>1</sup> Government Practitioner at the Directorate General of Taxes, Indonesia.  
E-mail: yuliteguhhidayat@yahoo.com

<sup>2</sup> Law Doctoral Program, Universitas Diponegoro, Semarang, Indonesia.  
E-mail: sinagahenrydp@gmail.com

Article	Abstract
<p><b>Keywords:</b> Legal Reconstruction; Tax Invoices Not Based on Actual Transactions; <i>Ultimum Remedium</i> Principle; Sustainable Development</p> <p><b>History of Article</b> Received: November 14, 2022; Reviewed: November 15, 2022; Accepted: November 21, 2022; Published: November 22, 2022;</p> <p><b>DOI:</b></p>	<p>The rampant cases of tax invoices transactions not based on actual transactions and handling that are not aligned and ignoring the principle of <i>ultimum remedium</i>, are crucial problems for the sustainability of the taxpayer's business that the tax authorities must immediately address. However, there have been several efforts in forming and enforcing laws in the field of taxation in terms of handling tax invoices not based on actual transactions; normative philosophical and juridical studies are needed by using the <i>ultimum remedium</i> principle and sustainable development buildings in answering the existing problem formulations. The findings of this study indicate that tax laws and regulations in dealing with tax invoices not based on actual transactions still ignore the <i>ultimum remedium</i> principle. There needs to be an ideal tax (legal) reconstruction in handling tax invoices not based on actual transactions in Indonesia through the meaning of the <i>ultimum remedium</i> principle and the business continuity of taxpayers. The ideal legal concept should become a policy structure, the provisions of which are contained in a Government Regulation and/or Minister of Finance Regulation.</p>

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

### 1. INTRODUCTION

Transactions of Value Added Tax (VAT) on tax invoices that are not based on actual transactions (TBTS) are still rife in Indonesia, even though the government has attempted to handle them through several tax legislation and followed by tax enforcement. However, various tax laws and regulations apply in handling tax invoices that are not based on actual transactions, which have resulted in various tax enforcement carried out by the tax authority in Indonesia, the Directorate General of Taxes (DGT). This can be proven by the

existence of many decisions on tax disputes and decisions on criminal offenses in the field of taxation related to the TBTS tax invoice.

The handling of TBTS tax invoices in the review of criminal acts in the field of taxation can be seen from the existence of several court decisions, such as:

- a) The decision of the Surabaya High Court Number 832/PID/2020/PT.SBY, which strengthens and defends the Decision of the Sidoarjo District Court Number 132/Pid.B/2020/PN.Sda, which states that the defendant was found guilty of committing the crime of Article 39A letter *a juncto* Article 43 paragraph (1) Law Number 6 of 1983 concerning General Provisions and Tax Procedures as amended by Law Number 16 of 2009 (UU KUP).
- b) The decision of the Bandung High Court Number 38/PID.SUS/2020/PT.BDG (which amended the Decision of the Cikarang District Court Number 512/Pid.B/2019/PN.Ckr) stated that the defendant was legally and convincingly proven guilty of committing a simultan crime is the same as deliberately issuing tax invoices that are not based on actual transactions.
- c) The decision of the Bekasi District Court Number 534/Pid.Sus/2019/PN Bks and Decision of the Surabaya District Court Number 1780/Pid.Sus/2021/PN.Sby, which convicts each Defendant who has been proven legally and convincingly guilty of using a TBTS Tax Invoice, thus causing state losses.
- d) Supreme Court Cassation Decision Number 2583 K/PID.SUS/2016, which imposed imprisonment and a fine on the Defendant, Directorate of the Company, who intentionally used tax invoices that were not based on actual transactions for SPT VAT from January 2007 to September 2009, resulting in a loss of the tax principal amounting to Rp.15.13 billion, even though the Defendant had good faith in repaying the state loss of Rp.8.27 billion when the preliminary evidence was being examined.

While the handling of TBTS tax invoices in the realm of administrative law in the field of taxation can be seen from several tax court decisions which still contain offenses under Article 39 A of the KUP Law, such as:

- a) The decision of the Tax Court Number: 82934/PP/M.VIB/16/2017, which ultimately granted the Taxpayer's appeal in the form of correction of Input Tax within Value Added Tax (VAT) for the February 2013 Tax Period of IDR 21.4 million.<sup>1</sup> Entirely, the Directorate General of Taxes evaluated this matter as the use of a fictitious indication of a tax invoice, as the issuer allegedly issued a Tax Invoice which was proven to be invalid because it was contained in attachment SE-04/PJ.5212006 dated 12 April 2006.<sup>2</sup>
- b) Tax Court Decision Number: Put-57014/PP/M.XIA/16/2014, which granted all Taxpayer appeals against The Directorate General of Taxes Decree Number KEP-1727/WPJ.07/2013 dated 28 August 2013 concerning Taxpayer Objections to Assessment Letters Underpayment of Value Added Tax on Goods and Services for the September 2010 Tax Period Number 00928/207/10/055/12 dated 14 August 2012. Through the Decree of the Directorate General of Taxes, there is a Tax correction on Tax Input which is indicated as a Fictitious Tax Invoice according to

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<sup>1</sup> Wajib Pajak tidak menyetujui Keputusan Direktur Jenderal Pajak Nomor KEP-4122/WPJ.07/2015 tanggal 7 Desember 2015, tentang Keberatan Wajib Pajak atas Surat Ketetapan Pajak Kurang Bayar Pajak Pertambahan Nilai Barang dan Jasa Nomor 00006/207/13/056/14 tanggal 11 September 2014

<sup>2</sup> Ortax, "Putusan Pengadilan Pajak Nomor: 82934/PP/M.VIB/16/2017", available at <https://datacenter.ortax.org/ortax/putusan/show/5220>, accessed on July 3, 2022.

the Circular Letter of The Directorate General of Taxes Number SE-27/PJ.52/2003 dated 27 October 2003 concerning List and Sanctions on Taxpayers who are suspected of issuing Illegal Tax Invoices as amended several times, most recently by Circular Letter of the Directorate General of Taxes Number SE-04/PJ .52/2006 dated 12 April 2006.<sup>3</sup>

- c) The decision of the Tax Court Number PUT-116785.16/2011/PP/M.IIA of 2019, which granted Rp. 227.23 million of Rp. 273.16 million Taxpayer's appeal (or the Panel of Judges maintains the Fiskus correction findings of Rp. 45.93 million). Correction of Rp. 273.16 million is an input tax credit. In the correction, there is an invalid tax invoice, which may not be credited as referred to in the Directorate General of Taxes Circular Letter Number SE-04/PJ.52/2006 dated 12 April 2006 concerning the Eighth Amendment to Circular Letter of The Directorate General of Taxes Number SE-27/ PJ.52/2003 concerning List and Sanctions on Taxpayers who are suspected of issuing Illegal Tax Invoices. SE-04/PJ.52/2006 confirms that taxpayers who make transactions with taxpayers included in the list in attachment SE-04/PJ.52/2006 cannot credit their input tax so that the VAT payable on the transaction will be billed again along with the penalty, if the results of an examination of the flow of money and goods can be proven that the transaction is unqualified.<sup>4</sup>

The inconsistent handling of TBTS tax invoices contained in many tax administration and criminal decisions has been criticized in several court decisions and several scientific studies. Several legal expert opinions contained in several court decisions regarding the occurrence of criminal acts in the field of taxation related to TBTS tax invoices have explained that the essence of the actual emphasis on criminal provisions in the field of taxation is as a final remedy (*ultimum remedium*) in administrative penal law.<sup>5</sup> This can be seen from the statements of several legal experts in court decisions related to TBTS tax invoices, such as the Supreme Court Cassation Decision Number 2583 K/PID.SUS/2016 and Palembang District Court Decision Number 394/Pid.sus/2015/PN Plg, which has been strengthened by the Supreme Court's Cassation Decision Number 1109 K/PID.SUS/2016. Through the Supreme Court's Cassation Decision Number 2583 K/PID.SUS/2016 there is an explanation of the Legal Expert on the State Budget and Public Finance, which among other things, explains that matters regarding the state financial regime (including taxes) are administrative settlements because the state prioritizes state revenues (information), and the explanation of the Criminal Expert explaining that at the administrative stage of settlement, there is an installment process, which is a good intention and therefore there is no intention to commit a tax violation, and it is a reason as an apology (declaration).<sup>6</sup> Furthermore, the testimony of the Criminal Law Expert in the Decision of the Palembang District Court Number 394/Pid.sus/2015/PN Plg has emphasized that before being subject to administrative sanctions or criminal sanctions against the Taxpayer, action must first be taken in the

<sup>3</sup> Utama Conculting, "Keputusan Pengadilan Pajak Nomor: Put-57014/PP/M.XIA/16/2014, available at <https://pengadilanpajak.com/2017/11/28/keputusan-pengadilan-pajak-nomor-put-57014-pp-m-xia-16-2014/>, accessed on July 5, 2022.

<sup>4</sup> Sengketapajak.com, available at <https://sengketapajak.com/2021/01/29/put-116785-16-2011-pp-m-ia-tahun-2019/>, accessed on May 30, 2022.

<sup>5</sup> 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, No. 2, 2020, p. 52, pp. 50 - 71.

<sup>6</sup> *Ibid.*, p. 59.

form of appeals and admonitions that are administrative, and if the administrative appeal is not fulfilled, then proceed with criminal sanctions.<sup>7</sup>

DGT has also worked to handle TBTS tax invoices through the creation of Electronic Tax Invoices, well known as *e-Faktur*.<sup>8</sup> However, the *e-Faktur* efforts that have been carried out since the issuance of the Directorate General of Taxes Regulation Number PER-16/PJ/2014 concerning Procedures for Making and Reporting Tax Invoices in Electronic Form have not been able to eliminate the occurrence of TBTS tax invoices considering that in 2018 there were 1,049 deactivations of electronic certificates Taxpayers who are indicated to issue illegitimate tax invoices,<sup>9</sup> and there are still 44 cases of criminal acts of taxation with the modus operandi in the form of TBTS tax invoices during 2020.<sup>10</sup>

The rise of TBTS tax invoices, the delict of Article 39A of the KUP Law, the implementation of the *ultimum remedium* principle in terms of criminal provisions in the field of taxation as administrative penal law, Article 8 paragraph (3) of the KUP Law which regulates the disclosure of untruthful actions by taxpayers only in the case of failure to submit Tax Period Notification Letter (SPT) or submitting it whose contents are incorrect or incomplete, or attaching information whose contents are incorrect, and law enforcement in the field of taxation against users of TBTS tax invoices that have not been aligned, can affect the continuity of a taxpayer's business. Maintaining the continuity of the taxpayer's business is an option for the government to reduce the burden on the environment with a particular focus on service approaches and closing regulatory loops that can hinder recovery and collaboration with other stakeholders.<sup>11</sup> Thus, it is crucial to answering the following 2 (two) essential problem formulations. First, what are the applicable tax laws and regulations in handling tax invoices that are not based on actual transactions in Indonesia? Second, what is the ideal tax (legal) reconstruction in handling tax invoices that are not based on actual transactions in Indonesia? The urgency of legal reconstruction is based on the need for philosophical and juridical studies in tackling violations or crimes detrimental to state finances through an action or process that rebuilds, re-creates, or reorganizes pre-existing legal constructions so that they become more ideal for use.<sup>12</sup>

## 2. METHODS

The two formulations of the research question demonstrate that this study adequately uses the doctrinal method. This method is commonly called the normative research method; working to find correct answers through the evidence sought in or from

<sup>7</sup> Henry D. P. Sinaga, Loss (of Revenue) of State within Taxation Crimes in Indonesia, *Mimbar Hukum*, Vol. 30, No. 1, 2018, p. 143, pp. 141-155.

<sup>8</sup> Adi Bayu Firdaus dan Andri Marfiana, Penerapan Prepopulated Data Pajak Masukan pada Aplikasi E-Faktur 3.0 dan Kesesuaiannya dengan Peraturan PPN, *Educoretax*, Vol. 1, No. 3, 2021, pp. 221-222.

<sup>9</sup> Inews, "DJP Nonaktifkan 1.049 Faktur Pajak Tidak Sah", 25 Januari 2018, available at <https://www.inews.id/finance/keuangan/djp-nonaktifkan-1-049-faktur-pajak-tidak-sah>, accessed on May 30, 2022.

<sup>10</sup> Direktorat Jenderal Pajak, Laporan Tahunan 2020, Jakarta: Direktorat Jenderal Pajak, 2021, available at <https://pajak.go.id/sites/default/files/2021-10/Laporan%20Tahunan%20DJP%202020%20-%20Bahasa.pdf>, accessed on May 29, 2022, p. 83.

<sup>11</sup> Rodrigo Lozano, Sustainable business models: Providing a more holistic perspective, *Business Strategy and the Environment*, Vol. 27, Iss 8, pp. 1159-1166, p.2.

<sup>12</sup> Henry D. P. Sinaga, Yudha Pramana, dan Anis W. Hermawan, Income Tax Reconstruction on Construction Services to Support Development in Indonesia, *World Journal of Entrepreneurship, Management and Sustainable Development*, Vol. 18, No. 6, 2022.

written legal prescriptions and through the underlying value or doctrine.<sup>13</sup> Furthermore, Sidharta emphasized that the method is called that because this method is based on principles that require that compliance be forced by using the tools of state power (normative), taking part in the world of obligations (*das sollen*), and the product is ethical.<sup>14</sup>

This doctrinal method uses secondary data, which are generally data in a ready-made state and can be used immediately.<sup>15</sup> The secondary data consists of 3 (three) legal materials, namely primary legal materials, secondary legal materials, and tertiary legal materials. Primary legal materials are binding legal materials.<sup>16</sup> Bearing in mind that the strength of this legal material is based on the hierarchy of laws and regulations as referred to in Article 7 of Law Number 12 of 2011 concerning the Formation of Legislation as last amended by Law Number 13 of 2022, the hierarchy is from the highest to the lowest are the 1945 Constitution of the Republic of Indonesia (1945 Constitution of the Republic of Indonesia), Laws/Government Regulations in Lieu of Laws, Government Regulations, Presidential Regulations, and Regional Regulations. Primary legal materials used in this study include the 1945 Constitution of the Republic of Indonesia, UU KUP, Ministry of Finance Regulation (PMK) Number 147/PMK.03/2017 concerning Procedures for Taxpayer Registration and Elimination of Taxpayer Identification Numbers and Confirmation and Revocation of the Confirmation of a Taxable Entrepreneur, Regulation of the Directorate General of Taxes Number PER-16/PJ/2018 concerning Amendments to Regulation of the Directorate General of Taxes Number PER-19/PJ/2017 concerning Treatment of Issuance and/or Use of Illegal Tax Invoices by Taxpayers, Circular Letter of the Directorate General of Taxes Number SE-17/PJ/2018 concerning Procedures for Handling Taxpayers Indicated As Issuers of Invalid Tax Invoices, Taxpayers Issuing Invalid Tax Invoices, and/or Taxpayers Indicated As Users of Invalid Tax Invoices.

Secondary legal materials are legal materials that provide an explanation of primary legal materials,<sup>17</sup> such as reference books, articles from scientific journals, and the results of existing research. Meanwhile, tertiary legal materials are legal materials that can provide explanations regarding primary and secondary legal materials, such as internet sources from certain institutions, dictionaries, and encyclopedias.<sup>18</sup> Furthermore, the legal materials in this study will be analyzed and discussed using several approaches so that conclusions and suggestions can be produced to answer the 2 (two) existing problem formulations. Some of the approaches used in this study are a philosophical approach, a statutory approach, a conceptual approach, and a systematic legal approach.

### 3. LITERATURE REVIEW AND THEORETICAL FRAMEWORK

In producing an ideal tax (legal) concept for taxpayers who use actual TBTS tax invoices in Indonesia, this study is based on many studies and literature related to the

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<sup>13</sup> Soetandyo Wignjosoebroto, *Ragam-Ragam Penelitian Hukum*, pp. 121-141, in Sulistyowati Irianto and Shidarta (Eds.), *Metode Penelitian Hukum: Konstelasi dan Refleksi*, Jakarta: Yayasan Obor Indonesia, 2009, p. 121-122.

<sup>14</sup> Bernard Arief Sidharta, *Penelitian Hukum Normatif: Analisis Penelitian Filosofikal dan Dogmatikal*, pp. 142-149, in Sulistyowati Irianto and Shidarta (Eds.), *Metode Penelitian Hukum: Konstelasi dan Refleksi*, Jakarta: Yayasan Obor Indonesia, 2009, p. 143.

<sup>15</sup> Soerjono Soekanto, *Pengantar Penelitian Hukum*, Jakarta: Penerbit Universitas Indonesia, 2010, p. 12.

<sup>16</sup> *Ibid.*, p. 52.

<sup>17</sup> *Loc.cit.*

<sup>18</sup> *Loc.cit.*

*ultimum remedium* principle and business continuity of taxpayers. It cannot be denied that in collecting taxes, criminal provisions are needed through laws where enforcement is carried out through criminal sanctions, which can be *primum remedium* or *ultimum remedium*.<sup>19</sup> Currently, enforcement of sanctions in the field of taxation is still characterized by autonomous law. Autonomous law tends to maintain institutional integrity; where to achieve this goal, law isolates itself, narrows its responsibilities, and accepts blind formalism to achieve integrity.<sup>20</sup> The occurrence of blind formalism is a challenge for business continuity bearing in mind that taxes cannot be separated from business and building Sustainable Development Goals (SDGs). The SDGs are a shift in 2 (two) approaches, namely from the rules-based approach to the principles-based approach.<sup>21</sup> In many cases, the rules-based approach that is oriented towards autonomous law creates valid obstacles to business continuity. In contrast, the principles-based approach is a business motivator that enables sustainable development.<sup>22</sup>

The principles-based approach builds on generally accepted declarations and principles (such as the human rights principle) and guidelines developed by intergovernmental organizations (such as the OECD) to fill governance and institutional gaps at all levels of society. The existence of the principles-based approach has established the floor of fundamental principles to 'not harm', thus realizing the main ambition of the SDGs, namely implementing the principles that could trigger a 'race to the top' to 'do good' in enhancing transformational change which is expected.<sup>23</sup> This principle approach, including the *ultimum remedium* principle, can be reformulated in detecting and fighting irregularities that hinder business continuity, which basically can be done through understanding relevant social norms (knowing norms), knowledge and understanding of actions, situations, or events that specifically have the potential to become hidden deviations (knowing the facts), ability to categorize actions, situations, or events that are not only deviations from relevant social norms and values but also morally reprehensible (judgemental ability), ability to formulate and report judgment and make others accept the definition of actions, situations or events as disgraceful (communication), and seek to obtain adequate action from, or with, other parties (mobilization).<sup>24</sup>

Further understanding of the essential principles of criminal law that can deal with obstacles to business continuity, in this case, an understanding of *primum remedium* or *ultimum remedium*, considering the firm grip of autonomous law in handling TBTS tax invoices so far. Based on the opinion of Anindyajati et al., the requirements for a criminal sanction can be used as a *primum remedium* if it fulfills the following certain criteria, among other things it is very necessary and other laws cannot be used, it causes a lot of victims, the suspect/defendant is a recidivist, the loss cannot be recovered, and if other,

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<sup>19</sup> Titis Anindyajati, Irfan Nur Rachman, dan Anak Agung Dian Onita, Konstitusionalitas Norma Sanksi Pidana sebagai *Ultimum Remedium* dalam Pembentukan Perundang-undangan, *Jurnal Konstitusi*, Vol. 12, No. 4, 2015, pp. 876-877

<sup>20</sup> Philippe Nonet and Philip Selznick, *Hukum Responsif*, diterjemahkan oleh Raisul Muttaqien, Bandung: Penerbit Nusa Media, 2010, p. 87.

<sup>21</sup> Rob van Tulder and Eveline van Mil, *Principles of Sustainable Business: Frameworks for Corporate Action on the SDGs*, Oxon: Routledge, 2023, p. 268.

<sup>22</sup> *Loc.cit.*

<sup>23</sup> *Loc.cit.*

<sup>24</sup> Tomas Brytting, *Rationalizing Deviances: Avoiding Responsibility*, in Susanne Arvidson (Ed.), *Challenges in Managing Sustainable Business: Reporting, Taxation, Ethics and Governance*, Palgrave Macmillan, 2019, p. 297.

lighter law enforcement mechanisms have been rendered ineffectual or neglected.<sup>25</sup> Criminal law as the final instrument (*ultimum remedium*) refers to the harshest criminal law among other legal instruments. There is a policy of abolishing independence which is legalized by law in controlling people's behavior, so criminal sanctions should be determined regularly and with full consideration.<sup>26</sup>

More specifically regarding *ultimum remedium*, this principle originates from the central idea of penology theory which states that the punishment imposed by the State in the form of imprisonment can cause painful suffering to wrong humans. That central idea is held to be wrong, regardless of whether it is exercised through democratically agreed institutions.<sup>27</sup> Thus, because imprisonment in its polymorphic quality is suffering, criminal law sanctions can only be justified as a last resort, as an *ultima ratio*, the essence of which is defined as the principle of last resort.<sup>28</sup> Furthermore, Van de Bunt argued that there are 3 (three) meanings of criminal law as *ultimum remedium*. The first meaning is that applying punishment only against anyone who violates the law is ethically very heavy. The second meaning is that criminal sanctions are heavier and harsher than those in other fields of law, so they should be applied in cases where these other areas of law cannot resolve existing violations. The third meaning is that it is the administrative official who knows that a violation has occurred, so the official is prioritized to take action first, then criminal law enforcers.<sup>29</sup>

Furthermore, Minkkinen critically discussed the constitutional status of the principle of 'last resort' at three different levels, namely at the level of jurisprudence as contained in the German Constitutional Court, at the level of criminal justice principles in Europe, and at the level of selecting human rights instruments at a global level.<sup>30</sup> Minkkinen's critical discussion resulted in allegations that criminal sanctions limited by the principle of 'last resort' are very polymorphic sanctions. The polymorph of the 'last resort' principle can be seen in the existence of deprivation of liberty and imprisonment involving elements of corporal punishment and shame. However, it must be in line with the fundamental rights protected by the principle of *ultimum remedium* in the form of human dignity (not complete personal freedom). This polymorphism, imprisonment, and human dignity, both sanctions, and rights that are threatened, must be watched out for because it can present 'obscurity' in the 'last resort', which is the hallmark of the principles of liberal constitutionalism.<sup>31</sup>

The polymorphously of the *ultimum remedium* principal experiences obstacles in the development of society. In today's developing society, if an act is considered detrimental to the interests of the state and the people, both according to the applicable laws and according to the people's feelings, then criminal sanctions are considered the first choice or *primum remedium*.<sup>32</sup> That is, the position of *primum remedium* in the

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<sup>25</sup> *Ibid.*, p. 877.

<sup>26</sup> *Loc.cit.*

<sup>27</sup> Panu Minkkinen, 'If Taken in Earnest': Criminal Law Doctrine and the Last Resort, *The Howard Journal*, Vol. 45, No. 5, 2006, p. 524.

<sup>28</sup> *Loc.cit.*

<sup>29</sup> Mas Putra Zenno Januarsyah, Penerapan Prinsip *Ultimum Remedium* dalam Tindak Pidana Korupsi: Kajian Putusan Nomor 2149 K/PID.SUS/2011, *Jurnal Yudisial*, Vol. 10, No. 3, 2017, p. 267, pp. 257-276.

<sup>30</sup> Panu Minkkinen, The 'Last Resort': A Moral and/or Legal Principle?. *Oñati Socio-legal Series* [online], Vol. 3, No. 1, p.21, pp. 21-30.

<sup>31</sup> *Loc.cit.*

<sup>32</sup> Kukuh Subyakto, Azas *Ultimum Remedium* atukah Azas *Primum Remedium* yang Dianut dalam Penegakan Hukum Pidana pada Tindak Pidana Lingkungan Hidup pada UU Nomor 32 Tahun 2009 tentang

context of law is no longer the last remedy but the first remedy to deter people who commit criminal offenses.<sup>33</sup> The constraints in the principle of *ultimum remedium* mean that criminal sanctions are not enforced as the final sanction after administrative sanctions or civil sanctions are no longer applicable.<sup>34</sup> In fact, the *ultimum remedium* principle contains elements of the objective so that the imposition of criminal sanctions can be given to the right person, bearing in mind that the perpetrators of criminal acts are still guaranteed their human rights, including the right to obtain justice, the right to life, and the right to self-improvement.<sup>35</sup>

There are several clear facts that there have been violations of the principles of criminal law theory and administrative penal law against the *ultimum remedium* principle in several laws and regulations in Indonesia, including in tax laws and regulations. First, the use of criminal threats in advance of fines or administrative sanctions, as the construction of the article is (criminal sanctions) + and/or + (fine sanctions), (criminal sanctions) + or + (fine sanctions), (criminal sanctions), or (criminal sanctions) + and + (fine sanctions).<sup>36</sup> Second, the current fine criminal sanction policy only increases the number of criminal threats, which have turned out to be ineffective in tackling criminal acts, including in the field of taxation, so a system of criminal sanctions should also include policies that can be expected to guarantee the implementation of these criminal sanctions.<sup>37</sup> Third, the implementation or enforcement of law in the field of taxation and issues in taxation, including in terms of handling the use of TBTS tax invoices, are identical to human problems, in which, in essence, there is an antinomy between the values of freedom and sustainability in fiscal administration law and the principle of legality in criminal law. . This antinomy can be seen from the following two sides. The first side efforts to realize the role of independent taxpayer participants in developing a self-assessment system as referred to in Article 12 of the KUP Law by the provisions of the laws and regulations that apply correctly.<sup>38</sup> On the second or the reverse side, there has been a criminal offense in the KUP Law as a fulfillment of the principle of legality, as the principle of legality refers to the first requirement to take action on a disgraceful act, there must be a provision in the criminal code that defines the disgraceful act and provides a sanction against it.<sup>39</sup> Certainly, this violation has also violated the constitutional rights of citizens in terms of deprivation of human rights attached to a person, as Article 28 paragraph (1) of the 1945 Constitution of the Republic of Indonesia has stated that "Every person has the right to recognition, guarantees, protection and assurance fair law and equal treatment before the law".<sup>40</sup>

Then in terms of tax law, the violation of the principle of criminal law theory against the *ultimum remedium* principle in several laws and regulations can be seen from

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Perlindungan dan Pengelolaan Lingkungan Hidup, Jurnal Pembaharuan Hukum, Vol. 11, No. 2, 2015, pp. 211-212.

<sup>33</sup> *Loc.cit.*

<sup>34</sup> Novita Sari, Penerapan Asas Ultimum Remedium dalam Penegakan Hukum Tindak Pidana Penyalahgunaan Narkotika, Jurnal Penelitian Hukum De Jure, Vol. 17, No. 3, September 2017, p. 353.

<sup>35</sup> *Loc.cit.*

<sup>36</sup> Titis Anindyajati, Irfan Nur Rachman, dan Anak Agung Dian Onita, *Op.cit.*, p. 879.

<sup>37</sup> Muladi dan Barda Nawawi Arief, Teori-Teori dan Kebijakan Pidana, Bandung: PT. Alumni, , p. 181.

<sup>38</sup> Mahkamah Agung Republik Indonesia, Antinomi Investigasi dan Pemeriksaan Pajak: Suatu Tinjauan atas Prinsip-Prinsip Yuridis Fiskal, Jakarta: Biro Hukum dan Humas Badan Urusan Administrasi Mahkamah Agung Republik Indonesia, 2016, p. 17.

<sup>39</sup> Eddy O. S. Hiariej, Asas Legalitas dan Penemuan Hukum dalam Hukum Pidana. Jakarta: Penerbit Erlangga, 2009, p. 27.

<sup>40</sup> Titis Anindyajati, Irfan Nur Rachman, dan Anak Agung Dian Onita, *Loc.cit.*



the criminal sanctions, which still prioritize the threat of imprisonment, which should not ignore alternative types of sanctions outside prison, for example, fines, or alternatives other forms of non-prison punishment.<sup>41</sup> This is in line with the idea of Thomas Aquinas, who emphasized that "*law is nothing but rational arrangements for the welfare and well-being of society as a whole, regardless of who makes it (government or society)*".<sup>42</sup> and Moerings' thoughts which emphasized that punishing criminals should also prevent potential perpetrators of crimes from realizing their bad intentions (general prevention).<sup>43</sup> Deterring potential perpetrators through effective threats is not based on the high crime threat but rather by considering how big the chance is to be caught. Considering that the perpetrators of committing the (criminal) act based on their deepest beliefs or because they are motivated by personal or social conditions will not feel afraid of threats of punishment, optimism for the effectiveness of punishment is only limited, namely dealing with potential perpetrators who are pursuing power and money/assets.<sup>44</sup>

Thoughts related to the *ultimum remedium* principle in criminal law, as explained above, indicate that the act of intentionally issuing and/or using TBTS tax invoices is in line with the position of tax law as part of state administrative law. So that in the context of tax restoration, which is the right of the state which has an impact on increasing voluntary compliance of taxpayers in the event of TBTS tax invoice transactions, legal certainty from state administrative law has a range of: (a) instruments of the authorities to regulate, balance and control various interests taxpayer; (b) regulate how the taxpayer participates; (c) legal protection and certainty for taxpayers; (d) the basis for the implementation of good governance.<sup>45</sup>

#### 4. ANALYSIS AND DISCUSSION

##### A. Overview of the Tax Invoices and Tax Invoices Not Based on Actual Transactions

The imposition of VAT in Indonesia is carried out based on a tax invoice system so that for every delivery of goods and/or services carried out by a Taxable Enterprise, a tax invoice must be made as proof of the transaction for the delivery of goods and/or services that are tax payable. Tax invoices as proof of tax collection for Taxable Enterprises that collect tax can be calculated by the amount of tax payable. The obligation to collect, deposit and report taxes is on the Taxable Enterprises that deliver the taxable goods or taxable services. However, there are exceptions as stipulated in Article 16A of the VAT Law, which states that specific individuals or certain entities or government agencies are appointed to collect, deposit, and report tax payable on receipt of taxable goods or receipt of taxable services from Taxable Enterprises.

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<sup>41</sup> Topo Santoso, Suatu Tinjauan atas Efektivitas Pemidanaan, dalam Agustinus Pohan, Topo Santoso, dan Martin Moerings (Eds.), *Hukum Pidana dalam Perspektif*, Denpasar: Pustaka Larasan; Jakarta: Universitas Indonesia, Universitas Leiden, Universitas Groningen, 2012, p. 221.

<sup>42</sup> Peter M. Marzuki, *Pengantar Ilmu Hukum*, Jakarta: Kencana, 2008, p. 97.

<sup>43</sup> Martin Moerings, Apakah Pidana Penjara Efektif, dalam Agustinus Pohan, Topo Santoso, dan Martin Moerings (Eds.), *Hukum Pidana dalam Perspektif*, Denpasar: Pustaka Larasan; Jakarta: Universitas Indonesia, Universitas Leiden, Universitas Groningen, 2012, p. 248.

<sup>44</sup> *Loc.cit*

<sup>45</sup> Ridwan HR., *Hukum Administrasi Negara*. Jakarta: RajaGrafindo Persada, 2006, pp. 43-45.

The mechanism for imposing VAT is by Law Number 8 of 1983 concerning Value Added Tax on Goods and Services and Sales Tax on Luxury Goods as last amended by Law Number 7 of 2021 concerning Harmonization of Tax Regulations (UU PPN and PPnBM) with an invoice system tax using the credit method are part of the application of a self-assessment system. What is meant by a self-assessment system in tax collection is to provide an opportunity for Taxpayers to voluntarily calculate, pay and report tax payable based on tax laws and regulations by the actual situation. The information that must be included in the Tax Invoice as part of the self-assessment system is: a) name, address and Taxpayer Identification Number (NPWP) of the Taxable Entrepreneur who sells or provides services, b) name, address and NPWP of the buyer of the goods or service recipient, c) type, type, quantity, unit price and selling or replacement price, d) VAT/PPn BM collected, and e) date of handover.

VAT collected by Taxable Enterprises in the VAT Law is referred to as output tax (PK) or Output VAT. In contrast, paid VAT on the acquisition or import of goods or utilization of services directly related to business activities is called input tax (PM) or Input VAT. In order for a PM to be credited, Article 13 of the VAT Law regulates several important requirements, including a) the PM is directly related to its business activities, the criteria for a direct relationship are expenses to carry out the functions of production, distribution and maintenance and collection of business income, b) Tax Invoice filled in completely, c) Tax Invoice is issued not exceeding a period of 3 months from the time the tax invoice is supposed to be made. Thus, if these conditions cannot be met, the paid VAT by Taxable Enterprises cannot be credited.

If the PK is greater than the PM in one tax period, then the difference is VAT that Taxable Enterprises to the state treasury must deposit. Meanwhile, if PK is less than PM, the difference is VAT which can be compensated for in the next tax period. The overpayment of VAT can be requested for a refund at the end of the financial year. For Taxable Enterprises that deliver exports or submit to VAT collectors or deliveries that receive accessible VAT facilities, the excess PM from PK can be requested for a return of each tax period.

Taxable Enterprises must submit a notification letter (SPT VAT) every tax period to account for collected, paid, and deposited VAT. SPT VAT is a tool for Taxable Enterprises to hold accountable the fulfillment of VAT obligations mandated by law. The format and form of VAT returns have been determined by the Minister of Finance.

The existence of a brief explanation of the tax invoice shows that the tax invoice has 3 (three) main functions. First, as proof of tax collection for Taxable Enterprises that deliver goods or services. Second, as proof of payment of VAT or PPn BM for goods buyers or service recipients. Third, as proof or credit basis for Taxable Enterprises that buy goods or use services. However, the existence of essential tax invoice functions in VAT in Indonesia has become a tool for abuse by specific individuals which can cause losses to state revenues. This can be seen from the prevalence of TBTS tax invoices in Indonesia. The TBTS tax invoice is part of an invalid tax invoice, as is an invalid tax invoice based on Article 1 Point 5 of the Directorate General of Taxes Regulation Number PER-19/PJ/2017 and Letter E number 1(a) Directorate General of Taxes Circular Letter Number SE- 17/PJ/2018 are tax invoices issued based on actual transactions, and/or tax invoices issued by Entrepreneurs who have not been confirmed as Taxable Enterprises.

## B. Prevailing Law of the Tax Invoices Not Based on Actual Transactions

The term tax invoices not based on actual transactions is found in criminal provisions in the KUP Law, as is the entire formulation of Article 39A of the KUP Law. The formulation of Article 39A of the KUP Law shows that the act of deliberately issuing and/or using a TBTS tax invoice is a formal offense, as the formulation of the offense in such a way gives the meaning that the core of the prohibition formulated does not require the emergence of a certain consequence from the act as a condition for completing the crime, but solely on the offender actions.<sup>46</sup> This consideration is strengthened by Article 39 paragraph (1) letter d of the KUP Law which can be said to be a material offense considering that the entire formulation of the Article states that "everyone who deliberately submits a Tax Return and/or statement whose contents are incorrect or incomplete to cause a loss on state income shall be punished with imprisonment for a minimum of 6 (six) months and a maximum of 6 (six) years and a fine of at least 2 (two) times and a maximum of 4 (four) times the amount of tax payable that is not or is underpaid.. However, if it intentionally issues and/or uses a TBTS tax invoice has violated 2 (two) offenses, namely Article 39A of the KUP Law and Article 39 paragraph (1) letter d of the KUP Law, then as the offense is an alternative offense (*concursum idealistic*), then the Taxpayer or the suspect is subject to the highest administrative sanction. This is exemplified in the 2022 Draft Government Regulation on General Provisions and Tax Procedures which explains that taxpayers or suspects committing criminal acts in the field of taxation "deliberately use tax invoices that are not based on actual transactions" resulting in taxpayers or suspects submitting "Letters Notification of Period of Value Added Tax whose contents are incorrect", then the criminal act in the field of taxation shall be subject to the sanction of Article 39A letter a of the KUP Law.

Furthermore, after the issuance of Law Number 7 of 2021 concerning Harmonization of Tax Regulations (UU HPP), there are no Government Regulations and Regulations of the Minister of Finance (PMK) governing implementing regulations regarding the issuance and/or use of tax invoices that are not based on transactions that actually. However, there is Government Regulation Number 74 of 2011 which indirectly regulates tax invoices not based on actual transactions, and there are Directorate General of Taxes Regulations and Circular Letters of the Directorate General of Taxes which directly regulate several matters concerning the term tax invoices not based on actual transactions.

Government Regulation Number 74 of 2011 which regulates indirectly regarding tax invoices not based on actual transactions can be seen from the provisions which confirm that taxpayers can make corrections to their SPT as long as an audit has not been carried out in order to issue a tax assessment letter (SKP) and the determination has not an expired tax within a period of 5 (five) years after the end of the tax period, part of the tax year, or the tax year, as referred to in Article 13 paragraph (1) of the KUP Law.

Regulation of the Directorate General of Taxes Number PER-16/PJ/2018 regulates the determination of suspending status for Taxpayers who are indicated to have issued an Illegal Tax Invoice, where what is meant by an Illegal Tax Invoice itself is a tax invoice issued not based on an actual transaction, and /or tax invoices issued by Entrepreneurs who have not been confirmed as Taxable Entrepreneurs. Article 2

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<sup>46</sup> Amir Ilyas, *Asas-Asas Hukum Pidana: Memahami Tindak Pidana dan Pertanggungjawaban Pidana Sebagai Syarat Pemidanaan*, Yogyakarta: Rangka Education Yogyakarta & PuKAP-Indonesia, 2012, p. 29.

paragraph (1) PER-16/PJ/2018 stipulates that the Directorate General of Taxes has the authority to determine to suspend status for taxpayers indicated as issuers based on the results of research on issuer indications, results of development and analysis of information, data, reports, and complaints, results of the development of evidence examination initiation of other Taxpayers, results of investigations of other Taxpayers, information obtained when the Taxpayer was being examined for preliminary evidence, or information obtained when the Taxpayer was being investigated.

The Circular Letter of The Directorate General of Taxes Number SE-17/PJ/2018 regulates internal DGT regarding the technical handling of Taxpayers Indicated as Illegal Tax Invoice Issuers. If the Directorate General of Taxes has issued a Decree of the Directorate General of Taxes concerning Determination of Suspend Status, then there will be temporary deactivation of the Electronic Certificate of the Taxable Entrepreneur's account on the Taxpayer's e-invoice application. Based on the Decree of the Directorate General of Taxes regarding the Determination of Suspend Status, Taxpayers with Suspend Status can submit clarifications to the Head of the Regional Office of the DGT by the provisions of Article 7 paragraph (2) PER-19/PJ/2017 as amended by PER-16/PJ/2018, as long as the said Taxpayer has not undergone Preliminary Evidence Audit or Investigation. Based on the review of the Taxpayer's clarification, the Head of the DJP Regional Office can grant or reject the Taxpayer's clarification. As for the meaning of a Taxpayer Indicated as an Invalid Tax Invoice Issuer is a "*Taxpayer who indicates a Taxpayer issuing an Invalid Tax Invoice*", while a Taxpayer Issuing an Invalid Tax Invoice is a "*Taxpayer based on a court decision that has had permanent legal force is declared as a Taxpayer who has issued an Invalid Tax Invoice*", and a Taxpayer who is indicated as an Illegal Tax Invoice User is a "*Taxpayer who uses an Illegal Tax Invoice issued by an Issuer Indicated Taxpayer and/or a Taxpayer Publisher*".

PER-16/PJ/2018 and SE-17/PJ/2018 regulate in detail the technical handling of Taxpayers Indicated as Issuers of Invalid Tax Invoices. Since establishing the suspended status, the DGT has only given a maximum of 30 days to taxpayers who are not currently being examined for preliminary evidence or criminal investigations in the field of taxation to make clarifications. If a taxpayer designated as suspended is suspected of having committed a tax crime, such as issuing a tax invoice that is not based on an actual transaction or has not been confirmed as a Taxable Entrepreneur, then the Preliminary Evidence Audit will be continued.

### **C. A Critical Review of Tax Invoices Not Based on Actual Transactions**

Solving legal problems must be carried out with observance and responsiveness to societal developments.<sup>47</sup> Law enforcement must be based on a scientific manner, including the courage to admit mistakes and correct them, be open to opinions or criticism, and be objective and impartial,<sup>48</sup> considering that the law could be better, because it is impossible for the law to regulate all activities of human life completely. There are times when a law is incomplete and sometimes unclear, but

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<sup>47</sup> Sudikno Mertokusumo, *Penemuan Hukum: Sebuah Pengantar*, Yogyakarta: CV. Maha Karya Pustaka, 2020, p. 41.

<sup>48</sup> *Loc.cit.*

even though it is incomplete or unclear, a law must still be implemented or enforced.<sup>49</sup>

Laws that must still be implemented or enforced despite incompleteness or ambiguity are also related to the existence of dualism of administrative sanctions and criminal sanctions against tax invoices not based on actual transactions. This can be seen from the formulation of Article 39A letter a of the KUP Law, which is a formal offense, the formulation of Article 39 paragraph (1) letter d of the KUP Law, which is a material offense, and the provisions of Article 44B paragraph (2) letter c of the KUP Law or Article 44B paragraph (2a) letter b and paragraph (2b) of the KUP Law which regulates that investigations of criminal acts in the field of taxation can be stopped or as a consideration for prosecution without being accompanied by imprisonment for taxpayers or suspects who pay off the amount of tax in a tax invoice plus an administrative sanction in the form of a fine of 4 (four) times the tax amount on the tax invoice. The three criminal provisions in the field of taxation create a legal vacuum when Article 8 paragraph (3) of the KUP Law stipulates that taxpayers of their own free will can express in a written statement the untruthfulness of their actions if they do not submit an SPT, or submit an SPT whose contents are incorrect or incomplete or attach a statement whose contents are incorrect, as referred to in Article 38 or Article 39 paragraph (1) letter c and letter d of the KUP Law, as long as the investigation has not been notified to the public prosecutor through investigators from the Indonesian National Police. That is, the Elucidation of Article 44B paragraph (2a) of the KUP Law explains that the handling of criminal cases in the field of taxation prioritizes recovery of losses on state revenue rather than punishment (which is extended to the trial stage), including in the case of transactions in the form of tax invoices not based on actual transactions, to ignore the *ultimum remedium* principle. In the case of taxpayers conducting tax invoices not based on actual transactions consisting of 2 (two) parties, namely the party issuing the TBTS tax invoice and the party crediting the TBTS tax invoice, they should be treated differently in terms of law enforcement in the field of taxation.

The TBTS tax invoice user fulfills a material offense when Article 39A letter a of the KUP Law is interpreted restrictively in Article 39 paragraph (1) letter d of the KUP Law, where an invalid VAT Input for credit causes the Taxpayer to submit a Periodic VAT SPT whose contents are incorrect. This can be interpreted that on Periodic VAT SPTs whose contents are incorrect originating from TBTS tax invoice transactions that are being examined for initial evidence until the start of the investigation have not been notified to the Public Prosecutor through investigators from the Indonesian National Police, the Taxpayer can still make disclosures the unrighteousness of his actions by submitting Periodic VAT Returns whose contents are correct or complete. It can also be interpreted that taxpayers who have not undergone a tax audit can voluntarily correct their SPT submitted to the tax office by submitting a written statement, as referred to in Article 8 paragraph (1) of the KUP Law.

However, the matter of self-disclosure of untruths and/or self-correction of the Taxpayer's Periodic VAT SPT regarding the crediting of tax invoices not based on actual transactions is deemed to be contrary to Article 39A letter a of the KUP Law due to a legal vacuum that must bridge taxpayers who carry out tax transactions

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<sup>49</sup> Sudikno Mertokusumo, *Bab-Bab Tentang Penemuan Hukum*, Bandung: PT. Citra Aditya Bakti, 2020, p. 3.

invoices not based on actual transactions that wish to comply in carrying out their VAT obligations. The following reasons cause this:

- a. The grammatical interpretation of Article 8 paragraph (3) of the KUP Law shows that the formulation does not regulate the issuance or use of tax invoices not based on actual transactions. The provisions only apply to non-reporting SPTs or SPTs that are submitted but the contents of which are incorrect or incomplete or attachments of information whose contents are incorrect, as referred to in Article 38 and Article 39 paragraph (1) letter c and letter d of the KUP Law.
- b. Interpreting Article 8 paragraph (1) of the KUP Law regarding the correction of SPT must be carried out systematically with Article 5 paragraph (1) of Government Regulation 74 of 2011 concerning Procedures for the Implementation of Rights and Fulfillment of Tax Obligations. This can mean that a taxpayer can only correct an SPT as long as the Directorate General of Taxes has not taken any verification actions to issue tax assessment letters, tax audits, or preliminary evidence audits. This systematic interpretation of Article 8 paragraph (1) of the KUP Law and Article 5 paragraph (1) of Government Regulation Number 74 of 2011 shows that as long as verification has not been carried out in the framework of issuing tax assessment letters, tax audits, or preliminary evidence inspection, then the SPT correction, including those originating from tax invoices not based on actual transactions, can still be made. However, Article 39A letter a of the KUP Law stipulates that anyone who intentionally makes tax invoice transactions not based on actual transactions must be punished. So further regulations are needed that can bind taxpayers, tax authorities, and other related parties.
- c. Article 23 Regulation of the Directorate General of Taxes Number PER-03/PJ/2022 concerning Tax Invoices as amended by PER-11/PJ/2022 stipulates that PKP must cancel Tax Invoices as referred to in Article 2 paragraph (4) for Tax Invoices that has been made on the delivery of Taxable Goods and/or JKP whose transactions were cancelled, or goods and/or services for which a Tax Invoice should not have been made. Then, Article 24 PER-03/PJ/2022 stipulates that the cancellation of the Tax Invoice must be made using the *e-faktur* application. The PKP that delivers the Taxable Goods or goods and/or delivers said JKP or services and the PKP Buyer of the BKP or the buyer of the goods and/or the JKP Recipient or the service recipient must correct the relevant VAT Periodic SPT by the provisions of the laws and regulations in the field of taxation. This matter can be interpreted that the provisions for canceling invoices using the *e-faktur* application as referred to in PER-03/PJ/2022 must be carried out with the knowledge and approval of both parties, namely the PKP issuing the tax invoice and the PKP crediting the tax invoice, with approval status from the relevant tax office. Of course, canceling invoices will result in correcting the SPT for PKPs that issue tax invoices and PKPs that credit tax invoices, but canceling invoices using this *e-faktur* application will not be carried out if one of the parties is verified in order to issue a tax assessment letter, tax audit, or preliminary evidence examination.

#### **D. The Legal Meaning of the Principle of *Ultimum Remedium* and Business Continuity of Taxpayers**

The principles contained in the SDGs apply to all levels of society and all business situations. A sustainable business must consider what principles must be adopted and rules must be obeyed. In the context of the SDGs, the more systemic changes and collective actions are needed, the more principles and values are applied to rules and laws as the primary coordination and regulatory mechanism.<sup>50</sup> Likewise in the case of TBTS invoice transactions, which have been handled so far using the rules-based approach. In fact, there is an *ultimum remedium* principle that can be used by DGT as good and responsible governance in handling TBTS invoices.

*Ultimum remedium* must be interpreted that criminal sanctions are used when other sanctions are powerless. In other words, in law criminal sanctions are listed as the last sanction, after civil sanctions, as well as administrative sanctions.<sup>51</sup> It can be stated that this principle has a governance perspective that ranges from rules-based to principles-based and from compliance-driven to beyond compliance—mediating between liability and responsibility.<sup>52</sup> By using the deduction method, the ideal handling of tax invoices not based on actual transactions can be conducted through the following logical arguments:

a) From rules-based to principles-based

If interpreted the provisions in Article 39A of the KUP Law grammatically, tax invoices not based on actual transactions are interpreted as formal offenses, which is undoubtedly different from the provisions in Article 39 paragraph (1) letter d which are material offenses. However, if interpreted systematically with the provisions in Article 44B paragraph (2) letter c, paragraph (2a) letter b, and paragraph (2b) of the KUP Law, there is an *ultimum remedium* principle as the basis to 'do no harm' and to 'do good' ' which can transform the business continuity of every taxpayer. Appropriately the application of a principle, in this case the *ultimum remedium* principle, is not only in the order of handling criminal acts in the field of taxation but extends to all stages of fulfilling tax rights and obligations, including in the case of correcting SPT before tax audits are carried out. This is based on the consideration that the legal principle is a general primary thought embodied in statutory regulations and can be found through the general characteristics of the concrete regulations.<sup>53</sup> *The ultimum remedium* principle should have a normative influence and be binding on the parties<sup>54</sup> contained in the UU KUP. Thus, in the framework of consistently implementing the self-assessment system, even though law enforcement actions are being carried out against taxpayers (whether in the form of tax audits, preliminary evidence examinations, criminal investigations in the field of taxation, prosecution, or trial of criminal acts in the field of taxation, taxpayers Fixed taxes have the opportunity to recover losses on state revenue or pay off unpaid or underpaid taxes along with sanctions as stipulated in the applicable tax laws and regulations.

<sup>50</sup> Rob van Tulder and Eveline van Mil, *Op.cit.*, p. 266.

<sup>51</sup> Didik Endro Purwoleksono, *Hukum Pidana: Untaian Pemikiran*, Surabaya: Airlangga University Press, 2019, p. 12.

<sup>52</sup> Rob van Tulder and Eveline van Mil, *Ibid.*

<sup>53</sup> Sudikno Mertokusumo, *Mengenal Hukum: Suatu Pengantar*, Yogyakarta: CV. Maha Karya Pustaka, 2019, p. 48.

<sup>54</sup> *Ibid.*, p. 50.

b) From compliance-driven to beyond compliance—mediating between liability and responsibility

Compliance-driven is considered to have motivated a narrow interpretation of a statutory regulation.<sup>55</sup> Thus, it is necessary to use a broader interpretation through a collaborative approach, development, and sharing of risks and opportunities beyond the 'avoid doing harm' logic in pursuit of the 'do good' logic that contributes to societal value creation.<sup>56</sup> From compliance-driven to beyond compliance—mediating between liability and responsibility, it is hoped that this will improve business sustainability through several changes, such as the shift in approach from 'having responsibility' to 'taking responsibility', from a compliance approach (restricting power abuse) to beyond compliance (positioning for good), from a liability and risk orientation to a responsible opportunity-seeking orientation, and from a governance mechanism that generates balancing forces to governance that entices collaborative powers.<sup>57</sup> Efforts to go beyond compliance in handling tax invoices not based on actual transactions are concluded in the goodness contained in the *ultimum remedium* principle, including protection of the public from crime, rehabilitation, and at the same time resocialization and reintegration of actors to become taxpayers who are entitled to carry out their tax obligations correctly, as well as restoring the disturbed balance over the occurrence of actions that are contrary to tax law.<sup>58</sup> So that it can be said that the approach to going beyond compliance is intended to build an *ius continuendum* that can achieve ideas for taxpayers and Fiscus in fulfilling constitutional obligations in the form of collecting state budget revenues and expenditures (APBN) through tax revenues.<sup>59</sup>

The *ultimum remedium* principle in handling tax invoices not based on actual transactions still has a legal vacuum in its implementation, bearing in mind that its implementation has not reflected the continuity of a taxpayer's business. Further tax policies are needed based on a principles-based approach and beyond compliance—mediating between liability and responsibility, which are expected to have an impact on solving problems faced by taxpayers who are affected by tax invoices not based on actual transactions. These further provisions should be regulated in the framework of Government Regulations and Minister of Finance Regulations, considering the rules that must be binding internally and externally on DGT, as well as the following considerations:

- a) Regulations of the Government and Regulations of the Minister of Finance will become a bridge for using systematic and/or restrictive interpretations in handling tax invoices not based on actual transactions. Thus, conflicts that might arise from taxpayers and Fiscus in terms of equality before the law and bearability can be resolved
- b) Legal policies within the framework of Regulations of the Government and Regulations of the Minister of Finance will become the legal basis for disclosing the

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<sup>55</sup> Rob van Tulder and Eveline van Mil, *Op.cit.*, p. 680.

<sup>56</sup> *Loc.cit.*

<sup>57</sup> *Ibid.*, p. 574.

<sup>58</sup> Niniek Suparni, *Eksistensi Pidana Denda dalam Sistem Pidana dan Pemidanaan*, Jakarta: Sinar Grafika, 2007, p.

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<sup>59</sup> Mahkamah Agung Republik Indonesia, *Ibid.*



untruthfulness of acts as referred to in Article 8 paragraph (3) of the KUP Law against acts as referred to in Article 39A letter (a) of the KUP Law which are fundamentally related to alleged criminal acts of taxation as referred to in Article 39 paragraph (1) letter b, letter c and letter d, as well as Article 43 UU KUP. In this case, early handling of tax invoices not based on actual transactions will minimize imprisonment, especially those involving Article 43 of the KUP Law, which basically are not necessarily the direct beneficiaries of the tax invoices not based on actual transactions.

- c) Regulations of the Government and Regulations of the Minister of Finance will fill the legal vacuum that exists between the formal offenses of Article 39A letter a KUP Law and PER-16/PJ/2018 issued in order to increase legal certainty regarding the Determination of Suspend Status and in order to increase the effectiveness and efficiency of implementation clarification of the Taxpayer on the determination of the Suspend Status.
- d) Regulations of the Government and Regulations of the Minister of Finance governing provisions for handling tax invoices not based on actual transactions will be binding within the scope of administrative law, considering that taxes are part of state administrative law even though the provisions for tax invoices not based on actual transactions are the domain of criminal law. Things that show the binding of administrative law are the mechanism for crediting Input Tax which must be carried out by the procedure as stipulated in Article 9 paragraph (2), paragraph (8), and paragraph (9) of the VAT and PPnBM Law and fulfillment of formal and material requirements tax invoices that can be recognized in Periodic VAT SPT.
- e) Not a policy in the framework of Circular Letter of the Directorate General of Taxes, but at least in the structure of Regulations of the Government and Regulations of the Minister of Finance, which are appropriate as legal polices that bind DGT external and internal parties in terms of uniformity, accountability, and transparency in carrying out the handling of taxpayers who are indicated to be making transactions tax invoices are not based on actual transactions

## 5. CONCLUSION

This study formulates two conclusions. First, the tax laws and regulations that apply in Indonesia in dealing with tax invoices not based on actual transactions still ignore the *ultimum remedium* principle which is sufficient to be applied in concrete events, as the principle in law has a function that is validating as well as regulating and explaining. Second, the ideal tax (legal) reconstruction in handling tax invoices not based on actual transactions in Indonesia must be in unity of legal meaning contained in the *ultimum remedium* principle with the business continuity of taxpayers, bearing in mind the consistency of implementing a self-assessment system that is in line with human guarantees. rights and equality before the law principles are the provisions of Article 8 paragraph (1) and Article 12 of the KUP Law. Even though there is a legality principle as the basis for justifying (formal) offenses in Article 39A letter a of the KUP Law, it must be realized that the provisions of Article 8 paragraph (1) and Article 12 of the KUP Law must be interpreted based on their systematics. This means that the use of a systematic interpretation of tax invoices not based on actual transactions will be more adequate if there is a legal policy in the framework of Government Regulations and/or Minister of Finance Regulations, so that there is no handling of tax invoices not based on actual

transactions that directly use Article 39A letter a of the Law. COUP. It is necessary and sufficient to regulate matters of certainty, uniformity, accountability and transparency in the handling of tax invoices not based on actual transactions through strengthening the meaning of the *ultimum remedium* principle with principles-based approach and beyond compliance–mediating between liability and responsibility within the framework of Regulations of the Government and Regulations of the Minister of Finance.

Concretely, to regulate matters of certainty, alignment, accountability, and transparency in the handling of tax invoices not based on actual transactions through strengthening the meaning of the *ultimum remedium* principle, it can be regulated in a Government Regulation concerning the possibility for Taxpayers who use fictitious Tax Invoices to be able to make SPT corrections or make disclosure of untruth when it enters the inspection stage. The imposition of tax administration sanctions related to the correction of SPT and the disclosure of untruth in connection with the existence of TBTS Tax Invoices can be higher than the sanctions for correction or disclosure of untruth currently exist.

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