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REFORMULATION OF DUAL AUTHORITY OF ARTICLE 44B OF THE GENERAL PROVISIONS AND TAX PROCEDURES LAW IN INDONESIA: AN OPPORTUNITY PRINCIPLE PERSPECTIVE*

Setia Untung Arimuladi[1], Faisal Arif[2]

[1] Mahasiswa Doktor Ilmu Hukum, Universitas Diponegoro. Email: Scopus ID: 57718736900
[2] Kejaksaan RI, Indonesia. E-mail: faisalarifyosa@gmail.com

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Abstract

Article 44B of the Law on General Provisions and Tax Procedures (KUP Law), which has undergone two amendments, has the potential to cause dual authority considering that the principle of opportunity that the Attorney General's Office only owns should not be regulated in the lex specialist in the field of taxation. This study produces two conclusions based on the normative juridical method, whose data collection comes from primary, secondary, and tertiary legal materials. First, the termination of prosecution in criminal offenses in the field of taxation in Indonesia is attached to the Prosecutor's Office Law, not Article 44B of the KUP Law. Second, the ideal regulation related to the termination of prosecution in criminal offenses in the field of taxation based on the principle of opportunity as stipulated in Article 30, Article 30C, and Article 35 of the Prosecutor's Office Law, should not be based on Article 44B of the KUP Law. Government Regulations and or Attorney General Regulations should be issued by the Prosecutor's Office in the handling of tax criminal cases related to prosecution and pre-prosecution in the context of recovering losses to state revenues, considering that there is still a lack of uniformity in interpretation and or incompleteness of tax laws and applicable procedural laws.

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

1. INTRODUCTION

Article 44B of 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 (from now on referred to as KUP Law) has undergone 2 (two) amendments, namely the first amendment based on Law Number 28 of 2007 and the second amendment based on Law Number 7 of 2021 concerning Harmonization of Tax Regulations (HPP Law). These provisions can be referred to as the termination of criminal investigations in the field of taxation in the context of the interests of state revenue.

Various studies have been conducted in terms of the termination of the investigation. However, these studies have never examined the principle of proportionality or dominus litis,

which is the absolute authority of the Prosecutor's Office as referred to in Law Number 11 of 2021 concerning Amendments to Law Number 16 of 2004 concerning the Prosecutor's Office. The study conducted by Emirzon et al. only concluded that the provisions of plea bargaining, as referred to in Article 44B paragraph (1) and paragraph (2) of the KUP Law, have not provided legal certainty, both to the perpetrators and to the state as a victim, whereas Article 23A of the 1945 Constitution of the Republic of Indonesia (UUD NRI Tahun 1945) has mandated that all handling of tax collection be carried out based on the Law and the formulation of Article 1 paragraph (1) of the Criminal Code (KUHP) which emphasizes the applicability of the principle of legality in criminal acts, including criminal acts in the field of taxation, which must be interpreted as the fulfillment of lex scripta, lex stricta, and lex certa.[1] Then, one of the conclusions of Bolifaar's study states that plea bargaining in tax crimes in Indonesia, currently regulated in Article 44B of the KUP Law, has not fulfilled the concept of access to justice, namely plea bargaining as a taxpayer's right (the right to life, the right to self-repair, and the right to actively participate in restoring losses to state revenue, due to the occurrence of a tax crime) and the state's right (the right to discipline and equalize the voluntary compliance of its taxpayers).[2] Furthermore, one of the conclusions of Wicaksono's study confirms that Deferred Prosecution Agreement (DPA) in tax crimes committed by Corporate Taxpayers in Indonesia can only be done through the interpretation of Article 30 and Article 35 of the Prosecutor's Office Law with Article 44 B of the KUP Law, but the authority and/or discretion of the Prosecutor's Office in conducting DPA against Corporate Taxpayers has not been specifically regulated, considering that Article 44B of the KUP Law applies to all taxpayers (both Individual Taxpayers and Corporate Taxpayers) and is still in the context of termination of criminal investigation in the field of taxation.[3] Then, one of the conclusions of Bolifaar's study states that plea bargaining in tax crimes in Indonesia, currently regulated in Article 44B of the KUP Law, has not fulfilled the concept of access to justice, namely plea bargaining as a taxpayer's right (the right to life, the right to self-repair, and the right to actively participate in restoring losses to state revenue, due to the occurrence of a tax crime) and the state's right (the right to discipline and equalize the voluntary compliance of its taxpayers).[4]

The existence of dual authority to investigate criminal acts in the field of taxation in Article 44B of the KUP Law and there are still no research results to date that examine Article 44B of the KUP Law based on the perspective of the principle of opportunity which the Attorney General's Office only owns, so this study seeks to answer two existing problem formulations. First, how is the arrangement of termination of prosecution in criminal offenses in the field of taxation in Indonesia? Second, what is the ideal arrangement regarding the termination of prosecution in criminal offenses in the field of taxation in Indonesia based on the principle of opportunity?.

2. METHODS

In answering the formulation of existing problems, this study utilizes a normative juridical approach. This method refers to the laws and regulations governing the issue of the Authority of the Attorney General of the Republic of Indonesia in the field of Investigation and Prosecution in prosecution of criminal acts in the field of taxation. The normative juridical

[1] Joni Emirzon, F. X. Adji Samekto, Henry D. P. Sinaga, Legal Certainty of Plea Bargaining in Addressing Tax Crimes in Indonesia, *International Journal of Global Community*, Vol. 5, No. 3, 2022, pp. 189-204.

[2] Andhy H. Bolifaar, "Access to Justice of Plea Bargaining in Addressing the Challenge of Tax Crime in Indonesia", *Scientium Law Review*, Vol. 1, No. 1 (2022): 1-12.

[3] Adi H. Wicaksono, Deferred Prosecution Agreement as an Alternative in Addressing Tax Crimes of the Corporate Taxpayers in Indonesia, *De Jure: Jurnal Hukum dan Syar'iah*, Vol. 14, No. 2, 2022, pp. 262-275.

[4] Loc.cit.

approach method is a method or procedure used to solve problems in research by examining them based on applicable laws and regulations. The juridical aspect of this study is viewed from a legal point of view of the Prosecutor's Office's main tasks and functions in law enforcement, especially in the prosecution of criminal acts in the field of taxation.

The types and sources of data in this paper are complemented by library materials (secondary data) in the form of primary, secondary, and tertiary legal materials.[5] Primary legal materials, namely binding legal materials, consist of the 1945 Constitution of the Republic of Indonesia and its Amendments, several basic regulations, such as the Prosecutor's Office Law, KUP Law, Decrees, and Regulations of the Attorney General. Secondary legal materials provide explanations of primary legal materials, such as textbooks, scientific journals, research results, and opinions of legal experts. Meanwhile, tertiary legal materials provide guidance and explanation of primary and secondary legal materials, such as (legal) dictionaries and encyclopedias. Primary, secondary, and tertiary legal materials obtained will be read and scrutinized, and then[6] dIt is critically analyzed based on laws and regulations that do not conflict with other laws and regulations, taking into account the hierarchy of laws and realizing legal certainty.,[7] systematically organized, to draw a conclusion and suggestions.

3. ANALYSIS AND DISCUSSION

A. Termination of Investigation and Discontinuation of Prosecution in Criminal Acts in the Field of Taxation

Termination of investigation and prosecution in the context of state revenue is regulated in Article 44B of the KUP Law. The full formulation of Article 44B are:

(1) In the interest of state revenue, at the request of the Minister of Finance, the Attorney General may terminate the investigation of criminal acts in the taxation sector within six months from the date of the request letter.

(2) The termination of the investigation of criminal acts in the taxation sector, as referred to in paragraph (1) shall only be carried out after the Taxpayer or suspect has paid:

a. *loss on state revenue as referred to in Article 38 plus administrative sanctions in the form of a fine of 1 (one) time the amount of loss on state revenue;*
b. *loss on state revenue as referred to in Article 39 plus administrative sanctions in the form of a fine of 3 (three) times the total loss on state revenue; or*
c. *he amount of tax in the tax invoice, proof of tax collection, proof of tax withholding, and or proof of tax payment as referred to in Article 39A plus administrative sanctions in the form of a fine of 4 (four) times the amount of tax in the tax invoice, proof of tax collection, proof of tax withholding, and or proof of tax payment.*

(2a) If the criminal case has been transferred to the court, the defendant can still pay off:

a. *loss in state revenue plus administrative sanctions as referred to in paragraph (2) letter a or letter b; or*

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[5]Soerjono Soekanto *et al.*, 2007, *Penelitian Hukum Normatif: Suatu Tinjauan Singkat,* PT. Rajagrafindo Persada, Jakarta, hlm. 13,14.

[6] Soerjono Soekanto, 2010, *Pengantar Penelitian Hukum*, UI Press, *Jakarta, hlm. 9,10*.

[7] *Ibid, hlm. 52,53.*

b. *the amount of tax in the tax invoice, proof of tax collection, proof of tax withholding, and or proof of tax payment plus administrative sanctions as referred to in paragraph (2) letter c.*

(2b) The settlement, as referred to in paragraph (2a), becomes a consideration for prosecution without being accompanied by an imprisonment sentence.

(2c) If the payment made by the Taxpayer, suspect, or defendant at the stage of the investigation until the trial does not meet the amount as referred to in paragraph (2), the payment can be calculated as payment of a criminal fine imposed on the defendant.

Then, the provisions in Article 44B of the KUP Law are further regulated in Article 63 and Article 65 of Government Regulation Number 50 of 2022 concerning Procedures for Implementing Rights and Fulfilling Tax Obligations (PP-50/2022). In Article 63 paragraph (3) of PP-50/2022, there is a provision that the repayment of losses to state revenue in the context of recovering losses to state revenue with administrative sanctions in the form of fines as referred to in Article 63 paragraph (2) of PP-50/2022 and Article 44B paragraph (2) of UU KUP is carried out by applying alternative or cumulative threats. That is, if the taxpayer or suspect is alternatively threatened with more than 1 (one) criminal sanction, the highest administrative sanction is applied, or if the taxpayer or suspect is cumulatively threatened with more than 1 (one) criminal sanction, administrative sanctions are applied cumulatively. Furthermore, Article 63 paragraph (7) PP-50/2022 stipulates that in the event of a request for termination of investigation from the Minister of Finance or a designated official, the Attorney General may delegate the authority to terminate the investigation to a designated official. This means that the provision fully delegates the mechanism of authority to terminate investigations of criminal offenses in the field of taxation to internal officials appointed by the Attorney General within the Prosecutor's Office.

Furthermore, the provisions in Article 44B, paragraph 2a, paragraph 2b, and paragraph 2c of the KUP Law are further regulated in Article 65 of PP-50/2022. The provision stipulates that the defendant can still pay off losses to state revenue and or tax amounts along with administrative sanctions even though the criminal case has been submitted to the court. Article 65 paragraph (1) and paragraph (2) of PP-50/2022 stipulates that the repayment can be a consideration for prosecution without imprisonment, and the repayment of losses to state revenue and or tax amounts along with administrative sanctions that have been made previously are taken into account as payment of losses to state revenue or fines imposed on the defendant. Then, Article 65 paragraph (6) of PP-50/2022 stipulates that the payment or what is calculated as payment of losses to state revenue or criminal fines, so that the defendant first applies for a payment certificate to the Director General of Taxes and submits the payment certificate issued by the Director General of Taxes to the public prosecutor.

The provisions of Article 44B of the KUP Law as well as Article 63 and Article 65 of PP-50/2022, still have a legal vacuum, despite the Minister of Finance Regulation (PMK) Number 55/PMK.03/2016 concerning Procedures for Requesting the Termination of Criminal Investigation in the Field of Taxation for the Interest of State Revenue as last amended by PMK Number 18/PMK.03/2021 concerning the Implementation of Law Number 11 of 2020 concerning Job Creation in the Field of Income Tax, VAT and STLG, as well as General Provisions and Tax Procedures (PMK-55/2016). The legal vacuum can be briefly explained in the following points:[8]

a) What are the legal certainty, treatment, or procedure for taxpayers, suspects, or defendants who have cooperatively paid part or all of the losses to state revenue during the investigation, prosecution, and trial process.

[8] Adi H. Wicaksono, *Ibid.*

b) The treatment of taxpayers or suspects or defendants who cooperate in paying the total loss to state revenue along with related fines but take several years to repay the substantial amount.
c) Article 5 of PMK Number 55/PMK.03/2016 stipulates that the amount of tax that is not underpaid or that should not be refunded, and administrative sanctions are calculated based on the minutes of the expert examination during the investigation. The expert who calculates the loss of state revenue so far comes from the internal Directorate General of Taxes (DGT) itself, so that the taxpayer or suspect or defendant feels that the amount of loss to state revenue is related to criminal acts in the field of taxation tersebut turns out to be different between DGT's internal expert and the expert submitted by the Defendant or Taxpayer or Suspect.[9]

B. About the Principle of Opportunity and the Authority of the Prosecutor's Office: A Case Study of Handling Criminal Offenses in the Field of Taxation

Article 1 letters a and b and Article 137 of the Criminal Procedure Code (KUHAP) stipulate that prosecutorial authority is vested in the public prosecutor. In terms of prosecution rights, the principle of opportunity is known. According to Hamzah, this principle means that the public prosecutor is not obliged to prosecute a person who commits an offense if, in his judgment, it is detrimental to the public interest.[10] This is also called the dominus litis principle, which means that the prosecutorial authority is imitatively regulated and held by the public prosecutor as a monopoly, meaning that no other body has the right to do so.[11]

Article 1 point 1 of the Prosecutor's Law defines the Public Prosecutor's Office of the Republic of Indonesia (hereinafter referred to as the Prosecutor's Office) as a government institution whose functions are related to judicial power that exercises state power in the field of prosecution and other authorities based on the Law. The function of the Prosecutor's Office can be seen in Article 30 and Article 35 of the Prosecutor's Office Law, which regulates several tasks and authorities in the criminal field. These duties and authorities include, among others, conducting prosecutions, implementing judicial decisions and court decisions that have been inkracht, completing specific case files and, for this purpose can conduct additional examinations before being submitted to the court, which in its implementation is coordinated with investigators, setting aside cases in the public interest, handling criminal acts that cause losses to the state economy and can use peace fines in economic crimes based on statutory regulations. The definition of "amicable fine" is contained in the Elucidation of Article 35 paragraph (1) letter k of the Prosecutor's Office Law, which is the termination of the case out of court by paying a fine as a form of application of the principle of opportunity owned by the Attorney General in tax crimes, customs crimes, or other economic crimes based on the Law.[12]

The duties and powers of the Public Prosecutor's Office, as referred to in Article 30 and Article 35 of the Public Prosecutor's Office Law, indicate that the Public Prosecutor's Office has a monopoly on the prosecution as referred to in the principle of opportunity, including not to prosecute or set aside a case. Case setting aside or not prosecuting is also regulated in the Criminal Procedure Code, such as Article 14 letter h, which regulates "Closing cases in the interest of the law", Article 140 paragraph (2) letter a of the Criminal Procedure Code, which states that other actions that can be carried out by public prosecutors, namely in the form of termination of prosecution, and Article 46 paragraph (1) letter c of the Criminal Procedure

[9] *Ibid.*

[10] Andi Hamzah, *Hukum Acara Pidana Indonesia*, Jakarta: Sinar Grafika, 2019, p. 17.

[11] Gede Putera Perbawa, Kebijakan Hukum Pidana terhadap Eksistensi Asas Dominus Litis dalam Perspektif Profesionalisme dan Proporsionalisme Jaksa Penuntut Umum, *Arena Hukum*, Vol. 7, No. 3, 2014, p. 334.

[12] Adi H. Wicaksono, *Ibid.*

Code which determines the authority to set aside cases in the public interest.[13] This principle of opportunity is further emphasized in the explanation of Article 77 of the Criminal Procedure Code, which recognizes the existence of the embodiment of the principle of opportunity.[14]

As for what is meant by a case that is stopped prosecuting in the interests of the law is a case that is stopped prosecuting because there is insufficient evidence or events.[15] Meanwhile, "in the public interest". The Explanation of Article 35 paragraph (1) letter c of the Prosecutor's Office Law explains that what is meant by "public interest" is the interest of the nation and state and or the interest of the wider community, which can be in the form of suggestions and opinions from bodies of state power that have a relationship with the issue. At the same time, the Constitutional Court Decision Number 29/PUU-XIV/2016 decided that the phrase "setting aside the case as referred to in this provision is an implementation of the principle of opportunism which the Attorney General can only carry out" is conditionally contrary to the 1945 Constitution of the Republic of Indonesia and has no binding legal force insofar as it is not interpreted that the Attorney General is obliged to pay attention to the advice and opinions of the bodies of state power that have a relationship with the matter."In order to ensure legal certainty in the context of the implementation of the principle of opportunity, the Prosecutor's Office should issue a determination/decision letter, a copy of which is given to those whose cases are set aside in the public interest or because there is insufficient evidence or events.[16]

C. The Dual Authority of Article 44B of KUP Law and Its Relationship with the Principle of Opportunity

As a law enforcement institution, the Prosecutor's Office should always be based on the law in carrying out its duties and authorities. The Prosecutor's Office must always side with the law to uphold justice and truth, both repressive concerning the Integrated Criminal Justice System Process, preventive in the form of counseling, and administrative in connection with the actions of the Prosecutor's Office in its efforts to regulate. These law enforcement measures are bound by the rules of law, specific procedures and are controlled by the law.[17] In addition, the Prosecutor's Office as one of the subsystems in the Integrated Criminal Justice System is emphasized in the Prosecutor's Office Law. In the Law, the Prosecutor's Office is a government institution that exercises power in prosecution and pre-prosecution. In an integrated criminal justice system, the prosecution authority is separated from the investigation and is not carried out by a separate institution so that the control function of each subsystem level runs appropriately. Therefore, the independence of the prosecutor's office and its transparency are needed in exercising its authority in handling criminal cases, including criminal acts in the field of taxation, so that the integration expected in the concept of the Integrated Criminal Justice System can be achieved.

A criminal case to be prosecuted or not is the prosecutor's authority under the principle of opportunity guaranteed in the Prosecutor's Law. Other laws should not limit the principle of opportunity attached to the Prosecutor's Office, and at the same time, the principle should not give absolute authority to the prosecutor, including in handling criminal cases in the field of taxation. The principle of opportunity or discretionary prosecution or prosecution based on the principle of expediency confirms that the public prosecutor is authorized to prosecute and not prosecute conditionally or unconditionally a person or corporation that has

[13] Yeni Handayani, Jaksa Agung dan Pengesampingan Perkara Demi Kepentingan Umum, *Rechts Vinding Online*, 2016.

[14] *Loc.cit.*

[15] *Loc.cit.*

[16] *Loc.cit.*

[17] Marwan Effendi, *Kejaksaan RI " Posisi dan Fungsinya dari Perspektif Hukum*" Ikrar Mandiri Abadi (Jakarta: 2005) hal. 6

committed an offense in the public interest and has taken into account the advice and opinions of state power bodies that have a relationship with the matter.[18]

The principle of opportunity that other laws cannot limit, in this case, the KUP Law, can be seen in the following points. First, the dominance of the authority of formal tax law in terminating prosecution through the wrapping of "termination of investigation of criminal offenses in the field of taxation for the benefit of state revenue" or the absence of authority to postpone prosecution of criminal offenses in the field of taxation based on the Prosecutor's Office in the event that the Taxpayer or Suspect has good intentions but still has different evidence and opinions in terms of the amount of loss to state revenue calculated by the Loss Calculator Expert on state revenue from the internal DGT. This means that Article 44B of KUP Law, which is the termination of investigation at the request of the Minister of Finance to the Attorney General, or the regulation of case termination after P-21 (the case file is declared complete). Article 30 and Article 35 of the Prosecutor's Office Law also apply in the case of tax criminal cases. However, the justification is following "in the public interest" or the field of taxation identical to "for the benefit of state revenue". Second, considering the tendency of the Expert (Loss Calculation Expert on State Revenue and or Taxation Regulation Expert) in the handling of tax crimes conducted by PPNS within the DGT is also a state civil apparatus (ASN) within the DGT, the potential difference in the amount of loss to state revenue between tax investigation and the Expert submitted by the Suspect in connection with expert testimony is evidence following Article 184 paragraph (1) and Article 1 number 28 of the Criminal Procedure Code and for the "sake of justice" by Article 179 paragraph (1) of the Criminal Procedure Code.[19] Appropriately, suppose there is a difference in expert testimony (tax regulation expert and or loss calculation expert on state revenue) between that submitted by the taxpayer and the PPNS within DGT. In that case, the Prosecutor may exercise his Pre-Prosecution authority, which is to complete certain case files and, for that purpose, may conduct an additional examination before being submitted to the court, which in its implementation is coordinated with the investigator as referred to in Article 30 letter c of the Prosecutor's Office Law, so that the examination results become more independent and objective. Third, the blocking and or confiscation of the suspect's property, which is the authority of PPNS within DGT as referred to in Article 44 paragraph (1) letter j of KUP Law, does not yet have procedural law or rules that limit it. For example, whether the PPNS within the DGT can confiscate and or block the suspect's property that is not related to the evidence and or not related to the tempus, the type of suspect's property that can be confiscated, and how to follow up the confiscation, what is the procedural law if the suspect does not want to be confiscated.[20] AArticle 30A of the Prosecutor's Office Law should not go beyond the formulation of Article 30A of the Prosecutor's Office Law, which stipulates that in asset recovery, the Prosecutor's Office is authorized to carry out tracking activities, seizure and return of assets obtained from criminal acts and other assets to the state, victims, or those entitled. Fourth, Article 30C letters c and d of the Prosecutor's Office Law stipulates that the Prosecutor's Office participates and is active in handling criminal cases involving witnesses and victims as well as the process of rehabilitation, restitution, and compensation, and conducts penal mediation, confiscates execution for payment of fines and substitute punishment and restitution. Thus, the formulation of Article 44B paragraph 2b of the KUP Law, which regulates that the repayment made by the defendant if the criminal case has been submitted to the court becomes a consideration for prosecution without the imposition of

[18] Ani Triwati, Pengesampingan Perkara Demi Kepentingan Umum Pasca Putusan Mahkamah Konstitusi, Jurnal Iusa Constituendum, Vol. 6, No. 2, 2021, p. 41.

[19] Henry Dianto Pardamean Sinaga, Loss (of Revenue) of State Within Taxation Crimes in Indonesia, *Mimbar Hukum*, Vol. 30, No. 1, 2018, pp. 141-155.

[20] Parluhutan Rajagukguk and Hariomurti Tri Kuntonegoro, Tax Bailiff Roles Post Assets Confiscation on Suspect of Tax Crime in Indonesia, *Journal of Tax Law and Policy*, Vol. 1, No. 2, pp. 29–47, DOI:https://doi.org/10.56282/jtlp.v1i2.97.

imprisonment, has exceeded the authority of the KUP Law because it is the authority of the Prosecutor's Office Law.

The existence of criminal provisions in KUP Law that have exceeded the principle of opportunity shows the need for tax certainty for taxpayers as a solution to mediate between rigidity and efficiency, and flexibility of criminal provisions in tax legislation.[21]and the Prosecutor's Office Law. It considers that in addition to requiring predictability, regularity, and uniformity of tax laws, tax, and prosecutorial laws must be dynamic, sustainable, and capable of transformation.[22]

4. CONCLUSION

This normative study resulted in 2 (two) conclusions. First, the regulation of termination of prosecution in criminal offenses in the field of taxation in Indonesia is attached to the Prosecutor's Office Law, not Article 44B of the KUP Law. Thus, the provisions of Article 44B of the KUP Law, which regulates the authority to prosecute in the event of recovery of losses to state revenue in criminal acts in the field of taxation, have exceeded the principle of opportunity of the Prosecutor's Office. Second, the ideal regulation related to the termination of prosecution in criminal offenses in the field of taxation based on the principle of opportunity should be based on Article 30, Article 30C, and Article 35 of the Prosecutor's Office Law, not based on Article 44B of the KUP Law. Government Regulations, Attorney General Regulations, and or Supreme Court Regulations are needed to handle tax criminal cases related to prosecution and pre-prosecution in recovering losses to state revenue.

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