

Legal Protection and Tax Treaty Position for Taxpayer Against Double Taxation Based on Legislation Regulations

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Abstract

This study aims to obtain information and legal analysis regarding legal protection and the position of the tax treaty against double taxpayers (Double Taxation), double taxation is the imposition of taxes on the same type of tax by different countries on the same subject and object, and in identical periods. The birth of double taxation is due to the principle of global taxation for domestic taxpayers, where income from within the country and abroad is taxed by the resident country (the country of residence of the taxpayer), besides that there is also territorial taxation for foreign taxpayers by the source country. where income originating from that country is taxed by the source country. To avoid state losses, a tax treaty was born which is part of international law, which minimizes double taxation and attempts to avoid tax.

Keywords

taxpayer; double taxation; tax treaty



I. Introduction

Along with the times, every country is competing to build various infrastructures with the aim of advancing their country as well as the Republic of Indonesia. There have been many various infrastructures built by the government, including roads, bridges, schools, hospitals/health centers, and so on. Infrastructure itself is a facility built by the government with the aim of being in the public interest, in carrying out infrastructure development itself, it really requires a large enough budget, where the budget is obtained from state revenues, one of which consists of tax revenue. Tax is a mandatory payment by taxpayers (either individuals or legal entities) to the state through the authorized agency to receive them with indirect returns given by the state. Development is a systematic and continuous effort made to realize something that is aspired. Development is a change towards improvement. Changes towards improvement require the mobilization of all human resources and reason to realize what is aspired. In addition, development is also very dependent on the availability of natural resource wealth. The availability of natural resources is one of the keys to economic growth in an area. (Shah, M. et al. 2020)

Juridically, double taxation is a tax imposed by different countries on the same subject and object of tax in the same period. (Fitriandi, 2019) Meanwhile, economically (economic double taxation) according to the Organization for Economic Cooperation and Development (OECD), namely: "Double taxation is economic if more than one person is taxed on the same item". And according to Darussalam and Septriadi, double taxation economically refers to a situation where the same income is taxed more than once in two or more different tax subjects. (Darussalam and Septriadi 2017)

Then the treaty on the avoidance of double taxation is one of the main sources of international tax law in addition to national tax laws because this treaty is essentially a reconciliation of two different tax laws. (Maghfiroh, 2013). International Tax can be

defined as an agreement between countries that have Double Taxation Avoidance Agreement (P3B). The provisions of this international tax base refer to the Vienna Convention. The enactment of this agreement may cause the tax provisions applicable in certain countries to no longer apply to foreign organizations or organizations, if they have been agreed in a bilateral agreement between the countries concerned.

Broadly speaking, international taxes regulate two things, namely the taxation of domestic tax subjects who receive income from sources abroad and the taxation of foreign tax subjects who receive income from domestic sources.

Based on the above background, this research is entitled "Legal Protection and Tax Treaty Position for Taxpayers Against Double Taxation Based on Legislation - Invitation." Which aims to find out what is the legal protection for double taxation taxpayers? and What is the position of the tax treaty on double taxation?

II. Research Method

This study uses a normative juridical approach, which is an approach based on the main legal material by examining theories, concepts, legal principles, and statutory regulations. The main point of this research is to use primary and secondary data by focusing on examining the determination of rules or norms in positive law. (Sari & Artha, 2019) The main approach is library data with research on secondary data which can be in the form of primary law itself. (Nachrawi & Dewi, 2021) This study aims to find out and obtain legal information regarding legal protection and the position of tax treaty for taxpayers against double taxation based on statutory regulations.

III. Result and Discussion

3.1 Foreign Tax Subjects and Objects

International taxation is an international aspect in the tax laws of a country, while international tax provisions are divided into two, namely;

1. Domestic terms
2. Tax treaty, including MLI (Multilateral Instrument)

Domestic international tax provisions are regulated in the Income Tax Law. The following are the articles in the Income Tax Law related to national taxes:

1. Article 2 concerning Domestic Tax Subjects (paragraph 3), Foreign Tax Subjects (paragraph 4), and Permanent Establishments (paragraph 5);
2. Article 3 regulates what is declared not a tax subject;
3. Article 5 regulates the tax object of Permanent Establishment (BUT);
4. Article 15 regulates the special calculation norms for calculating the net income of shipping, or international flights, and foreign trade representative offices (KPDA);
5. Article 18 regulates the ratio of debt to capital (paragraph 1) Controlled Foreign Company (paragraph 2), Special Relations (paragraph 3, 3D, and 4), Procedures for Mutual Agreement and Transfer Price Agreement (paragraph 3A), Special Purpose Company (paragraph 3B, and 3C);
6. Article 24 concerning foreign tax credits;
7. Article 26 concerning tax objects of foreign tax subjects;
8. Article 32A concerning the authority to carry out tax treaties.

a. Tax subject

What is meant by Foreign Tax Subjects are:

Namely individuals who do not reside in Indonesia, as well as individuals who are present in Indonesia for not more than 183 (one hundred and eighty three) days within a period of 12 (twelve) months, and entities that are not established and are not domiciled in Indonesia. who run a business or carry out activities through a Permanent Establishment in Indonesia.

b. BUT Tax Object

Based on Article 5 paragraph (1) of the Income Tax Law, the tax objects of a BUT are:

1. income from business or activities and from assets owned or controlled by the PE;
2. head office income from businesses or activities, selling goods, or providing services in Indonesia that are similar to those carried out or carried out by BUT in Indonesia (force of attraction);
3. income as referred to in Article 26 of the Income Tax Law received or obtained by the head office, as long as there is an effective relationship between the BUT and the assets or activities that provide the income in question (effectively connected).

Then in the PER-25/PJ/2018 Article 2 policy, Foreign Taxpayers who are entitled to receive income from Indonesia by utilizing the Double Taxation Avoidance Agreement (P3B) are as follows:

1. Taxpayers who receive income are not Indonesian domestic tax subjects;
2. Taxpayers who receive income are domestic tax subjects from partner countries or partner jurisdictions that have agreed on the Tax Treaty;
3. There is no misuse of P3B;
4. Taxpayers who receive income are beneficial owners, in accordance with the requirements in the Tax Treaty.

And furthermore, in carrying out tax collection, it must be regulated by laws and regulations because if you collect taxes outside those stipulated in the law, it can be classified as robbery which is often called tax without law is robbery. (Adam, O., Tuli, H., & Husain, SP 2017).

3.2 Double Taxation

Prof. Rochmat Soemitro stated that International Tax Law is a national law which consists of rules, both in the form of national rules and methods derived from treaties between countries and from principles or customs that have been accepted by both countries in the world to regulate matters relating to taxation. matters of taxation and in which foreign elements are shown, both regarding the subject and the object. (Prabu et al., 2021)

Furthermore, in order to develop the domestic economy, the Indonesian government conducts trade with various countries. Indonesia is also making efforts to improve the economy by joining cooperative relations between countries that are members of groups such as ASEAN, OPEC, APEC, and so on. (Pudyatmoko, 2009) Furthermore, in trade cooperation between countries, such as the establishment of a single market for the ASEAN Economic Community (ASEAN Economic Community), there is an agreement on regulations. More specifically, regulations relating to double taxation. Double tax itself can be interpreted narrowly and broadly, namely:

Narrowly, double taxation is defined as the occurrence of Taxation repeatedly by tax subjects and/or tax objects in the same tax administration, while broadly double taxation

can be interpreted as the imposition of taxes and other levies more than once, can be in the form of double taxation or multiple taxation on a fiscal fact (subject and object of tax). Double taxes with a broad meaning according to the country or jurisdiction of the tax collector can be grouped into domestic or international taxes.

Double Taxation itself can be caused by a single ruler (singular power) or multiple layers of administrators (plural power). Meanwhile, double taxation at the singular power level can occur against P3B on building taxation and on income from rent or transfer of property from the sale of the building, this double taxation is often called economic double taxation. Meanwhile, double taxation at the level of plural power can occur vertically, for example between Regional Governments and the Center, horizontally, for example, between Regional Governments, namely one Region and another, and diagonally, for example, City or Regency Governments with Province X or Province Y.

The countries that have agreed on double taxation agreements usually use the principles in the tax collection process by prioritizing the following principles:

1. Domicile principle;
2. Source principle;
3. Nationality principle.

a. Domicile Principle

Based on the domicile principle, the tax subject is taxed in the country where the tax subject is domiciled. Generally, this country applies the principle of world wide income, namely income that will be taxed in the country of domicile, both domestically and abroad.

b. Source Principle

Based on the principle of source of tax imposed based on where the source of income comes from.

c. Principles of Citizenship

Based on the principle of citizenship, taxation is based on a person's citizenship status. So everyone who becomes a citizen of a country will be taxed in that country even though his income is received from another country. The United States is a country that adheres to this principle. (Learning, nd) in addition to the domicile principle, the source principle, and the citizenship principle. There is also a territorial principle and a mixed principle that regulates the collection of double taxation for taxpayers.

d. Territorial Principle

This principle adheres to the principle that the imposition of tax is only on income derived from the territory of one country, so that if it is related to income originating from outside that country, it will no longer be taxed.

e. Mixed Principle

This principle is a mixture of the principles above, where a country if it applies this principle then the taxation will be carried out based on what principles are applied. (Setiyawan, 2019)

In addition, there are also principles that must be understood in international taxation, including:

1. Capital Export Neutrality

Where our ability to invest, the tax burden paid must be the same, so that there is no difference when investing at home or abroad;

2. Capital Import Neutrality

Wherever our investment comes from, it will be subject to the same tax, so that both domestic and foreign investors will be subject to the same tax rate when investing in a country;

3. National Neutrality

Each country has the same share of tax on income. So if there is a foreign tax that cannot be credited, it can be deducted as a profit deduction fee.

Then, the efforts to avoid double taxation are as follows:

1. Tax Treaty

Where this agreement is an agreement between two countries to avoid double taxation with the aim of promoting investment between the two countries;

2. Overseas Tax Credit

That is, the amount of tax paid abroad can be deducted from income tax as a whole, in Indonesia this is regulated in the income tax law article 24.

Next is the process of avoiding double taxation international, among others:

1. Unilateral (unilateral)

This method is carried out by including the provisions of avoiding double taxation in a state law, with a clear procedure and having legal force, which regulates society and legal entities unilaterally by the state itself.

2. Bilateral (between two countries)

This method is carried out through a negotiation between two countries with an interest in avoiding double taxation.

3. Multilateral (between several countries simultaneously)

This method is carried out through a multilateral negotiation by more than two interested countries with the aim of avoiding double taxation.

3.3. Tax Treaty

The tax treaty is a legal instrument that applies specifically to regulate the taxation rights of each country with the aim of providing legal certainty in avoiding double taxation. (Wirawan B. Ilyas & Richard Burton 2010) The function of this agreement is to provide clarity on the right to tax a country with another country on the same tax object, so that taxpayers are not burdened with taxation twice with the same object. (Pungutan et al., 2022)

According to Jonathan Schwarz, Tax Treaty is an international agreement that binds the parties to the agreement which are subject to international treaty law. (Jonathan Schwarz 2002) Therefore, the provisions agreed upon in the double taxation avoidance agreement must be implemented in good faith. Which is basically a reconciliation between the provisions of the domestic laws and regulations of each country that entered into the agreement.

Then the provisions are specialists (legal speciales) on the general provisions of taxation of the contracting country (lex generalis). So, based on the principle of "lex specialis derogat legi generali", the position of P3B is above the provisions of domestic taxation. (Klaus Vogel, 2006). This principle is known as "lex posterior generalis non derogat legi priori speciali". However, in the United States, Federal tax laws issued after the double taxation treaty may "override" the double taxation treaty that has been enforced by the United States (referred to as a "treaty override"). This is known in the United States as "later in time" (Anne Van de Vijver, 2009).

Then the double taxation treaties contain several things including an agreement on the definition of double taxation, the tax base imposed, taxation regulations, and

mechanisms to eliminate double taxation. The purpose of the purpose of the Tax Treaty is to avoid the imposition of double taxation so that there is no excessive tax payment, in addition to the imposition of double taxation, the tax treaty is also one of the attractions for foreign investors to enter the country where there are several tax relief incentive facilities.(Torres, 2017)

3.4. Position of Tax Treaty Against Taxpayers

Tax treaty is an agreement on the avoidance of double taxation, which was agreed upon by countries mostly from Asia and Europe, the agreement aims to minimize double taxation and tax avoidance efforts.

Indonesia has carried out tax treaties with other countries with approximately 70 countries, as an example of a tax treaty, namely between Indonesia and Singapore, where the agreement decides which country has the right to tax it, whether Indonesia or Singapore? The existence of a tax treaty also makes it easier for taxpayers in terms of paying taxes, so that there is no double taxation that can result in losses for taxpayers, in terms of running their business.

Hofbauer in Lang (2001) states that almost all countries that carry out Tax Treaties use the OECD Model or UN Model guidelines, then the OECD Commentary and the UN can be a source for interpreting the terms contained in the Tax Treaty.(Ardiansyah, 2021). The OECD Model is a P3B model for developed countries which was established in Paris on December 14, 1960. The developed countries include Australia, Germany, France, England, South Korea and other countries. Because these countries are capital and service exporting countries that apply the domicile principle. Therefore, taxation tends to be more in the domicile country of the taxpayer, while the UN Model is a model specifically designed for developing countries, this model provides wider taxation to the source country of income arising from its territory. So that taxation tends to be more in the source country of income.

Meanwhile, Indonesia itself tends to enter the OECD Model and the UN Model. Therefore, Indonesia is more flexible depending on the agreement between Indonesia and the country, for example, Indonesia exempts taxes from Singapore on the condition that Singapore must also exempt Indonesian taxes. This treaty accommodates provisions that provide protection for residents of a treaty state who do business in the other contracting state.(Prabu et al., 2021)

3.5. Legal Protection for Taxpayers

According to Satjipto Rahardjo, legal protection is to provide protection for human rights that are harmed by others and that protection is given to the community so that they can enjoy all the rights granted by law. (Satjipto Rahardjo 2000), Theory of legal protection for people's rights John Locke put forward in 1691 in the theory of social contracts stating that when forming a state in social contract theory, these rights are not handed over to the authorities when the social contract is carried out. Therefore, the power of the ruler granted through a social contract, by itself cannot be absolute. However, the existence of such power is precisely to protect the intended natural rights from dangers that may threaten, both from within and from outside. That's it,(Advianto, 2018)

Therefore, taxpayers or tax subjects also have rights that must be protected by law, from things that can result in losses for taxpayers. Where these rights are contained in Law No. 16 of 2000 concerning the Second Amendment to Law No. 6 of 1983 concerning General Provisions and Tax Procedures, which are as follows:

1. The right to overpayment of taxes;
This right means that if the tax payment paid/withheld/collected is greater than what should be owed, the taxpayer has the right to recover the excess. Tax overpayments can be refunded within 12 months from receipt of a complete application.
2. The right of confidentiality for taxpayers;
In this case, the taxpayer has the right to obtain confidentiality protection for all information that has been submitted to the Directorate General of Taxes (DGT) in order to implement tax provisions. However, in the context of investigation, prosecution or in cooperation with other government agencies, written information or evidence from or about the Taxpayer may be given or shown to certain parties as determined by the Minister of Finance.
3. Right to installment or deferment of payment
Under certain conditions, the taxpayer may apply for installments or postponement of tax payments;
4. Right to defer annual tax return reporting
For certain reasons, the taxpayer may submit an extension of the submission of the Annual SPT, both Corporate Income Tax (PPH) and Personal Income Tax;
5. The right to deduction for income tax article 25
For certain reasons, the taxpayer may apply for a reduction in the amount of Article 25 PPH installments;
6. Right to land and building tax deduction
under certain conditions, for example the tax object is affected by a natural disaster, the taxpayer may apply for a reduction in the land and building tax (PBB) owed. This PBB deduction right also applies to taxpayers who are members of veteran freedom fighters and veteran defenders of independence;
7. Right to tax exemption
taxpayers may apply for exemption from withholding/collection of income tax;
8. Right of prepayment of overpayment of tax.
taxpayers who have met certain criteria as compliant taxpayers may be given a preliminary refund of tax overpayments within a period of no later than 1 month for VAT and 3 months for PPh from the date of application;.
9. The right to receive taxes is borne by the government.
In the context of implementing government projects financed with grants or foreign loan funds, income tax payable on income received by contractors, consultants and main suppliers is borne by the government.
10. Right to get tax incentives
in the field of VAT. Certain Taxable Goods that are exempted from the imposition of VAT include Trains, Airplanes, Ships, Books, TNI/POLRI equipment which are imported or delivered within the customs area by certain WP. In addition, companies that carry out activities in certain areas, such as bonded zones, are entitled to an Uncollected VAT facility, among others, on imports and the acquisition of raw materials.

Furthermore, Paul Effendy Lotulung argues that the right thing to do is because tax law provides legal protection to taxpayers, both outside and through tax courts (Paulus Effendy Lotulung 1986). As for legal protection outside the tax court, it can be in the form of submitting an application for changes to writing errors and counting errors made by taxpayers or tax officials who issue tax assessment letters incorrectly so that taxpayers request correction of tax assessment letters. while legal protection through the tax court can

be in the form of filing an objection to the agency's objection, filing a cassation or lawsuit to the tax court, and submitting a review to the Supreme Court.(Rochaeti, 2012)

Legal protection for Taxpayers in Tax Dispute Settlement. based on tax laws. Namely the settlement of tax disputes that arise between taxpayers and the Director General of Taxes is resolved through two forms of settlement.

1. Settlement of tax disputes that are resolved by the parties involved in the dispute, namely the Director General of Taxes. The form is through objections and requests for correction, see Article 16 of the KUP Law and Article 36 of the KUP Law.
2. Settlement that is settled by parties/agencies that are not involved in the dispute, namely the Tax Court through appeals and lawsuits. Furthermore, based on the decision of the appeal and the lawsuit, the parties can submit a PK to the Supreme Court for a special nature.

The legal protection for taxpayers against double taxation has been regulated in the International Taxation Law. International taxes imposed in Indonesia are fully regulated in several national tax regulations, including:

1. The National Tax Regulations which regulate the Double Taxation Avoidance Agreement (Article 32 A of the Income Tax Law) regarding the government having the authority to enter into agreements with the governments of other countries in the context of avoiding double taxation and preventing tax evasion;
2. National Tax Regulations (Article 3 of the Income Tax Law) concerning: Excluding Tax Subjects;
3. National Tax Regulations (Article 2 of the Income Tax Law) concerning Foreign Tax Subjects and Permanent Establishments (BUT);
4. National Taxation Regulations (Article 18 of the Income Tax Law) concerning: Special Relations, Whenever there is an Impropriety in Taxation;
5. National Tax Regulations (Article 24 of the Income Tax Law) concerning: Foreign Tax Credits.

IV. Conclusion

From the above discussion, it can be concluded that the taxpayer is an individual or entity which, according to the provisions of the tax laws and regulations, is determined to carry out tax obligations, including certain tax collectors or withholding taxes.

In addition, there is also a double taxation, which arises from the same tax subject and object with identical periods, which can harm the taxpayer in running his business. In order to avoid double taxation, Indonesia enters into tax treaties with interested countries, with the aim of minimizing the occurrence of double taxation and tax avoidance.

The protection for taxpayers has been regulated in the taxation law, which includes the rights of taxpayers, avoidance of double taxation against taxpayers, legal protection for taxpayers, and so on.

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