

Deferred Prosecution Agreement as an Alternative in Addressing Tax Crimes of the Corporate Taxpayers in Indonesia

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Received: 2022-12-16	Revised: 2022-12-16	Approved: 2022-12-28
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Abstract:

Tax revenue from Corporate Taxpayers to the State is very significant, however, this is directly proportional to the large number of crimes committed by Corporate Taxpayers. This is caused by a legal vacuum in terms of postponement or termination of prosecution of Corporate Taxpayers who commit criminal acts in the field of taxation. There are various problems in the criminal justice system in Indonesia related to the prosecutor's authority over the domino effect of crimes committed by corporate taxpayers who should consider strengthening the Deferred Prosecution Agreement (DPA) or Non-Prosecution Agreements (NPA) in cases related to state finances. Based on the normative juridical method with approaches in the form of a positive legal inventory, legal principles, as well as legal systematics and the level of legal synchronization, two conclusions are produced. First, the authority and/or discretion of the DPA against Corporate Taxpayers have not been specifically regulated and is still in the context of terminating criminal investigations in the field of taxation. Second, the Attorney General needs to issue laws and regulations related to DPA for corporations in Indonesia, including Corporate Taxpayers. It is recommended that DPA rules, including procedures, formal requirements, and material requirements, be in the framework of a Government Regulation.

Keywords: deferred prosecution Agreement (DPA); corporations; tax.

Introduction

The number of corporate taxpayers in Indonesia, which always increases from year to year, is expected to play an important role in tax revenue in Indonesia. The increase in the number of corporate taxpayers can be seen from the number of corporate taxpayers in 2016-2020, which was 2.9 million in 2016, 3.1 million in 2017, 3.32 million in 2018, 3.55 million in 2019, and 3.56 million in 2020. However, the rise of tax evasion that occurs by using the means of corporate taxpayers is very

detrimental to state revenues in the tax sector¹. Some of the parameters can be seen from several aspects, such as, the level of compliance in reporting the Annual Corporate Income Tax Return is still not maximal, the number of handling tax crime investigations is still increasing, and there are still regulatory loopholes that can be a means of tax evasion. The level of compliance in reporting the Annual Corporate Income Tax Return during 2016-2020 fluctuated, each by 58.15% in 2016, by 65.14% in 2017, by 58.86% in 2018, amounting to 65.47% in 2019, and amounted to 60.16% in 2020.² The number of losses in state revenue (excluding criminal sanctions) due to tax evasion in Indonesia during 2016-2020 can be seen from the judges' verdicts, which each year amounted to Rp. 0,78 trillion in 2016³, Rp. 1.34 trillion in 2017⁴, Rp. 1.73 trillion in 2018⁵, Rp. 1.11 trillion in 2019⁶, and Rp. 0.67 trillion in 2020⁷. Until now, there is no data on recovery of losses in state revenues along with criminal penalties for criminal acts in the taxation sector. Then, loophole rules that can be a means of tax evasion can be used by Corporate Taxpayers with the obligation to keep books of account for each corporation as stipulated in Article 28 of the Law on General Provisions and Tax Procedures as last amended by Law Number 21 of 2021. concerning Harmonization of Tax Regulations (UU KUP). Through certain bookkeeping, many taxpayers are proven to have manipulated accounting and finance for certain illegal purposes, both internationally and nationally, even though almost all of their financial statements have been audited by public accountants.⁸

More specifically to tax crimes that cause losses to state revenues. There are as many as 239 case files that have been declared complete by the Prosecutor (P-21), but there are only 8 case files whose investigations were terminated during 2019-2020.⁹ Even though it has been regulated in Article 44B of the Law on General Provisions and Tax Procedures, that the termination of the investigation of tax crimes in case the Taxpayer or suspect has paid off the loss to state income plus administrative sanctions in the form of fines, will still have no significant impact. The lack of use of Article 44B of the KUP Law must be addressed immediately, considering the authority of the prosecutor's office which has been regulated in Law Number 11 of 2021 concerning Amendments to Law Number 16 of 2004 concerning the

¹ Henry D. P. Sinaga, *The Criminal Liability of Corporate Taxpayer in the Perspective of Tax Law Reform in Indonesia*, (Jakarta: Mimbar Hukum, Vol. 29, No.3, 2017), 543.

² Direktorat Jenderal Pajak, *Laporan Tahunan Tahun 2015*, (Jakarta: Direktorat Jenderal Pajak, 2016), 190.

³ Direktorat Jenderal Pajak, *Laporan Tahunan Tahun 2016*, (Jakarta: Direktorat Jenderal Pajak, 2017), 59.

⁴ Direktorat Jenderal Pajak, *Laporan Tahunan Tahun 2017*, (Jakarta: Direktorat Jenderal Pajak, 2018), 75.

⁵ Direktorat Jenderal Pajak, *Laporan Tahunan Tahun 2018*, (Jakarta: Direktorat Jenderal Pajak, 2019), 84.

⁶ Direktorat Jenderal Pajak, *Laporan Tahunan Tahun 2019*, (Jakarta: Direktorat Jenderal Pajak, 2020), 76.

⁷ Direktorat Jenderal Pajak, *Laporan Tahunan Tahun 2020*, (Jakarta: Direktorat Jenderal Pajak, 2020), 83.

⁸ Henry D. P. Sinaga, F. X. Adji. Samekto, and Joni Emirzon, *Ideal Corporate Criminal Liability for the Performance and Accreditation of Public Accountant Audit Report in Indonesia*, (International Journal of Economics and Business Administration, Vol. 7, No. 4, 2019), 452.

⁹ 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.



Prosecutor's Office (herein after referred to the Prosecutor Law). (*dominus litis*) by applying the Deferred Prosecution Agreement (DPA) or Non-Prosecution Agreements (NPA) method in cases related to state finances.¹⁰ The Prosecutor applies the DPA in many ways, among others, to impose criminal sanctions, including criminal fines and restitution, to intervene more directly in the company's internal affairs, such as to regulate the structure and level of the company's compliance program, the structure and composition of the board and supervisory committee. management, the scope and extent of external oversight of company affairs, and the scope of the company's business practices.¹¹

Concrete actions are needed to overcome several complicated and recurring problems in the criminal justice system in Indonesia related to the prosecutor's authority over the domino effect of criminal acts committed by corporate taxpayers (not just criminalizing the management so far).¹² Actions that can be taken such as overloaded criminal case arrears (both in the stages of investigation, prosecution, court of first instance, appeal, cassation, and review), the settlement process is slow and time-consuming, costs a lot of money, does not accommodate the sense of justice of the community, too rigid, too formal, and too technical,¹³ and can ensnare perpetrators who do not receive benefits for the occurrence of criminal acts of corporate taxpayers in connection with the existence of Article 43 of the KUP Law which imposes criminal acts against representatives, proxies, employees of the Taxpayer, or other parties who order to do, participate in doing, who recommend, or who helps commit criminal acts in the field of taxation. The vulnerability of corporate tax crimes is undoubtedly a serious problem, including harming state revenues, harming compliant taxpayers, causing unfair market distortions for businesses that run lawfully and compliantly, and damaging the global reputation and perception of the country's economy.¹⁴ So, it is necessary to overcome these problems by answering the two existing problem formulations. First, how are the applicable laws and regulations related to the Deferred Prosecution Agreement in tax crimes committed by corporate taxpayers in Indonesia. Second, how are the laws and regulations governing the ideal Deferred Prosecution Agreement in dealing with tax crimes committed by corporate taxpayers in Indonesia.

Considering that the Prosecutor in carrying out his authority and tax enforcement must be carried out based on the principle of legality, the principle of

¹⁰ Moh. Dani Pratama Huzaini, *Implementasi Deferred Prosecution Agreement di Indonesia dalam Sejumlah Kasus*, accessed January 24, 2021, <https://www.hukumonline.com/berita/a/implementasi-i-deferred-prosecution-agreement-i-di-indonesia-dalam-sejumlah-kasus-1t5e4b5d0202267?page=1>

¹¹ Jennifer Arlen, *Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed Through Deferred Prosecution Agreements*, (Journal of Legal Analysis, Vol. 8, No. 1, 2016), 199.

¹² Ahmad Iqbal, *Penerapan Deferred Prosecution Agreement di Indonesia sebagai Alternatif Penyelesaian Tindak Pidana Ekonomi Yang dilakukan oleh Korporasi*, (Jurnal Yuridis, Vol. 7, No. 1, 2020), 216.

¹³ Asep N. Mulyana dalam Eka Lutfia dan Pudji Astuti, *Deferred Prosecution Agreement sebagai Alternatif Penyelesaian Korupsi oleh Korporasi dalam Prespektif Transplantasi Sistem Hukum*, (Novum: Jurnal Hukum, 2021), accessed on March 10, 2022 <https://ejournal.unesa.ac.id/index.php/novum/article/view/41569>.

¹⁴ Michael Bisgrove and Mark Weekes, *Deferred Prosecution Agreements: A Practical Consideration*, (Criminal Law Review, Issue 6, 2014), 417.



protection of human rights (HAM), and the general principles of good governance, so in producing the ideal DPA legal concept, this research is adequate to use the normative juridical method. The normative juridical method in this study is based on relevant legal materials in answering the formulation of the existing problems. This method is carried out through identification of the facts behind the problem, to find the applicable positive law, and then legal analysis and discussion is carried out to produce conclusions and prescriptions.

Normative juridical studies cannot be separated from legal concepts whose entire activities take place in the literature, several approaches are used, namely the positive legal inventory approach, the legal principles approach, and the legal systematic approach and level of legal synchronization. The positive law inventory approach is carried out based on a critical-analytical identification process in seeking and finding applicable positive law, the legal principles approach is carried out through philosophical studies in finding the ideal elements of law, a systematic approach and legal synchronization are carried out to reveal the reality to what extent certain laws are compatible vertically or horizontally. Considering that the Prosecutor in carrying out his authority and tax enforcement must be carried out based on the principle of legality, the principle of protection of human rights (HAM), and the general principles of good governance,¹⁵ so in producing the ideal DPA legal concept, this research is adequate to use the normative juridical method. The normative juridical method in this study is based on relevant legal materials in answering the formulation of the existing problems.¹⁶ This method is carried out through identification of the facts behind the problem, to find the applicable positive law, and then legal analysis and discussion is carried out to produce conclusions and prescriptions.¹⁷ Normative juridical studies cannot be separated from legal concepts whose entire activities take place in the literature,¹⁸ several approaches are used, namely the positive legal inventory approach, the legal principles approach, and the legal systematic approach and level of legal synchronization. The positive law inventory approach is carried out based on a critical-analytical identification process in seeking and finding applicable positive law, the legal principles approach is carried out through philosophical studies in finding the ideal elements of law, a systematic approach and legal synchronization are carried out to reveal the reality to what extent certain laws are compatible vertically or horizontally.¹⁹

Result and Discussion

Prosecutor's Authority and Deferred Prosecution Agreement in Indonesia

Based on Article 1 Point 1 of the Prosecutor's Law, the Prosecutor's Office of the Republic of Indonesia (hereinafter referred to as the Prosecutor's Office) is defined

¹⁵ Henry D. P. Sinaga and Denny Irawan, *Reformulation of the Preliminary Evidence Audit Type in Taxation: When Legal Hermeneutics Meets the Rule of Law (Part 1 of 2)*, (Scientium Law Review, Vol. 1, No. 2, August 2022), 1.

¹⁶ Soetandyo Wignjosoebroto, *Hukum: Paradigma, Metode dan Dinamika Masalahnya*, (Jakarta: Elsam dan Huma, 2002), 17.

¹⁷ E. A. Nolfi, *Basic Legal Research for Paralegals*, (New York: Second edition, McGraw-Hill/Irwin 2008), 7.

¹⁸ Ade Saptomo, *Pokok-Pokok Metodologi Penelitian Hukum Empiris Murni: Sebuah Alternatif*, (Jakarta: Penerbit Universitas Trisaksi, 2009), 25.

¹⁹ Ronny Hanitijo Soemitro, *Metodologi Penelitian Hukum dan Jurimetri*. (Jakarta: Ghalia Indonesia, 1990), 34.



as a government institution whose functions are related to the judicial power that exercises state power in the field of prosecution and other authorities based on the law. Following to the Article 30 and Article 35 of the Prosecutor's Law, the Prosecutor's Office have several duties and authorities in the criminal field, including carrying out prosecutions, carrying out judges' decisions and court decisions that have been inkracht, completing certain case files and for this reason they can carry out additional examinations before being transferred to a court that in its implementation it is coordinated with investigators, putting aside cases in the public interest, handling criminal acts that cause state economic losses and may use peaceful fines in economic crimes based on statutory regulations. What is meant by "peaceful fine" is the termination of a 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 Act, as referred to in paragraph (1). in the Elucidation of Article 35 paragraph (1) letter k of the Prosecutor's Law. In addition, in terms of asset recovery, the Prosecutor's Office is authorized to carry out tracing, confiscation, and return of assets acquired by criminal acts and other assets to the state, victims, or those entitled to as referred to in Article 30A of the Prosecutor's Law.

According to Asep, the attorney general's *dominus litis* authority, one of which explains the principle that gives the Attorney General the prerogative to continue or stop the process of a criminal case (opportunity principle), confirms that the DPA concept can be applied in Indonesia..²⁰ One of the implementations of this principle is the collaboration between the Attorney General's Office and the Supreme Court in formulating Supreme Court Regulation Number 1 of 2013 concerning Procedures for Settlement of Property Applications in the Crime of Money Laundering, which in essence is a combined mechanism between criminal and civil processes. This shows that the concept of an agreement to postpone prosecution in a criminal case, as usually used in the common law system, can be applied in Indonesia. The aim is to explore the potential for state revenue from a corporate crime case considering that the legal subjects in the legal system consist of individuals, legal entities, and assets.²¹

Although in the practice of DPA, corporations may have little choice but to pay the prescribed fine in case of potential criminal liability, in all cases the focus should still be on resolving criminal liability without interfering with the running of the company's business.²² This concept does not conflict with the prosecutor's authority in terms of terminating the investigation of criminal acts in the field of taxation for the benefit of state revenue,²³ as referred to in Article 44B of the Law on General Provisions on Taxation, the Minister of Finance, at the request of a Taxpayer or a suspect, may apply for stopping the investigation of criminal acts in the field of

²⁰ Moh. Dani Pratama Huzaini, *Ibid.*

²¹ Moh. Dani Pratama Huzaini, *Ibid.*

²² Scott A. Resnik and Keir N. Dougall, *The Rise of Deferred Prosecution Agreements*, (New York Law Journal, Monday, December 18, 2006).

²³ 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.



taxation to the Attorney General, after the Taxpayer or the suspect has paid off the loss on state revenue as referred to in Article 38, Article 39, and Article 39A of the Law on General Provisions on Taxation plus administrative sanctions in the form of fines and as long as the case has not been transferred to court.

In the interests of state revenue, at the request of the Minister of Finance, the Attorney General may stop Investigations of criminal acts in the field of taxation within a maximum period of 6 months from the date of the letter of request. Termination of the investigation of criminal acts in the field of taxation is only carried out after the taxpayer or the suspect has paid off. In case the criminal case has been transferred to the court, the defendant can still pay off for the losses. In case the payment made by the taxpayer, suspect, or defendant at the stage of investigation up to the trial does not meet the amount, payment can be calculated as a payment of fines charged to the defendant.

Literature and Critical Review of Deferred Prosecution Agreement and Corporate Tax Crime in Indonesia

The position of the corporation as a part of the legal subject as mentioned in various literature in its application there are still many deviations in law enforcement practices, one of which is in the practice of investigating tax crimes, where the rules in the Criminal Code regarding the handling of tax criminal practices place corporations as the legal subject is still in the drafting stage. Nevertheless, there are other regulations outside the Criminal Code which contain rules related to corporate crime, including Law Number 8 of 2010 concerning Prevention and Eradication of Money Laundering Crimes, Law Number 41 of 1999 concerning Forestry, Law Number 32 of 2009 concerning Management and Protection of the Environment, Law Number 20 of 2001 concerning Amendments to Law Number 31 of 1999 concerning Eradication of Corruption Crimes, and Republic of Indonesia Supreme Court Regulation Number 13 of 2016 concerning Procedures for Handling Criminal Cases by Corporation.²⁴ Based on legal point of view, various regulations that contain rules related to dealing with corporate crime as mentioned above have weaknesses in their implementation practices, especially in terms of recovering state losses due to these corporate crimes.²⁵

The Attorney General's Office as an institution that has the authority as a prosecutor, executor of court decisions, and other authorities has a role in handling problems related to the loophole of criminal liability for corporate taxpayers with the legal subject of the corporate taxpayers themselves. In the case of criminal acts in the field of taxation, the prosecutor's office as a holder of dominus litis must be oriented towards restorative justice in dealing with these crimes, in the sense that recovery for losses incurred as a result of criminal acts of taxation by corporate taxpayers is carried out through the organs of the company. This is based on the formulation of Article 4 and Article 32 paragraph (1) of the General Provisions and Tax Procedures Law which contains the rule that every Taxpayer is required to fill out and submit a Tax Return (SPT) correctly, completely, clearly and signed, in case an Corporate

²⁴ Ahmad Iqbal, *Op.cit.*, 216.

²⁵ Febby Mutiara Nelson, *Pengembalian Kerugian Keuangan Negara: Dapatkah Menggunakan Deferred Prosecution Agreement?* (Simbur Cahaya, Vol. 26, No. 2, Desember 2019), 231.



Taxpayer is represented by a management.²⁶ Furthermore, Article 32 paragraph (2) of the General Provisions and Tax Procedures Law confirms that each representative of the Taxpayer is jointly and severally responsible for the payment of tax owed, unless the representative of the Taxpayer can prove and ensure that in his position, according to fairness and decency, it is impossible to be held accountable.²⁷ The important role of the prosecutor in pushing the DPA as a driving force to resolve corporate violations where handling costs a lot and time is one form of action taken as an effort to deal with various challenges in criminal acts of Corporate Taxpayers and recovery of state revenue losses,²⁸ in addition, the prosecutor also plays a role in preventing injustice to parties who do not receive benefits from the criminal acts of corporate taxpayers.

There are various pros and cons in the application of DPA, in the United States, companies can be held criminally responsible for crimes committed by their employees, provided that these crimes were committed within a scope related to work.²⁹ Corporate criminal responsibility can even be imposed on companies that have effective compliance programs, as the United States federal prosecutor's record shows that the main purpose of implementing DPA is to achieve better corporate governance and renewal of trust without destroying the company's reputation which can result in job loss. employee.³⁰ Corporate criminal liability can provide an opportunity for public companies to take steps to avoid punishment for various employee misdeeds through Department of Justice (DOJ) policies, thereby indirectly encouraging prosecutors to apply DPA or NPA.³¹ In essence, DPA or NPA policies are policies that replace de jure rules regarding corporate criminal liability with formal enforcement practices that are strictly enforced and compel companies to adopt effective compliance programs, self-report, and cooperate fully.³²

The application of DPA is also carried out in the United Kingdom, this is as stipulated in Schedule 17 Crime and Courts Act 2013. DPA is an agreement between a designated prosecutor and a person—a legal entity, partnership, or non-legal entity association—which is being considered by the prosecutor for violations in the form of common law offenses, statutory offenses, and ancillary offenses. Common law offenses cover various matters related to conspiracy to defraud and cheating the public revenue. While statutory offenses consist of various violations as stated in the Theft Act 1968 (theft, false accounting, suppression etc of accounting, dishonestly retaining a wrongful credit), every violation contained in the Customs and Excise Management Act 1979 (offences to exportation of prohibited or restricted goods, untrue declarations etc, fraudulent evasion of duty etc), violations contained in the Forgery and Counterfeiting Act 1981 (forgery, copying a false instrument, using a

²⁶ Anis W. Hermawan, *Improving Tax Compliance of the Construction Sector in Indonesia: A Juridical Perspective*, (Scientia Business Law, Vol. 1, No. 2, 2022, 1-16.

²⁷ Febby Mutiara Nelson, *Loc.cit.*

²⁸ Michael Bisgrove and Mark Weekes, *Loc.cit.*

²⁹ Jennifer Arlen, *Op. cit.*, 197.

³⁰ Rachel Delaney, *Congressional Legislation: The Next Step for Corporate Deferred Prosecution Agreements*, (Marquette Law Review, Vol. 93, 2009), 878.

³¹ Jennifer Arlen, *Op. cit.*, 197-198.

³² Rachel Delaney, *Loc.cit.*



false instrument, using a copy of a false instrument, offenses relating to money orders, share certificates, passports etc), violations as stated in section 450 of the Companies Act 1985 (destroying, mutilating etc company documents), violations in section 72 of the Value Added Tax Act 1994 (fraudulent evasion of VAT), violations in the Financial Services and Markets Act 2000 (contravention of prohibition of carrying on regulated activity unless authorized or exempt, contravention of restrictions on financial promotion, prohibition of dealing etc in transferable securities without approved prospectus, provision of false or misleading statements to auditors or actuaries, misleading statements and practices, and misleading the FSA), violations in section the Proceeds of Crime Act 2002 (concealing etc criminal property, arrangements facilitating acquisitions etc of criminal property, acquisition, use and possession of criminal property, failing to disclose knowledge or suspicious of money laundering, and tipping off), violations in section of the Companies Act 2006, (general rule against limited company acquiring its own shares, prohibiting financial assistance, and fraudulent trading), violations in the Fraud Act 2006, (fraud, possession etc of articles for use in frauds, making or supplying articles for use in frauds, and obtaining services dishonestly), an offense under section of the Bribery Act 2010 (bribing another person, being bribed, bribery of foreign public officials, and failure of commercial organizations to prevent bribery), and violation of regulation 45 of the Money Laundering Regulations 2007. The ancillary offenses relate to violations in the form of aiding, abetting, counseling or procuring the commission of the offense, an offense under Part 2 of the Serious Crime Act 2007 (encouraging or assisting crime) concerning to the offenses, and attempting or conspiring to commit the offense.³³

Delaney argued that DPA and NPA are variations of Petrial diversion agreements that cover matters related to federal monitoring, restitution, fines, additional audit actions, termination of individual responsibility, and probation..³⁴ However, in both DPA and NPA, the government can penalize entities if the government believes the entity violates the agreement. In the practice of implementing DPA, the prosecutor can file criminal charges against the company and agree not to sue for claims as long as the entity concerned complies with the terms of the suspension agreement, whereas in the application of the NPA, if the corporation does not fulfill the terms of the agreement, the prosecutor can submit claims that were not previously filed at the start of the prosecution.³⁵ In another opinion, Resnik and Dougall stated that based on several cases examined, it can be concluded that prosecutors will approve DPA and NPA if companies have the desire to institute fundamental reforms to companies that can produce good corporate citizens. Given the relatively large costs involved in the practice of implementing DPA and NPA, the practice of implementing them is only recommended for corporations that have a high error rate and possibility of being charged, then the corporation concerned can make changes to the board structure and new company compliance, conduct supervision, reporting, as well as strict disclosure mechanisms, and payment of restitution.³⁶ Nelson in his opinion also emphasized that the DPA mechanism can be applied in Indonesia by referring to several laws and regulations

³³ Jennifer Arlen, *Loc.cit.*

³⁴ Rachel Delaney, *Loc.cit.*

³⁵ Jennifer Arlen, *Loc.cit.*

³⁶ Scott A. Resnik and Keir N. Dougall, *Loc.cit.*



that have regulated corporate crime issues with a resolution mechanism similar to DPA.³⁷ Nelson in his opinion also emphasized that the DPA mechanism can be applied in Indonesia by referring to several laws and regulations that have regulated corporate crime issues with a resolution mechanism similar to DPA.³⁸

In contrast to the various opinions that have been stated above, several studies are against the idea of DPA, including the opinion put forward by Amulic stating that DPA is inadequate as a mechanism for resolving corporate crime due to 2 reasons, namely, first, there is coercion of collateral consequences that A large amount of violence against the accused can cause these people to have little or no opportunity to lead a normal life after serving their sentence. The second reason is that there is a marked difference in treatment between non-corporate defendants and corporate defendants which can lead to an increase in racial and socioeconomic stratification in law enforcement practices, for example, wealthy corporate defendants have a high probability of not being subject to criminal penalties.³⁹ In line with the opinion presented by Amulic, Reilly argued that the United States federal prosecutor has broad and uncontrolled powers and policies in the use of DPA, especially in the practice of corporate violations, the government should conduct discussions regarding the procedure for applying DPA which must be carried out with approval from the district court, so that the court can review the use of DPA before granting or rejecting the DPA agreement between the prosecutor and the defendant for any reason.⁴⁰ This opinion was conveyed based on the jurisprudence of several decisions in the United States. U.S. verdict v. Robert S. Furst, U.S. Judgment v. Atlantic Bank, and U.S. Judgment v. BP America Inc. states that an agreement to postpone the prosecution of the accused must be carried out based on the Court's approval as contained in 18 U.S.C 3161(j)(2), so that if the Court refuses to approve the suspension of charges for any reason, then the agreement is null and void.⁴¹

The Ideal Legal Concept in the Deferred Prosecution Agreement for Corporate Taxpayer Crimes

The application of DPA has been carried out in many countries, some of which are the United States and the United Kingdom, especially related to law enforcement against "white collar crimes", including various other cases such as fraud, trade violations, and accusations of wrongdoing based on the False Claims Act, Controlled Substances Act, the Foreign Corrupt Practices Act, and the Cosmetics Act.⁴² Based on several literatures, DPA offers a flexible and fast solution for responsible companies so that they can obtain several benefits such as preventing recidivism, helping companies avoid serious consequences for an indictment, and preventing permanent losses for corporations and innocent third parties (such as

³⁷ Febby Mutiara Nelson, *Op.cit.*, 250.

³⁸ Scott A. Resnik and Keir N. Dougall, *Loc.cit.*

³⁹ Andrea Amulic, *Humanizing the Corporation While Dehumanizing the Individual: The Misuse of Deferred Prosecution Agreements in the United States*, (Michigan Law Review, Vol. 116, Issue 1, 2017), 152.

⁴⁰ Peter Reilly, *Corporate Deferred Prosecution as Discretionary Injustice*, (Utah Law Review, Vol. 2017, No. 5, Article 1, 2017), 857-858.

⁴¹ Andrea Amulic *Loc.cit.*

⁴² Andrea Amulic, *Ibid.*, 842.



customers and suppliers).⁴³ In the practice of implementing DPA or NPA, prosecutors can file formal demands for the postponement or cancellation of criminal charges if the corporation concerned complies with the provisions of the agreed agreement. Prosecutors can also negotiate pretrial diversion agreements and seek corporate reform, restitution, and other conditions in return for agreeing to waive or suspend prosecution proceedings.

The existence of the concept of DPA as one of the prosecutor's powers can be applied in the practice of handling criminal responsibility loopholes for corporate taxpayers and corporations as legal subjects who commit these crimes. This is in line with the principle of public benefit in handling criminal acts of corporate taxpayers, where there are other objectives in investigating tax crimes other than deterrent effects, as stated in Article 1 paragraph (1) letter c and paragraph (2) of the Regulations. Government Number 39 of 2016 concerning Types and Tariffs for Types of Non-Tax State Revenue Applicable to the Attorney General's Office of the Republic of Indonesia confirms that payment of fines for criminal acts originating and/or resulting from the determination of judges and/or court decisions that have obtained legal force remains a type of Revenue. Non-Tax State (PNBP) that applies to the Attorney General's Office.⁴⁴

The existence of various positive impacts on the use of the DPA cannot be used as an excuse for the absolute authority given to prosecutors, given the fact that in practice, the application of the DPA still draws a lot of criticism from various parties. The urgency of tax certainty for Corporate Taxpayers is considered as a solution that can mediate between the rigid nature, efficiency and flexibility of tax laws and prosecutorial laws.⁴⁵ In this case it can be understood that on the one hand the tax law regulations and the prosecutor's law require predictability, regularity and uniformity, but on the other hand it must also ensure development, survival, capability and transformation in their implementation.⁴⁶ Tax Certainty in the use of DPA must include fulfilling several formal and material requirements consisting of fulfilling requirements in the form of accuracy, clarity, understandability, and accessibility to general taxation norms, stability of tax laws and regulations, as well as logical and systematic consistency of tax norms (coherence and lack of contradiction), where each norm applied must be in harmony with national legal norms including the Prosecutor's Law.⁴⁷

In order to avoid having absolute power possessed by the attorney or tax investigator and to avoid the stereotype that DPA implementation can result in subordination of interests and undermine the division of powers, it is necessary to make several improvements in the practice of DPA implementation, as follows: first, there is no DPA in tax crimes committed by Corporate Taxpayers, bearing in mind that there is only 1 regulation that contains rules related to this matter, namely Article

⁴³ Lauren Giudice, *Regulating Corruption: Analyzing Uncertainty In Current Foreign Corrupt Practices Act Enforcement*, (Boston University Law Review, Vol. 91, 2011), 360.

⁴⁴ Denny Irawan, *Restorative Justice Aspect in Strengthening Preliminary Evidence Audit in Indonesian Taxation*, (Journal of Tax Law and Policy, Vol. 1, No. 2, 2022), 2-3.

⁴⁵ Risanto and Arief Hakim P. Lubis, *Novum and Unrevealed Data in Tax Disputes in Indonesia: A Legal Certainty Perspective*, (Journal of Tax Law and Policy, Vol. 1, No. 2), 17-28.

⁴⁶ Daniel Deak, *Neutrality and Legal Certainty in Tax Laws and the Effective Protection of Taxpayers' Rights*, (Acta Juridica Hungarica, Vol. 49, No. 2), 2008.

⁴⁷ Risanto and Arief Hakim P. Lubis, *Loc.cit.*



44B of the KUP Law which states that the termination of investigations is at the request of the Minister of Finance to the Attorney General, where these rules are not the same with the rules related to the termination or postponement of the prosecution of criminal acts of taxation based on the authority or discretion of the prosecutor's office as referred to in Article 30 and Article 35 of the Law on the Prosecutor's Office. The termination of the investigation into criminal acts of taxation as referred to in Article 44B of the KUP Law applies to all taxpayers, there are no special provisions for Corporate Taxpayers;

Second, Provision of discretion to prosecutors in terms of tax penalty fines in the DPA procedure against Corporate Taxpayers. The DPA procedure has a fairly high range of administrative sanctions, namely in the form of a fine of 1 (one) times the amount of state revenue loss in case of a violation of Article 38 of the KUP Law, a fine of 3 (three) times the number of loss in state revenue in case of a violation of Article 39 of the KUP Law, a fine in the amount of 4 (four) times the amount of tax in the tax invoice, proof of tax collection, proof of with holding tax, and/or proof of tax payment in case a violation of Article 39A of the KUP Law. The existence of very high criminal fines results in a small number of Corporate Taxpayers filing DPA if they are involved in a tax crime;

Third, Issuance of implementing regulations for Article 44B of the KUP Law, bearing in mind that there are still many legal voids related to these provisions. Even though the regulations contain related rules such as Minister of Finance Regulation (PMK) Number 55/PMK.03/2006 concerning Procedures for Requesting Termination of Investigation of Criminal Acts in the Tax Sector for the Interest of State Revenue as amended by Regulation of the Minister of Finance Number 18/PMK.03/2021 concerning the Implementation of Law Number 11 of 2020 concerning Job Creation in the Field of Income Tax, PPn, PPnBM, as well as General Provisions and Tax Procedures, in fact there is still a legal vacuum, including: a) the treatment of corporate taxpayers who repay part or overall loss to state revenue during the investigation and prosecution process, b) treatment of cooperative corporate taxpayers to pay for losses on state revenue but takes several years to repay sizable criminal fines, c) Article 5 PMK Number 55/PMK .03/2016 which stipulates that the amount of tax that is not paid or underpaid or that is not ak should be returned and administrative sanctions are calculated based on the minutes of expert examination during the investigation, but the procedures for experts and independent competent institutions have not been regulated given that the tool for calculating losses on state revenue so far comes from the internal Directorate General of Taxes itself;⁴⁸

Forth, It is necessary to have rules related to the criteria for violations of which Corporate Taxpayers are entitled to be given DPA, including that there are repeated violations or the first violation, how is the responsibility of corporations that have special relations or have majority shares in Corporate Taxpayers who are suspected of committing acts tax crime and apply for DPA;⁴⁹ Fifth, Special arrangements regarding the authority and/or discretion of the Attorney General's Office regarding

⁴⁸ Denny Irawan, *Loc.cit.*

⁴⁹ Yudha Pramana, *Legal Reconstruction on Domestic Related Party Transactions*, (Journal of Tax Law and Policy, Vol. 1, No. 1, 2022), 23-38.



DPA must be based on the principles of public interest, the principle of prudence, and the principle of division of powers, the existence of these special rules will only undermine public trust in the criminal law system as a whole. One of them is taking into account that there is a DPA procedure that can be filed by a Corporate Taxpayer that is not carried out to prevent the company from further criminal liability and/or so that the company avoids further criminal proceedings.⁵⁰

Conclusion

Based on the discussion described above, several conclusions can be drawn, namely, first, the Deferred Prosecution Agreement in the practice of tax crimes committed by Corporate Taxpayers in Indonesia can only be implemented through the interpretation of Article 30 and Article 35 of the Prosecutor Law and Article 44B of the KUP Law . However, the Attorney General's authority and/or discretion in implementing DPA against Corporate Taxpayers has not been specifically regulated, bearing in mind that the provisions contained in Article 44B of the KUP Law apply to all Taxpayers (both Individual Taxpayers and Corporate Taxpayers), and still in the context of terminating the investigation of criminal acts of taxation. Second, it is deemed necessary for the Attorney General to issue statutory regulations at the level of Government Regulations that regulate Deferred Prosecution Agreements for corporations, including regulations related to Corporate Taxpayers and regulations regarding formal and material requirements. The existence of a DPA procedure is needed to ensure the continuity of a company so that it is efficient and compliant with subsequent business processes, not to build the impression that a company can buy justice to get out of the criminal problems it is experiencing or to cover up bigger and more mistakes.

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⁵⁰ Michael Bisgrove and Mark Weekes, *Op.cit.*, 437.



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