

THE USE OF FORCE MAJEURE BY ATTORNEY AGAINST TAXATION CRIME

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Abstract

This study aimed to see the effectiveness of using force majeure along with the challenges the attorney might encounter against taxation crime. It was a normative study with statute and case approaches. The study was conducted in High Prosecutor General office in Makassar and Directorate General of Tax South Sulawesi. The result showed that the force majeure by attorney against taxation crime might be applied in the form of detention to complete particular documents and conduct an additional investigation before filing the case to the court. The challenges in implementing the force majeure by attorney against taxation crime might come from legal and non-legal factors. The former involved confusing phrase of 'investigation termination' by attorney and the light different view on state financial losses between under Corruption Law and under General Act of Taxation, and the later involved the professionalism of attorney and information transparency.

Keywords

Attorney, Taxation, Force Majeure

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Introduction

Law is a sub-task in social system that may function to integrate public interests, and thus creating a neat condition and reaching justness. In functional setting, law should be able to serve elementary needs for the sustainability of social life (Anton dan Ninis, 2018) One of Government's state primary obligations is improving public welfare and reinforcing people to be responsible and participating on national development for the sake of public welfare (Marwan, 2012).

Toward the embedded function of organizing a government to improve public welfare, it may evoke several consequences as well, including the needs of huge financial support for the state and the government to run their functions for the sake of national goals. The importance of financial support for the state is a reasonable consequence, as it is crucial for the sustainability of people live. The state needs to have income from its domestic and foreign people in the form of taxes.

In this case, tax is the product of legal politic expected to improve people welfare. Tax is the primary financial source for a state, and the purpose of its utilization is for the sake of national development, defense, and administrative affairs. Tax is a compulsory payable contribution from both individuals and corporations to the nation, and it is coercive based on the applied law. People may not get a direct reward, as it is for the national needs and as much as people welfare.

Indeed, it carries on both positive and negative effects. As previously discussed, tax that people pay may lead the state to the expected goal, which is public welfare. On the other hand, it may encounter some challenges or obstacles to reach the goal. Therefore, it needs prevention and solution through legal instruments. To promote taxation in Indonesia, for instance, it needs a legal instrument of taxation. Similarly, to cope with the failure of reaching the expected taxation goal, it needs a legal instrument of taxation as well.

Regardless those all, taxation crime may affect the sustainability of the state's finance, causing incapability to reach people welfare (Saidi dan Merdekawati, 2012). Talking about crime, when the injured party refers to a state, the culprits are tax staff and taxpayers. However, in addition to the state as the injured party, such crime may target taxpayers as the injured party as well.

The use of criminal law in taxation setting is coercive. It has a specific sanction in the form of physical sentences (e.g., death, in prison) and/or additional sentences (e.g., the abolition or seizure of rights and particular assets, and the announcement of judges' statement). In the context of taxation law, however, it only recognizes in-prison arrestment and fine as the criminal sentences. Therefore, the compliance of legal substance for taxation crime is actually complete to cope with any violation against taxation law.

From such legal construct, taking action against taxation crime is one topic to be discussed in the politic of criminal law (Barda, 2016), as every taxation activity is set under taxation law, including those committing actions against taxation. Toward

taxation, the government of Indonesia has established a policy under the law of tax amnesty. As previously discussed, any action against the taxation law has been mentioned within. However, the establishment of tax amnesty is expected to turn the effort of criminalization into decriminalization.

Decriminalization has been clearly mentioned in Article 1 subsection (1) of Act No. 11 Year 2016 about Tax Amnesty, which is the nullification of tax payable with neither administrative nor criminal sanction by revealing the total assets and paying ransom.

The issue of tax amnesty is the current condition in Indonesia taxation. Noted that Indonesia is making an effort of reformation for total law enforcement across the lines or facets. In taxation context, the enforcement of taxation law is through decriminalization by implementing tax amnesty. Regardless this issue, the authors see that it needs to do a further analysis in relation to the role of law enforcement, especially by the attorney of the Republic of Indonesia as the only attorney institution in Indonesia. Looking into the regulation of tax amnesty, the attorney as though had nothing to do with the enforcement of taxation law.

In relation to the implementation of tax amnesty, it is not immediately implemented to all the taxpayers. There are several exceptions on that, as mentioned in Article 3 subsection (3) of Act No. 11 Year 2016 about Tax Amnesty, as follow.

- a. Being fully investigated and the document of investigation is considered complete by the attorney.
- b. Being in litigation process
- c. Being charged due to criminal action in taxation.

Looking into that provision, the attorney keeps accomplishing its function after the application of tax amnesty law, both in the process of prosecution (the process of investigation between investigator and the prosecutor) and the process of prosecution in tax court.

In further analysis, the obligation of attorney is not solely law enforcement, but also having prosecution function based on the regulation of attorney. However, there are several actions the attorney may conduct, including force majeure. The use of force majeure needs to be regulated in clear and comprehensive way. In this study, the authors examined to what extent the use of force majeure is conducted by the attorney by associating to the challenges they may encounter in conducting their prosecuting function, especially those in relation to taxation crime.

Research Method

This study was conducted in High Prosecutor General Makassar and Directorate General of Tax South Sulawesi. It is a normative research using statute and case approaches. statute approach is useful to analyze the law and other regulations, especially those related to taxation crime. Case approach is useful to identify the empirical implementation of law in relation to taxation crime.

The Use of Force Majeure by Attorney against Taxation Crime

The Attorney of the Republic of Indonesia has a very strategic role in law enforcement. The explanation of Act No. 16 Year 2004 about the Attorney of the Republic of Indonesia mentions that, in implementing their function and authority as a government official authorized to conduct prosecution, the attorney should be able to create legal assurance, legal order, justness, and truth based on applied law and consider the norms of religion, politeness, and morality, as well as exploring the values of humanity and fairness on societal life.

Therefore, it notes that the function, obligation, and authority of the attorney in criminal, civil, and administrative law are all based on legal assurance, fairness, and expedience. From the authors' view, particularly to the criminal context, the implementation of prosecutors' function, obligation, and authority should consider the concept of *due process of law*; that relies on the equilibrium of public and subject interests.

Looking into the implementation of function, obligation, and authority of the attorney, the authors argue the prosecutors' authority through attribution based on the regulations of their institute. As discussed above, the more important thing for this study is the role of attorney as the executor. The attorney is the only body that executes the resolution from Public Court. Executor is one with an authority to seize, take action, and execute a resolution based on the applied regulation and law. Things the prosecutors may execute are related to convicted person, evidence, and compensation. Therefore, they may only describe the execution of the court resolution which has fixed legal power on the evidence.

From the regulation on the prosecutors' obligation and authority in relation to taxation crime as discussed above, the authors define that there are only four obligations and authorities of the attorney are all based on the law of attorney, in particular to taxation, including conducting prosecution, defining the judge, completing particular documents for additional investigation, and prevent as well as avoid particular parties to stay or leave the Republic of Indonesia due to their involvement in a crime based on the applied law.

This result of analysis only relies on Attorney Law. To complete the analysis, therefore, it is elaborated with the regulation of taxation, including Act No. 6 Year 1983 about the General Regulation and Procedures of Taxation, as amended several times and recently through Act No. 16 year 2009 about the Definition of Government Regulation in Lieu of Law No. 5 Year 2008 about the Fourth Amendment of Act No. 6 Year 1983 about the General Regulation and Procedures of Taxation, to turn into legitimate law.

Following the investigation related to the attorney, in particular to their obligation, functions, and authority on taxation, it notes that article 44B subsection (1) of Taxation Law mentions that, for the sake of national income, under the order of the Minister of Finance, the Attorney General may stop any investigation on taxation crime in 6 (six) months period of time at most since the date of the appeal letter.

The termination of investigation, as discussed above, has particular conditions clearly mentioned in Article 44B subsection (2) that the termination of investigation on taxation crime as intended by subsection (1) is conducted only after the taxpayers paid the tax not or less paid or not supposed to be returned and added along with an administrative sanction in the form of fine as much as fourfold of the total tax not or less paid or not supposed to be returned.

According to several investigation and analysis, a conclusion is found that prosecutors' obligation, function, and authority in taxation setting based on the regulation of attorney and taxation law are as follow.

1. Conducting prosecution;
2. Executing the judge's resolution;
3. Completing particular documents for additional investigation;
4. Preventing and avoiding particular parties to stay or leave Indonesia due to their involvement in a crime based on the applied law;
5. Terminating the investigation.

Looking into those five functions, obligations, and authority of the attorney, the role of attorney in taxation setting is only related to crime. Therefore, any action the attorney commit in the concept of taxation crime is classified into the obligation, function, and authority in terms of force majeure.

Force majeure, as described in operational definition, is an authority or a series of actions under particular law for law enforcers (i.e., police officers-investigator, civil servant, prosecutors, and judges) to conduct a seizure, including arrestment, detention, searching, confiscation, document investigation, etc.

Force majeure in taxation setting by the attorney may not be apart from their obligation, function, and authority as described in previous analysis. Therefore, the subsequent analysis focuses on the force majeure of the attorney in terms of prosecution, arrestment, and accomplishment of case file, as well as terminating the investigation.

Challenges in Implementing Force Majeure by Attorney against Taxation Crime

From the result of analysis, the authors defines two indicators to discuss this second research problem related to legal and non-legal challenges/factors.

Non-Legal Factor

Non-legal challenge is a condition in which the implementation of force majeure by the attorney is due to political, social, religious, and cultural factors, as well as the other factors. In conducting the analysis, the authors found several non-legal factors that may inhibit the force majeure by the attorney against taxation crime. Those factors are as follow.

a. Judge Professionalism

It is tightly related to judges' knowledge and skills to solve particular cases. for further analysis, the authors had an interview with general prosecutors that took the taxation case.

The following is the result of interview:

Handling taxation cases is often defined by the initial conduct of the law enforcer self. Their knowledge in solving a case is one of the examples. The case of taxation crime is one with different level of difficulty compared to the other criminal cases. Therefore, the attorney should take a technical practice to conduct the prosecution of taxation case. It may optimize the function of law enforcers, in particular to taxation setting.

From the authors' view, the prosecutors' professionalism has been on satisfying level, as it shows an improvement on their performance for recent years. This far, some cases are found completed with final resolution by the attorney.

Such performance is supported not only by the internal elements of attorney, but also a concrete cooperation through MoU with some related institutions, as follow.

1. The MoU between the Ministry of Finance and the Attorney of the Republic of Indonesia No. Mou-2/MK.01/2012 and No. KEP-053/A/JA/04/2012 about Coordination in the Implementation of Obligation and Function.
2. The Mou between Directorate General of Tax under the Ministry of Finance of the Republic of Indonesia and Indonesia Junior Attorney General for General Crime No. KEP - 109/PJ/2012 and No. KEP-03/E/EJP/04/2012 about the Enforcement of Criminal Law in Taxation.
3. The Mou between Directorate General of Tax under the Ministry of Finance of the Republic of Indonesia and Junior Attorney General for Civil and Administrative Law No. KEP - 110/PJ/2012 and No. B/169/G/Gs.1/04/2012 about the Settlement of Civil and Administrative Cases.
4. The Mou between Directorate General of Tax under the Ministry of Finance of the Republic of Indonesia and Junior Attorney General for Intelligence No. KEP - 111/PJ/2012 and No. B-474/D/Ds/04/2012 about the Cooperation in order to Support the Enforcement of Taxation Law.

b. Information Transparency

Another non-legal factor the authors involve is information transparency. Toward individual freedom to express their ideas in cyber or digital setting, this factor significantly affects the performance of the attorney, especially in assuring its independence. As mentioned in Article 37 subsection (1), the Attorney General is responsible to conduct prosecution independently for the sake of justice derived from

law and conscience. Thus, from the highest up to the lowest lines of that body are all engaged to the independence that assures justice derived from law and conscience.

In empirical setting, we find that people are talking about a top trending topic related to the notion of a threatening text by the General Chairman of Perindo to Public Prosecutor Yulianto. The suspect is directly announced by a public prosecutor, Agung H. M. Prasetyo, in front of mass media before the police force of the Republic of Indonesia announces the suspect. Without any polemic, the authors see that, on the other hand, the attorney is now investigating a corruption case of tax restitution between PT Djaja Nusantara (DNK) and PT Mobile-8 in 2007-2008, and the loss this country suffer is due to this corruption is about IDR 114 billion, which also involves the General Chairman of Perindo) (www.merdeka.com).

As we know, that tax restitution case is filed to pre-trial session, and the attorney is not allowed to conduct investigation. On the basis of judge's statement that verify and conduct the hearing session on that pre-trial resolution, the judge views that (Muhammad Djafar Saidi, 2014) :

1. The Attorney General has no authority to investigate any taxation cases, as it is related to taxation crime.
2. Defining that the determination of suspects is considered invalid and null and void.
3. Ordering the attorney to stop the investigation.

From the pre-trial resolution, we find a different perspective between pre-trial judges and the attorney (i.e., investigator) in classifying the case. Following the *aquo* award, the case refers to taxation crime, while the Attorney General sees the case as a corruption case and thus, they has an authority to do investigation on that case.

Legal Factor

It is a condition of confusing legal substance in terms of its meaning. The overlapping regulations on particular issues are not set yet. The result of analysis on legal factor in terms of using force majeure against taxation crime shows that the confusion is found in the usage of the term 'termination of investigation' by Attorney General in taxation case.

Article 44B of Taxation Law clearly mentions about the termination of investigation on taxation crime by Attorney General. However, as we know that the one with authority to conduct investigation on taxation case is the investigators from Directorate General of Taxation. Therefore, a perception of who actually conduct the investigation (either tax investigator or public prosecutor) reveals. In this case, the author assumes that the phrase "termination of investigation" should be altered into "termination of prosecution" or another equivalent term. Under the juridical base, the termination of investigation is totally assigned to tax investigators from Directorate General of Taxation (Nahak, 2014).

To complete this legal argumentation, the authors need to convey the provision of attorney law about Attorney General's authority to put aside particular cases as mentioned in Article 35 subsection (c) of Attorney Law that Attorney General has an authority to put aside particular cases for the sake of public interest. The definition of public interest in the explanation of that law refers to national interest and/or public interest.

In relation to taxation, it argues that the termination of investigation' (in which the authors feel that this term is not quite appropriate to be used) by Attorney General due to issue of national income. The authors see that the state's income is classified into public interest as well. Therefore, in order to avoid any different perception or interpretation, Article 44B subsection (1) should be altered, and it should consistently use the phrase mentioned in Attorney Law applied as the legal basis for the attorney to conduct their function, obligation, and authority.

Another legal factor that may impede the force majeure, as the authors assume, is the light difference between inflicting the state financial loss between due to corruption and inflicting the state financial loss due to taxation crime. Our legal apparatus debate these different interpretations. From those two provisions, the authors highlight the term 'State Finance' and 'State Income'.

The Act of State Finance No. 17 Year 2003 mentions that the State finance refers to any rights and obligation of the state that can be valued using currency, and everything in the form of cash and assets that may belong to the state due to the implementation of those rights and obligations. Furthermore, one of the state rights is collecting taxes in normative way, and thus, the state income is classified into the object of the state finance as mentioned in Act of State Finance. In addition, the state finance as in Corruption Law along with the explanation mentions that the state finance refers to all the state assets, both separated and non-separated ones, including any parts of the state assets and the rights and obligation that reveal:

- a) Under the governance, management, and responsibility of government officials, both central and regional ones.
- b) Under the governance, management, and responsibility of State-owned/local-owned corporations, foundations, and other enterprises that enclose the state asset or the third party based on an agreement with the state.

The explanation in Corruption Law shows a fundamental difference between the state finance as the object of corruption and the state loss as mentioned in Taxation Law, which both of them bring financial loss for the state based on the Law of State Finance. However, the difference is seen on the phrase "under" in the explanation of Corruption Law which indicates that the state finance is under the governance of state administrator, and of Taxation Law which indicates that the state finance is not set under the governance of state administrator, but more likely to the taxpayers.

Conclusion

The use of force majeure by attorney against taxation crime can be conducted in the form of arrestment to complete particular case file and having additional investigation before filing the case to the court. The challenges the attorney may encounter to conduct their function against taxation crime are due to legal and non-legal factors. The former involved the confusing phrase of investigation termination by attorney and the light different view on state financial losses between under Corruption Law and under General Act of Taxation. The later involved the professionalism of attorney and information transparency.

In order to avoid any different perception and interpretation on general act of taxation, it should make an alternation either on the mechanism of legislation or the mechanism of article examination on taxation law in Constitutional Court, especially in a phase "termination of investigation." To improve the professionalism of attorney body, it needs a mechanism of periodic education and training related to the contemporary issues in legal context which is in blue-grey area that involves not only one single legal facet, but also two or even more facets, such as taxation and crime, or taxation, crime, and administrative law.

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