The Implementation of Gijzeling in Solving Tax Corruption Cases in Indonesia

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***Abstract*- This study has three objectives. The first is to analyze the legal mechanisms and procedures in preventing and combating corruption in taxation. The second is to examine constraints faced by the law enforcement and government in efforts to prevent and eradicate corruption in taxation. The third is to examine the right policy conception in preventing and eradicating corruption in taxation. Note that, data and information used in the study were taken from literatures and other secondary sources relevant to this study. The study found inter alia that the case of tax corruption done by Gayus and his associates needs to be studied further at higher level of justice. This study also suggest the important of Gijzeling to regain financial loss of the state related to tax corruption.**

***Index Terms*— Corruption, taxation, Gijzeling, Implementation.**

I. INTRODUCTION

Tax corruption in Indonesia becomes a serious public concern in recent years. Of the many incidence of tax corruption that gain public concern was the case of the two tax officers, namely, Gayus Tambunan and Dhana Halomoan Widyatmika. They were found guilty in misusing their authority as the tax officers by the Corruption Institution so called KPK. According to the Indonesian Corruption Watch-ICW (2010), there are at least three possible ways corruption that can happen in the taxation department. The first is through the process of staff recruitment in which the personnel tax officers was bribed by the job applicants. The second is by extorting the taxpayers. The third is through negotiation process between tax officers and taxpayers. This negotiation further lead to the reduction of the amount of tax payments by the taxpayers, while the tax officers receive payment from the tax payers.

As the corruption increased significantly in the taxation department, the law enforcement agencies in 2012 consisting of three institutions, namely, the police institution, the judiciary institution, and the Corruption Commission Institution agreed to issue regulation. In the regulation, it was stated that the taxation department as the public institution is prone to corruption. These three institutions consequently further agreed to issue regulation in preventing, combating and eradicating tax corruption. The importance of the concern to the tax corruption is partly because tax is the lifeblood of development in Indonesia. This is simply because without tax, the Indonesian government will be unable to increase the welfare of the society.

As tax revenue is important for the economy, any corruption in the taxation sector will disturb the government efforts in sustaining the development programs. This suggests that corruption in the taxation sector should not be allowed to become a bureaucratic culture, and hence it should be prevented and eradicated.

It is argued that of the many ways to obtain the money corrupted back to the government, a form of force body penalty or *Gijzeling* can certainly be used. The Gijzeling has been issued in the Articles 209-223 HIR. However, Gijzeling cannot be meant as a way to replace the obligation of debtors to repay the money that was corrupted. In other words, through Gijzeling the corruptor in the taxation sector is expected to repay the money that was corrupted. Note that, the detail process of Gijzeling can be seen in HIR.

Many years ago the Supreme Court through the issuance of the internal letter No. 4 of 1975 argued that gijzeling is against the human right and hence it cannot be used as a method to punish the corruptor in the taxation sector. However, Sudargo Gautama argued for many reasons that gijzeling can be a good way to fine the corruptor in the taxation sector. He further argued that gijzeling has no conflict with humanity. Due to the above arguments, this study has three objectives. The first is to analyze the legal mechanisms and procedures in the taxation sector in preventing and combating corruption. The second is to examine constraints faced by the law enforcement and government in efforts to prevent and eradicate corruption in the taxation sector, and the third is to examine the right policy conception in preventing and eradicating corruption in the taxation sector. Note that, the method used to examine the above research questions are by undertaking review literature and other secondary sources relevant to this study.

II. SYSTEM AND MECHANISM IN PREVENTING AND COMBATING TAX CORRUPTION

The systems and mechanism in preventing and combating corruption in the taxation sector has already been determined by the government. The government parties that involved in determining the system and mechanism are the Deputy Attorney General for Special Crimes (Jampidsus), the Head of the Criminal Investigation Police, and the Secretary General of the Corruption Eradication Commission (KPK). They indicated that corruption in the taxation sector can be done by the tax employees or by the taxpayers or by the tax brokers.

There are two types of facts were agreed in preventing and combating corruption in the taxation. The first is based on the formal facts. The format fact is a fact that indicates that the perpetrator committed an unlawful act or abuse of authority in the taxation sector. The second is the material facts. This material facts show the inner attitude of the perpetrators to do unlawful act or abuse of authority.

It was identified that the modus operandi of corruption in the taxation sector can happen in two ways. First, the existence of conspiracy between the State Officials (tax employees) and

the taxpayers and brokers. The second is the conspiracy of those three parties that further lead to actions against the law or by misusing the authority in the taxation sector. This can happen in the process of auditing or in determining the value of taxes to be paid, as well as in the process of decision making and/or when the payment of VAT (value added tax) is restituted.

One of the laws related to the tax corruption is a Presidential Instruction No. 1 of 2011. In this act, it was regulated how the government accelerates the settlement of legal cases on one hand and how the mafia law is eradicated. This Presidential Instruction is issued due to the increasing demand by the people to eradicate the corruption in taxation. This INPRES can be considered as one legal instrument that gives authority to the Chief of Police, the Attorney General, Minister of Justice and Human Rights, and the Minister of Finance, to do the following.

The first is to take steps required under the duties, functions and powers through coordination and integration among the relevant institutions to accelerate the settlement of legal cases and tax irregularities, including but not limited to the Gayus HP Tambunan. Second, to speeding up the process of law enforcement synergistically by establishing the Financial Reporting institution and a task force specifically to eradicate Tax Mafia. Third, to conduct performance audit and financial audit to any institutions. Fourth, implementing the law enforcement with a fair treatment and non-discriminatory basis against all the parties that involved in tax corruption cases.

Fifth, improving the effectiveness of law enforcement based on the principle of reversed burden of proof in accordance with legislation. Sixth, freezing all assets and funds allegedly derived from criminal acts and / or tax irregularities in an effort to return the country's wealth. Seventh, provide administrative and disciplinary action to all officials who obviously do irregularities and violations, and immediate replacement or termination of the relevant authorities within the period of one week. Eight, rearrangement of the organizations or institutions within a period of one month after the Presidential Instruction was issued. Ninth, evaluate and repairing work system and all related rules, which are considered to have a weakness or provide opportunities for fraud and / or abuse. Tenth, providing progress report of the legal settlements toward taxation cases to the President on a regular basis at least every two weeks. Finally, provide an explanation to the public about the process that has been completed or is still being done or that will be done.

Apart from the above tasks, another important thing that is worth to be mentioned here is that the Presidential instruction gives also the authority to the Vice President of Republic of Indonesia to supervise, monitor and evaluate the implementation of the instructions with the assistance of the task force relevant to tax eradication.

After two years of the issuance of the above Presidential Instruction, the vice President of Republic of Indonesia reported that the instruction was able to reach the following four major results. The first is that many cases in taxation have been handled quiet well by the court. Second, the importance of the role of justice collaborator and whistle-blowers to uncover the cases. Third, the need to search assets of crimes to be confiscated by the state. Finally, the importance of institutions to undertake good governance principles so that in the future these government institutions do not do any wrong doing in managing taxation. These four aspects further become the standard procedure for the enforcement and prevention of corruption in the taxation sector by the government.

III. CONCEPTION POLICY IN ERADICATING, PREVENTING AND COMBATING TAX CORRUPTION

Gijzeling can be considered as the right concept in the eradication of corruption in the taxation. This method has been considered more useful than having to punish the corruptor in the field of taxation. The importance reason to apply Gijzeling was based on the legal case of PT. Surya Alam Tunggal (PT SAT) that sold a number of assets to PT. Adikumala Surya Abadi (PT SAA) on 7 January 2004. The assets sold consisted of land (Rp. 1.2 Billion), building (Rp. 1.7 Billion) and engine (Rp. 3.1 Billion) with a total sales value of Rp. 6 billion, as stated in the bond sale and purchase agreement dated January 7, 2004 made by the Notarist Nansijani Sohandjaja, SH.

However, as the above transaction was imposed to PT SAT to pay the large amount of tax in accordance to the Article 16 D of the Law No. 11/1994, PT SAT then proposed a legal appeal to reconsider the obligation to pay the above VAT tax. This appeal has been accepted by the Directorate of General of Taxation. If this appeal was accepted, this means that the Directorate of Taxation has to face financial loss of government revenue.

After this appeal is reviewed, it was found that the Directorate of Taxation has made mistakes in imposing PT SAT to pay VAT tax. This mistake occurs as the issuance of the law No. 11/1994 has been made before this case happening. Thus, this case was considered purely a mistake made by the Directorate General of Taxation. So that PT SAT was considered tax free. Note that the decision made by the Directorate General Taxation has been supported by the South Jakarta District Court decision as well as by the Jakarta High Court decision.

From the above case. one can learnt that opinion and interpretation differences among the tax officials can occur. This difference, consequently, should not be punished. In this case, the disagreement occurred in regard with the imposition of VAT Article 16D the Law 11/1994, Government Regulation No. 50/1995 and the Law No. 8/1983 on Value Added Tax on Goods and Services and Sales Tax on Luxury Goods as well as the Government Regulation No. 22/198 on the Implementation of the Law on Value Added Tax 1984.

The use of the rules and regulations above relating to the two events. The first incident PT SAT sell some assets to PT SAA on January 7, 2004. The Audit Office of East Java declare these assets subject to VAT Article 16 D with the details of assets by Rp. 1.9 billion of Cold Storage has been subject to VAT while the rest of Rp. 2.9 billion was not the subject of VAT. Thus, taxpayers have to pay VAT plus administrative sanctions of the total amount of Rp. 429 000 000, -.

It can be noted, however, that the article 16 of the Law No. 11/1994 with effect from 1 January 1995 essentially stated that value added tax is imposed on the transfer of assets by Taxable assets which according to the original purpose is not for sale. Value Added Tax that is paid at the time of acquisition can be credited. The article 16 D essentially stated that delivery machines, buildings, equipment, furniture or other assets in accordance with its original purpose are not by taxable, but is

taxable insofar as they meet the requirements (see Article 13 paragraph 5).

Based on the wording of the Article 16 D, it was was revealed that on the sale of assets which, according to its original purpose is not for sale, any goods are subject to VAT if at the time of acquisition of such assets, there is VAT that should be paid and credited. This can seen in the word "along" which is the limit for the imposition of VAT under Article 16 D. Thus, on the sale of assets which, according to its original purpose is not to be traded if there is no VAT paid at the time of acquisition and cannot be credited to it on the sale of assets, hence it is not subject to VAT.

It should be noted also that the article 16 D of the Law No.11/1994 determined whether the assets sold are subject to VAT or not is depending on the time of acquisition. If the assets that are sold by PT SAT to PT SAA was in 1994 are not subject to VAT, then it is subject to VAT if it is sold in 2004. Therefore, the sales occurred in 1994 is subject to the Law No. 8 of 1983. In this law especially article 4 paragraph (1), it was mentioned that : "Delivery of Goods Tax payable" must meet conditions. These conditions, among others, are the submission made in the company. However, if the delivery of goods was done not in order to run the company or work, for example, any sold assets are not tax payable. Based on the wording of Article 4 of the law No. 8 In 1983, it is known that one of the conditions for the Value Added Tax is: "Taxable Goods conducted in the Customs Area within the company or the work by the Entrepreneur and so on".

Furthermore, the definition of "in the company or work by company" was clarified in the explanation of Article 4 paragraph (1) of the law. It was mentioned that the handover is done in a company or work as taxable entrepreneur. This means that in the context of their daily activities as a taxable company any delivery of goods that were done not in order to run the company or work, transfer of assets that are not intended for sale, are not subject to VAT. Note that in the article 9 paragraph (1) letter a PP 22 of 1985 on the implementation of Law No. 11 of 1983, it was explained that if, for example, PT. A sells machines to make sewing machine, this company does not have any obligation to pay tax.

Based on the above example, the delivery of taxable goods made by PT SAA to PT SAT was not subject to pay VAT as the goods are bought to run the company. This regulation is based on Article 4 paragraph (1) letter a of Law No. 8 of 1983 and the explanation and the Government Regulation No. 22 of 1985.

IV. IMPLEMENTATION OF THE CORRUPTION LAW

The case of PT SAT above can be considered as administrative matter so that when the case was tried as an act against the law and abuse of authority then in our opinion there was criminalization of tax decisions. There are a few considerations that we judge the controversial value as described below.

First, it relates with the aspect of interpretation of the element of "will" to benefit others. In its legal considerations, the judge essentially states that Mr. Gayus Tambunan has an intention to make the corporation and others to gain profit. This is proposed by using the Association Sale and Purchase Deed and transfer No. 160 dated December 31, 1994 and the documents No. 8 dated June 5 1995 made by Notary Lukito SH.

Furthermore, in accordance with Regulation of the Minister of Finance No. 425 / PH.I / 2007 on the Environment Position Description Office of Directorate General of Taxation, the officer in the Directorate of Objection and Appeal gradually have done its job according to the tasks assigned by the Director General of Taxation. Gayus and his associates, after doing his investigation, then proposed to accept the petition of objection taxpayer then they submit the proposal to the Director General of Taxes to issue the legislation in force.

In proposing to accept the objection of taxpayer, Gayus used many rules and regulations. These rules and regulation include the Law No. 8 of 1983, the Law No. 11 of 1994, the Government Regulation No. 22/1985 on Implementation of the Law on Value Added Tax and the Government Regulation No. 50/1995. These rules and regulation stated that an item is designated as a payable tax when goods are delivered and controlled by the taxpayer within the meaning of Article 11 of Law No. 8 of 1983 as amended by Law No. 11 1994 junto Article 20 PP 22, 1985 and Article 33 PP 50 of 1995 which essentially states the goods are not moving is at the time of the transfer of rights to use or control of the goods do not move either legally or substantially to the purchaser or recipient of the goods are not moving.

Under the Article 1, Article 4 and Article 5 of the law No. 160, December 31, 1994, PT. SAT has mastered and has fixed assets owned by PT. SAA significantly since December 31, 1994. Other documents that can prove the change of ownership is the financial statements of PT. SAT which is the annex of SPT 1994 of PT. SAT in which the financial statements can be seen that the fixed assets of PT. SAT has increased worth of the assets transferred. Also, the letter No. 160 On December 31, 1994 followed by the legal letter No. 161, Act No. 162, and Act No. 163 on December 31, 1994 in the form of Power of Attorney and Letters Chargé which clearly states the power to become the owner of the assets transferred under the Sale and Purchase Association and transfer No. 160 On December 31, 1994.

The officers of the Directorate Objection and Appeal did not consider the legal letter No. 8 On June 5, 1995, Act No. 9 On June 5, 1995, and Act No. 10 On June 5, 1995 because of the Acts is not a document of transfer of assets, but it only explains about the occurrence of physical delivery or real assets of PT SAA to PT SAT through debt swaps or novation ex Article 1413 of the Civil Code with the approval of BRI.

The Director General of Taxation under the Ministry of Finance Regulation No. 425 / PM.I / 2007 dated June 25, 2007 on Environmental Position Description in the Central Office of the Directorate General of Taxation has the responsibility for the correctness of Decree issued with regard to his position so that if the decision does not blame this institution then obviously the proposals made by the Directorate of Objection and Appeal also is true. Even if the proposed of Directorate of Objection and Appeal is found wrong, the proposal then should be considered as a proposal as such, so it did not have any legal consequences due to its sheer administrative procedural. Thus, it can be proven that it is proposed for seeking self benefit and benefits for others. So there is absolutely no element of the will in the act of the Directorate Objection and Appeal to accept the petition Objection PT SAT.

Secondly, regarding the interpretation of the element "Purpose Profitable Others". It was mentioned in the law that the judge essentially states what is meant by the goal is a will in the realm of mind or inner nature perpetrator intended to meet profit. It is extremely difficult to prove a situation that was in the mind of another person or the offender. However, the law only regulates how seeing a purpose in one's inner nature is apparent actions. Thus, the judge can conclude that the wrong doing has been in the mind of the perpetrator.

Elements of the offense in the Article 3 of the corruption law explicitly include the word purpose has two meanings that are "intentionally" or "intentionality" which is an "element of the offense that is subjective." This means that all the elements of the offense behind the word "with the goal" was covered by the accidental or intentional.

If the defendant has violated the laws and regulations applicable tax, then the next question is whether the offense that he/she as defendant intentionally or not to benefit themselves or another person or entity? According to the doctrine, in general, in the formulation of the offense which consists of the element of "knowingly" means that the offender must first know, willingly and conscious, so he is accountable for his actions as criminal. Van Teolichting mentioned that "Criminal generally should be imposed only on goods who commit a prohibited act with a desired and known".

Back to the consideration of the judges on the intentions or motives in the case of Gayus case to use the legal action No. 8-10 On June 5, 1995 as noted above, in our opinion it is not entirely true. This is because the documents on the Recorded Credit Agreement No. 8 dated June 5, 1995, the Investment Credit Record No. 9 dated June 5, 1995, and the Bank Guarantee Facility Agreement No. 10 dated June 5th, 1995 is not a document transferring assets, but it was only the notification of a debt in the Article 1413 of the Civil Code. PT SAA has submitted substantially all of its assets based on the legal letter no. 160 On 31 December 1994, and the BRI bank has approved the transfer and also an approval for the extension of credit. Thus, no proof exists to what has been done by Gayus in proposing the acceptance of PT SAT request.

Third, interpretation of the element of "abusing the Authority or ingredients available to him because of the official position". In the Judgment, the judge essentially has stated that there was an abuse of authority done by Gayus in his position. However, this abuse of authority has been done because Gayus used the legal letter No. 160 and He does not carefully read that legal letter which mentioned that legal letter is still bound in the Bank of BRI in Surabaya. Gayus did not consider documents No. 8/5 June 1995, Act No. 9/5 June 1995, and the Act No. 10/5 June 199, while in the documents it was mentioned that the payment on the sale of assets occurred on June 5, 1995. This indicated that Gayus used improper provision, while he should use an Article 35 paragraph (2) PP / 50/1994. So that the sale of these assets by PT. SAT to PT. SAA in 2004 has obligation to pay VAT based on Article 16 D Law / 11/1994.

However, the judge found that actions that were done by Gayus have been recognized from the beginning since under discussion with the Tax Audit and taxpayers there is an intention to grant the petition of objection to PT. SAT with no support of other documents. Therefore, Gayus has been approved to do wrong doing in his authority due to his position in the office by doing investigation proposed by PT. SAT.

The question then is whether there is "misuse of authority" specifically as stated by the judge above? Basic imposition of VAT by the examiner is based on Article 16 D Law 11 of 1994 so that the documents and data required only evidence related to the acquisition of the assets are bought and sold. This is concerned with the wording of Article 16 D which essentially states: "VAT charged ... etc., all the VAT paid at the time of acquisition can be credited." This means the need to look for documents that may provide information to us whether at the time of acquisition, the assets are subject to VAT or not.

To find out the acquisition of the assets formerly subject to VAT or not, the documents available is the legal letter of Sale and Purchase Association and transfer No. 160 December 31, 1994 and Financial Report as Appendix SPH Agency 1994 of PT SAT showing the assets of PT SAT that has been increased by the sale price of the assets transferred. In the indictment and the prosecution, there was no evidence of the legal letter of sale or any other documents that show the time of delivery of other assets. The legal letter No. 8, Act No. 9 and No. 10 On June 5, 1995 have nothing to do with the transfer of assets but it only contains a notice concerning the transfer of assets as of December 31, 1994.

In addition, the judge declared assets may not be physically delivered on December 31, 1994 because it is still under warranty mortgages in bank BRI. In the VAT Act, the assets that became collateral for the credit agreement is still owned by the party that has collateral and there is no ban on these assets to be processed or sold legally. Moreover according the legal letter No. 8, Act No. 9 and No. 10 On June 5, 1995, BRI actually agreed to deliver or transfer of debt.

Then is it true that Gayus had used the wrong tax rules in the case of objections PT SAT? In fact, Gayus using the VAT rules regarding the imposition of VAT is really good toward the Article 16 of Law No. 11 of 1994 on VAT, as well as the determination of the time the VAT according to Law No. 8 of 1983 as amended by Law No. 11 Year 1994. Thus, in our opinion there is no act of misuse of authority committed by Gayus and his associates as prosecuted by the public prosecutor.

Fourth, interpretation of State Loss. In the Judgment, the judge essentially stated that there has been state loss due to the appeal requested by the Director General of Taxation. The interpretation of the state loss is quiet debatable. In the rules of corruption, the state losses may arise if the state should spend money based on a rationale that is against the law or pursuant to a crime or a criminal act. Payment and receipt of funds by PT SAT and the state is not based on a crime, but it is based on the objection petition in tax payments that have been deemed correct by the Directorate General of Taxation. The articles No. 25-26 UU KUP clearly gives the opportunity to every citizen as a taxpayer to propose objection against the tax bill that does not correspond to the actual so that if the petition objections are received then it is not a crime. Moreover, the objection petition does not at all mean delaying bill payments.

The general philosophy objection to the tax bill is to provide certainty and fairness for all taxpayers to pay tax in accordance with applicable regulations. Therefore, funds paid by the state to taxpayers based on received objections cannot be defined as state loss.

Fifth, regarding the interpretation of participation. In the Judgment, the judge essentially stated that there has been a common agreement for any persons who commit, told to do, or

participate, do not have to meet all the elements of a criminal offense. But it is enough if there is an indication of the intention to do criminal offense. Further, panel of Judges of the Gayus case stated that what has been done by Gayus is a corruption as there has been some parties benefits from that action on one hand, and the misuse of authority done by Gayus on the other hand.

Doctrine of jurisprudence in general proclaims that anyone who decided guilty in doing corruption if and only if there are evidences or facts of it. However, if there are no evidences, there will be no penalty that should be imposed to that particular person. In Gayus case as the focus of this study, it was found that there is absolutely no evidence of intent or opzet the same between the defendant, unless examine the objection petition and made the result is to be proposed to the Director General of Taxation. In addition, *tumt sertalmedeplegen* also suggests the existence of a joint initiative between Gayus and his associates, but in this case there is no evidence of joint initiatives because each defendant has the responsibility and authority are different. This matter is noted in the Article 55 paragraph (1).

If there is proven criminal elements to other defendants, then the respective defendant cannot be justified as the participant of the criminal offense. This is simply because the respective defendant did not meet the elements of indictment so that she/he has no actions against the law, nor there is an opzet or intention to do criminal offense with other defendants.

The result or product of the research on the petition of the taxpayer's objection (PT SAT) is a proposal to the Director General of Taxation. This proposal is in the form of either rejection or acceptance toward the objection petition of the taxpayer. As a proposal, whether the proposal is considered wrong or not, the status of proposal is still a proposal in that it does not have any legal consequences for the content and the maker of the proposal. If then the judge accepted the proposal as one that can be justified by law, the judge's judgment or opinion is erroneous and incorrect because the proposal still requires an approval from the Directorate General of Taxation. If the proposal is rejected by the Directorate General of Taxation, the proposal does not mean anything, the opposite turned out the proposal is justified and approved by the Directorate General of Taxation. This is important in order to make a clear judgment that the acceptance of proposal on taxpayer request by PT SAT is not a crime.

The Minister of Finance Regulation No. 425 / PM.I / 2007 dated June 25, 2007 on the description of structural position at the Office of Directorate General of Taxes has the responsibility for the correction of the issuance of a decision. The legal letter made by the Director General of Taxation is still valid so that the defendant and others by themselves is not responsible. Therefore, the act of Gayus Tambunan, Humala, Maruli, Johny Tobing to Bambang Heru as the Director Objection and Appeal of Taxation office cannot be categorize as a crime that can be punished.

V. CONCLUDING REMARKS

Gayus case related to tax disputes of PT SAT needs to be studied more deeply by the judges at a higher level, as well as the assessment of the juridical fact made previously controversial. This is because the application of the rules let alone the rules of criminal corruption in tax disputes that are administrative broad impact on the lives of taxation in general.

Tax disputes PT SAT purely administrative in nature so that differences of interpretation of rules of law should not be convicted, or convicted of acts of corruption, let alone absolutely no action "against the law" by Gayus et al. To regain the loss of state, this study suggests the important of Gijzeling to be implemented in tax corruption. However, much remain to be done to make Gijzeling to become an effective method to deal with the corruptor in taxation sector.

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