

Reconstruction of the Element of 'Person' Understanding in Tax Criminal Liability According to General Provisions and Tax Procedure Act 2020

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ABSTRACT

The Indonesian Criminal Code, as the main book of criminal law, still adheres to the principle of *societas delinquere non potest* or *delinquere non potest universality*, where legal entities cannot commit criminal acts, so that criminal responsibility is imposed on humans. Act Number 6 of 1983 concerning General Provisions and Tax Procedures as Amended Several Times, the latest by the Act of the Republic of Indonesia Number 11 of 2020 (Act of General Provisions and Tax Procedures 2020), uses the term 'person' in the formulation of the criminal subject, does not mention the taxpayer who is a criminal tax address. As a result, when a tax crime occurs by a corporate taxpayer, it is difficult to determine the criminal liability of the person, the management, or the corporation. The term 'person' seems to limit only natural humans who can be held accountable for the crime. It is necessary to strengthen the formulation of the criminal subject in the Act of General Provisions and Tax Procedures (GPTP) 2020 by reconstructing the understanding of the articles that use the term 'person'.

Keywords: Criminal liability, Person, Taxpayers.

1. INTRODUCTION

Discussions on criminal law among academics and practitioners always experience very dynamic changes, in line with changes in social, economic, political life. Even now, the most attention-drawing is rapid technological changes. However, this is natural because humans always try to improve their quality of life by learning from past experiences.

Observing the current development of criminal law, especially in special laws outside the Criminal Code, which include criminal acts, there is a tendency to alternate the definition of criminal subjects. As the main book of criminal law, the Criminal Code still adheres to the principles that developed in the 19th century, namely the *societas delinquere non potest* or *delinquere non potest universality*, where legal entities cannot commit criminal acts. Therefore, the fault cannot be blamed on legal entities or corporations but humans. Article 59 of the Criminal Code recognizes that the perpetrators of criminal acts are only humans (*natuurlijk persoon*) and contains the reasons for eliminating criminal acts for administrators, members of the board of directors, or commissioners who did not participate in committing the crime.

Tax law is an administrative law with criminal provisions as reinforcement so that it is more obeyed by all levels of society, especially taxpayers. The purpose of criminal provisions in administrative law is "so that all provisions of state administration can apply effectively, and a law enforcement policy is developed by functionalizing aspects of criminal law in state administration laws and regulations, which gives rise to administrative penal law). [1]

"Tax law regulates the relationship between the state as the holder of taxation jurisdiction and citizens as taxpayers in the implementation of taxation rights and obligations. Tax Law is included in Public Law and is included in State Administrative Law". [2] According to Anshari Ritonga, tax law is a special law because it has provisions that are not the same or provisions that deviate from general provisions. As a particular law, "criminal tax law meets the criteria as a systematic *lex specialis* because its address is extraordinary, namely taxpayers and tax officers. In addition, both material provisions and formal provisions in criminal tax law deviate from the Criminal Code and Criminal Procedure Code so that during the court process, the provisions used are criminal tax provisions." [3]

Formal tax laws are regulations regarding ways to transform the material law mentioned above into a reality. This section of the law contains procedures for the implementation of the determination of tax debt, government control on its implementation, the obligations of taxpayers (before and after receiving a tax assessment letter), obligations of third parties, as well as procedures for collection. [4] The formal tax law in Indonesia that is currently prevailed is the Act of the Republic of Indonesia Number 6 of 1983 concerning General Provisions and Tax Procedures (GPTP 2020) as has been amended several times, most recently by the Act of the Republic of Indonesia Number 11 of 2020 (hereinafter referred to as GPTP 2020), contains criminal provisions, which regulate the elements of criminal acts including criminal subjects, acts due to negligence, intentional acts, trials, and others.

GPTP 2020 applies the term 'person' as a criminal subject and does not use the term taxpayer, which consists of individual and corporate taxpayers. The Act of GPTP 2020 also does not regulate criminal liability for corporate taxpayers, so the question arises whether to follow the principle of *societas delinquere non potest* or *delinquere non potest universitas*, where legal entities cannot commit criminal acts and mistakes cannot be charged to legal entities. Alternatively, corporation but is imposed on humans.

With such a line of thought, the administrator is responsible for the crime when a corporate taxpayer associated with a corporation commits a criminal act. If this is the case, then the Act of GPTP 2020 is not in line with the changes that have begun to occur in the special law, where corporations are already considered criminal subjects. There are several doctrines regarding corporate responsibility so that corporations can become criminal subjects. Theoretically, there are at least 3 (three) general concepts in corporate criminal liability, namely direct corporate criminal liability, strict liability, and vicarious liability.

Based on the background of the research, the formulation of the research are a) What is the meaning of the 'person' element in the tax criminal law in the 2020 GPTP Act? b) What are the implications of the term 'person' as an element of tax crime for corporate taxpayers' crimes? c) How to attribute individual faults to entities/corporations according to the 2020 GPTP Act?

2. RESULT AND DISCUSSION

2.1 The Element of 'Person' in Tax Criminal Law on General Provision and Tax Procedure 2020

2.1.1 The Definition of 'Person' in Criminal Code

Unlike civil law, the subject of criminal law is not related to rights and obligations but criminal acts (criminal act) or criminal behavior (criminal conduct). Fault cannot be blamed on legal entities or corporations but humans. If a crime is committed within a corporate environment, it is the management who commits the

crime. The system adopted by the Criminal Code, which is stated in Article 59 stated: "In cases where because of a violation it is determined that a crime is determined against the management, members of the management body or commissioners, then the management, members of the management body or commissioners who do not appear to have interfered shall do so. Violations are not punished". Article 59 of the Criminal Code recognizes that the perpetrators of criminal acts are only human (*natuurlijk persoon*) and contains the reasons for eliminating the crime for administrators, members of the management body, or commissioners who did not participate in committing the crime.

2.1.2 The Term 'Person' as Tax Criminal Element

In Chapter VIII of the criminal provisions, articles 38, 39, 39A, 41A, 41B, and 41C of the 2020 GPTP Act (criminal articles), the term 'person' is used as a subject element in criminal tax law that can be held criminally responsible and does not mention 'taxpayers' as the address of the criminal element The term taxpayer is only implicitly contained in Article 43 of the 2020 GPTP Act (criminal inclusion). The explanation of Article 38, which mentions the word taxpayer, has also been removed in the latest amendment to the 2020 GPTP Act.

The tax payable by the taxpayer is an administrative tax, following all the procedures set out in the formal provisions and calculated by the material provisions, namely the self-assessment system. "Since 1984, Indonesia has implemented a modern self-assessment tax administration system based on voluntary compliance. This tax system entrusts the initiation of taxation to the taxpayer, starting from the activities of calculating, paying or paying off taxes owed, to reporting in Tax Notification Letter "[5]

A tax crime arises if there is a loss in state income, a material offense that is a prohibition to cause a consequence, or a formal offense that is a prohibition to do something. Article 38 and Article 39 of the 2020 GPTP Act are material offenses, while Article 39A of the 2020 GPTP Act, which does not require any loss to state revenue, is a formal offense. Article 1 paragraph (2) of the 2020 GPTP Act states that "Taxpayers are individuals or entities..." However, the tax criminal articles in the 2020 GPTP Act state that the elements of the perpetrators of tax crimes are not direct individual taxpayers or corporate taxpayers but uses the terms 'each person' or 'person'.

Several articles in the 2020 GPTP Act proves that the term 'private person' has the meaning of *natuurlijk persoon*, the most obvious of which is Article 7 paragraph (2) a: "The imposition of administrative sanctions in the form of fines as referred to in paragraph (1) is not carried out against: a. Individual taxpayers who have passed away." Only a *natuurlijk persoon* can die, so the term 'private person' denotes the meaning of a *natuurlijk persoon* (natural person). The address of Article 38 of the 2020 GPTP Act is 'person'. Article 38 regulates offenses committed due to negligence and is

limited to Tax Notification Letter that is not submitted or imperfectly or incorrectly submitted. *Negligence* in the explanation of this article is defined as being unintentional, negligent, not careful, or not paying attention to his obligations so that such actions can cause losses to state revenues.

Furthermore, Article 39 paragraph (1) letter a of the 2020 GPTP Act is formulated as an offense committed by a 'person' intentionally or dolus as a reason for punishment related to violations of acts in the field of taxation that must be carried out or omission offenses. So the 'person in question is a person who has met the subjective and objective requirements (article 2 paragraphs (1) and (2) of the 2020 GPTP Act) but deliberately does not register to get a Tax ID number or Taxable Entrepreneur and can cause loss of state revenue.

Article 39 paragraph (1) letter b is a commission offense committed by a 'person' by abusing or using without right the Taxpayer Registration Number or the Confirmation of a Taxable Entrepreneur to cause losses to state revenues. This abuse can be carried out by 'people' as individuals or entities, both those who already have a Taxpayer Registration Number or those who do not have a Taxpayer Registration Number.

Furthermore, Article 39 paragraph (1) letters c, d, e, f, g, h, and i are commissions and omissions offenses committed by 'people' intentionally causing losses to state revenues. The actions regulated in this article can only be carried out by taxpayers who already have a Taxpayer Registration Number, both individual taxpayers, and corporate taxpayers.

There is an exciting term in article 39 (2) that uses the term 'someone', which suggests that criminal tax liability can only be carried out by *natuurlijk persoon*. However, when the explanation is examined, it is clear that Article 39 paragraph (2) emphasizes the regulation to prevent repeated or recidive criminal acts. The term person can be interpreted as one 'person'.

Then article 39, paragraph (3) is intended to regulate the trial offense (poging), which is limited to an act of abusing or using without rights the Taxpayer Registration Number and/or Taxable Entrepreneur Identification Number as referred to in article 39 paragraph (1) letters b and d. So the 'person' referred to in Article 39 paragraph (3) is the same as Article 39 paragraph (1) letters b and d, namely offenses committed by individuals or entities that do not yet have a Taxpayer Registration Number or who already have a Taxpayer Registration Number.

Article 39A is very strict because, according to the Elucidation of Article 39A, "Tax invoices as evidence of tax collection are an essential administrative means in implementing the provisions of Value Added Tax. So the element of 'people' in article 39A is inclusive, including individuals and entities, both those who already have a Taxpayer Registration Number and those who do not have an NPWP. In short, anyone who commits a criminal

offense under Article 39A will be subject to criminal sanctions.

In comparison, in international tax regulations, the term 'person' is clearly defined. In article 3 paragraph (1) letter a and letter b Model Tax Convention on Income and Capital: Condensed Version 2017 (OECD Model) and Article 3 paragraph (1) letter a and letter b United Nations Model Double Taxation Convention between Developed and Developing Countries 2017 (UN Model 2017), 'person' has the exact definition, which stated as follows:

"a) the term "person" includes an individual, a company and any other body of persons; b) the term "company" means any body corporate or any entity that is treated as a body corporate for the tax purpose;."

Thus, based on the above discussion, the use of the term 'person' to refer to the criminal element of a tax subject turns out to have broad implications because criminal tax liability can be carried out by anyone, not limited to persons or entities that are already registered and have a Tax Registration Number but also include person or entity that has not registered and does not have a Tax Registration Number. If the term 'person' is replaced with the term taxpayer, it will distort the scope of the tax criminal subject itself.

2.2 The implications of the term 'person' as an element of tax crime against corporate taxpayers' crimes

When a corporation is declared criminally responsible for a criminal act committed, there are generally three systems of corporate criminal liability, namely:^[6]

- 1) The management of the corporation as the maker and the manager is responsible (development of corporate responsibility in the first stage),
- 2) The corporation is the maker, but the management is responsible (development of corporate responsibility in the second stage)
- 3) The corporation as the maker must also be responsible (development of corporate responsibility in the third stage).

The complexity of tax crimes can involve both internal parties such as directors, commissioners, employees, affiliated companies, even owners, and external parties such as accountants, consultants, suppliers, and other parties. The formulation of article 43 of the 2020 GPTP Act is a legal basis that can be applied to demand criminal responsibility for those who ordered to do it, who participated in doing it, who recommended, or who helped commit a criminal act involved in the crime.

According to R. Soesilo, ^[7] "participate" in the sense of the word "to do together." There must be at least two people, namely the person who commits (pleger) and who participates in committing (medepleger) criminal events. In the explanation of Article 56 of the Criminal Code, it is said that the element of "deliberate" must exist so that people who, by chance without knowing, have

provided opportunities, efforts, or information to commit the crime are not punished. The "intention" to commit the crime must arise from the person given the assistance, opportunity, effort, or information. If the intention arises from the person assisting himself, then that person is guilty of "persuading to do" (uitlokking).

There is a fundamental difference between "committing" a crime to "helping to commit" a crime. In "committing," there is conscious cooperation between the perpetrators, and they jointly carry out the will. The perpetrators have a goal in committing the crime. Whereas in "helping to do," the will of the person helping to do is only to help the leading actor achieve his goal without having a goal of his own.

For corporate taxpayers, what is meant by representatives are administrators (article 32 paragraph (1) letter a of the 2020 GPTP Act). Furthermore, there is an expansion of the meaning of management in Article 32 paragraph (4), "Included in the definition of management as referred to in paragraph (1) letter a is a person who has the authority to participate in determining policies and/or making decisions in running the company." So there is no need for formal requirements for the status of people who have authority, but only the facts. "Representatives, as referred to in paragraph (1), are personally and/or jointly responsible for the payment of the tax payable, unless they can prove and convince the Director-General of Taxes that in their position it is impossible to be responsible for the tax payable".

2.3 Attribution of Individual Fault to Corporations according to the 2020 General Provision and Tax Procedure Act

2.3.1 Doctrines of Corporate Criminal Liability

The 2020 GPTP Act does not provide a clear basis for attributing individual men's rea to corporations, so the doctrines of corporate responsibility will be described to understand the problem. The respondeat superior doctrine is a well-known doctrine in corporate responsibility and has three models, namely direct corporate criminal liability, strict liability, and vicarious liability, as explained below, where all three are related to one another so that they cannot be separated. . In addition, the doctrine of aggregation and the doctrine of corporate culture or culture will also be discussed.

2.3.1.1 Strict liability Doctrine

Strict liability or absolute liability or also called liability without fault or called no-fault liability or liability without fault. In this principle, accountability can be requested without proving the guilt of the perpetrator of the crime. The reason or rationale for this is that in the case of strict liability, a person who has committed a prohibited act (actus reus) as formulated in the law can be convicted without questioning whether the perpetrator had an error (men's rea) or not. So someone who has committed a crime that meets the formulation of the law must or absolutely can be punished. [8]

2.3.1.2 Vicarious Liability Doctrine

The vicarious liability doctrine is based on the "employment principle," meaning that the employer is the main person in charge of the actions of his workers or employees. So, in this case, the principle of "the servant's act is the master act in law" or the agency principle, which reads "the company is liable for the wrongful acts of all its employees." According to Clarkson, the rationale for applying this theory is because the employer (corporation) has control and power over them and the profits they earn are directly owned by the employer (corporate). [9]. According to Clarkson, the rationale for applying this theory is because the employer (corporation) has control and power over them and the profits they earn are directly owned by the employer (corporation). [10]

2.3.1.3 Identification Theory

In the Identification Theory or Direct Liability Doctrine, a corporation can be criminally responsible, either as the maker or participant for each offense. It is required to have men's rea using the identification principle. According to this doctrine, corporations can commit criminal acts directly through a "senior officer," who is the "directing mind" of the corporation and is identified as an act of the company or the corporation itself. The actions or wills of the directors are the actions and wills of the corporation.

2.3.1.4 Aggregation Doctrine

The Doctrine of Aggregation is a doctrine that pays attention to the mistakes of several people collectively, namely people who act for and on behalf of a corporation or people who act in the interests of that corporation. [11]. According to this doctrine, all actions and mental elements or mental attitudes or mistakes and groups of people are considered as and committed by a corporation, so that the corporation deserves to be criminally responsible. [12]. According to Clarkson AND Keating, *dalam doktrin pengatributan kesalahan kepada korporasi hanya didasarkan kepada kesalahan satu orang saja, sedangkan doktrin aggregation untuk dapat mengatributkan kesalahan kepada korporasi harus dapat ditentukan terlebih dahulu suatu kesalahan yang merupakan kombinasi dan kesalahan kesalahan beberapa orang.* According to Clarkson and Keating, in the doctrine of attributing errors to corporations, it is only based on the faults of one person, while the doctrine of aggregation to be able to attribute faults to corporations must first determine an error which is a combination of the mistakes of several people. [13]

2.3.1.5 The Corporate Culture Model

Sutan Remy Sjahdeni stated that criminal responsibility is charged to the corporation if it is found that someone who has committed an unlawful act has a rational basis for believing that a member of the corporation who has the authority has given authority or allowed the criminal act to be committed. [14] As a whole, the corporation is the party that must be responsible for the unlawful act and it is not the person

who has committed the responsible act, but the corporation in which that person works. [15]

2.3.1.6 Attribution of Individual Fault to Corporations

The formulation of Article 43, which is the basis for the expansion of criminal subjects for offenses in Articles 39 and 39A, is starting to show a relationship with the existence of equal treatment of representatives, proxies, employees of the taxpayer, or other parties who order to do, who participate in doing, who recommend, or who assist in committing criminal acts in the field of taxation. The expansion can identify criminal subjects with their respective qualifications so that the relationship between the corporation and the criminal subject of the expansion can be seen. Actus reus carried out by corporations can be approached and understood through the criminal subject of the expansion. Then with the approach of the doctrines described above, the process of attribution of errors from individuals to corporations can be explained.

The doctrine of strict liability crimes does not require the existence of men's rea in corporations, but criminal liability is directly imposed on corporations. This doctrine cannot be used as the basis for attribution of fault because the tax criminal articles require negligence or intentional elements. The doctrine of vicarious liability, in essence, is that the employer is the primary person responsible for the actions of his workers or employees so that the employee's men's rea is transferred to the corporation to be held criminally accountable.

The Doctrine of Aggregation considers the fault of several people collectively acting for and on behalf of a corporation or people acting for the corporation's benefit in question. So when a tax crime is committed by a representative, proxy, employee of the taxpayer, or another party, with qualifications who order to do it, who participate in committing, who recommends, or who helps commit criminal acts in the field of taxation.

In the corporate culture model theory, criminal liability is imposed on the corporation if someone who has committed an unlawful act has a rational basis for believing that a member of the corporation who has the authority has given authority or permitted the commission of the crime. In practice, corporate tax criminal liability has been applied to tax evasion crimes committed by Asian Agri Group (AAG) corporations in Supreme Court Decision No: 2239K/PID.SUS/2012 by implementing Vicarious Liability Accountability. In the verdict, only Suwir Laut, a tax manager from AAG, was charged with representing the interests of 14 companies in AAG. At the same time, none of the corporations were prosecuted and made defendants. However, by implementing vicarious liability combined with identification theory and functional accountability, the fault, and criminal sanctions are transferred to the corporation, considering that the corporation wanted Suwir Laut to commit the tax crime.

On the other hand, corporations also receive benefits from these tax crimes, with reduced taxes paid.

Therefore, the judge imposed sanctions on the 14 AAG group companies to pay a fine of Rp. 2,519,955,391,304, - (two trillion five hundred nineteen billion nine hundred fifty-five million three hundred ninety-one thousand three hundred four rupiahs) in cash.

3. CONCLUSION

Based on the result of the research and discussion above, the conclusion of this study are:

- a. Tax criminal law applies the term 'person' to refer to elements of criminal subjects with the understanding of individuals and entities, including individuals and entities registered with the Directorate General of Taxes and have a Taxpayer Identification Number or who do not have a Taxpayer Identification Number.
- b. The implication of using the term 'person' as an element of a criminal subject against corporate taxpayers is that an entity or corporation can be criminally responsible and made a suspect and subject to criminal tax sanctions if proven guilty.
- c. No specific article regulates the attribution of personal guilt feelings (men's rea) to corporations. However, article 43 of the 2020 GPTP Act can be used as the basis for bridging the attribution. However, it is carried out based on the vicarious liability doctrine, identification doctrine, aggregation doctrine, and corporate culture doctrine, both jointly or individually.

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