



Tax Incentives in Spatial Planning and Regional Taxes: A Conflict of Norms for the Acceleration and Ease of National Strategic Project

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Abstract. Tax incentives are used as spatial planning controllers when a person or a legal entity could utilize a space according to the plan by the Regional Government. The norm conflict occurs when the national strategic project gets the opportunity to receive fiscal incentives in the form of tariff adjustments despite there being an absent Regional Regulation that justifies its utilization. These incentives can be given even if the national strategic project is not in accordance with regional spatial planning, as long Central Government issues a recommendation for spatial planning suitability. So it is necessary to conduct a study to determine the preferences of tax incentive policies that are used when there is a conflict of norms. As well as initiating incentive policies that balance the interests of controlling spatial planning and ease of doing business. To answer these legal problems, normative legal research is used with a conceptual and statutory approach. Based on the theory of legal preferences, *lex specialist derogate legi generali*, tax incentives can still be given to facilitate national strategic projects based on Law Number 1 of 2022 and its technical regulations. However, in order to maintain spatial utilization and environmental protection, the theory of tax regulation and the theory of the polluter pays principle needs to be applied in order to provide ideal notion, where not all types of regional taxes, specifically regional environmental taxes, should exclude as incentives object. Furthermore, it's necessary to regulate specific tax and retribution as incentive object such as land and building tax, acquisition fees on land and buildings, certain goods and services tax, and certain permit retribution.

Keywords: Conflict of Norm, National Strategic Project, Regional Tax, Tax Incentives

1. Introduction

Taxes contribute more than 80% of annual state revenue, this clearly shows the main function of taxes is budgetary.[1] However, in various public policies, taxes are also used as a control instrument that puts forward the regulatory function. One of tax policy directed as a tool of social engineering is tax incentives, as in theory also called tax expenditure.[2]

OECD defined tax incentives as special exclusions, exemptions, deductions or credits that provide special credits a preferential tax treatment or deferral of tax liability. [3] Although there is no juridical definition of tax incentives, this fiscal

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policy has been used in various laws and regulations in Indonesia, such as tax holiday[4], tax allowance[5] and tax amnesty[6]. This study limits the scope of tax facilities in 2 (two) areas of regulation, namely the scope of local taxes and spatial planning.

The tax facility policies in Law Number 1 of 2022 concerning Financial Relations between the Central Government and Regional Governance *juncto* Government Regulation Number 35 of 2023 concerning General Provisions for Regional Taxes and Regional Levies are given to taxpayers by taking into account the condition of the ability to pay, the condition of the tax object, and also as an effort to support ease of doing business and investment. While regulated in Law Number 26 of 2007 concerning Spatial Planning *juncto* Government Regulation Number 21 of 2021 concerning Implementation of Spatial Planning, tax instruments are used both as incentives and disincentives in spatial utilization activities. Tax relief will be given as compensation for activities that are in line with the spatial planning, whereas high taxes accompanied by additional costs are provided in order to prevent, limit and reduce activities that are not in line with the spatial planning.[7]

In practice these two regulations encountered a conflict of norms in order to realize the goal of accelerating and ease the National Strategic Projects (NSPs). The NSPs is basically project and/or programs implemented by the Central Government, Regional Government, and/or Business Entities that has a strategic nature for growth and equitable distribution of development within the framework of efforts job creation and welfare improvement public.[8] The government has compiled a list of NSPs in the Regulation of the Coordinating-Minister for Economic Affairs Number 9 of 2022, there was 200 NSPs listed from several sectors such as roads and bridges, the port sector, airports, railways, areas, housing, dams and irrigation, clean water and sanitation, coastal embankments, energy, technology, education, tourism and plantations.

The NSPs are complemented by 20 other Strategic Programs in the form of a strategic electricity program, economic equity, development of border areas, development of exit toll access roads, development of national tourism strategic areas, development of installations for processing waste into electrical energy, construction of smelters, food estates, super hubs, regional economic acceleration, economic zones specifically, and revitalizing the national sugar industry and down streaming the palm oil industry.

To accelerate the development of NSPs, Government Regulation number 42 of 2021 concerning Ease of National Strategic Projects was promulgated, which regulates various forms of facilitation such as permits/non-permits granted in the context of accelerating the process of planning, preparation, transactions, construction, and smooth operation control, including financing mechanisms for NSPs. Also included in the form of Project Development Facilities, the fiscal facilities provided by the minister of finance to increase the effectiveness of the implementation of the preparation and execution of project transactions.

An example of a NSPs is the Green Fuel Development project such as Green Diesel Bio Refinery Revamping, CPO Hydrogenation, and Green Refinery which were built in Cilacap, Central Java and Plaju, South Sumatra. The project is classified as a high-risk business, but there is no spatial use plan found in regional regulations and spatial planning technical regulations in Cilacap and Plaju. However, the absence of spatial use planning does not hinder efforts to grant permits, build and operate NSPs. This is because the central government can issue Recommendations on the Suitability of Spatial Utilization Activities for NSPs even though they have not been regulated in the National or Regional Spatial Planning.[9]

So, the question arise is whether or not NSPs with issue Recommendations on the Suitability of Spatial Utilization Activities identify as subject to tax facility. It is also questioned regarding the position of the tax facility, whether it is prioritized as an instrument to support the ease of NSPs or an instrument to control the use of space. The theory of legal preferences is used to answer these conflicting norms. Furthermore, this research will also offer tax facility policy offers to balance the interests of NSPs and accountability for the sustainable use of space.

2. Problems

This article aims to answer two research questions: First, Does the National Strategic Projects that are not regulated in the Spatial Planning Regulations be subject to tax incentives? Second, What is the ideal concept for balancing the use of tax instruments in accelerating NSPs and controlling spatial use?

3. Method

This type of research is normative legal research and using statutory and conceptual approach. In this study, legal problems of conflicted norm will be assed using statutory approach, compared existing laws and regulations. While conceptual approach used to develop the idea of ideal tax incentives for NSPs that unregulated in spatial law. The data sources used in this study are secondary data sources consisting of primary legal materials, secondary legal materials, and tertiary legal materials. This research uses data collection techniques by searching literature in the form of books and scientific journals as well as other relevant references. Data collected will be analyzed descriptively-qualitatively to answer problem formulations.

4. Discussion

4.1. Preference Norm for Tax Incentives for National Strategic Project

Government of Indonesia (GoI) established NSPs of gigantic infrastructure program in various sector. Even though the NSPs has the aim of boost economic growth and opening up wide employment opportunities, various measure to accelerate and facilitate the ease of NSPs was taken by the GoI. Encouragement to facilitate NSPs

often leave problems with the community, because NSPs were built far away from regulation of spatial planning utilization and gave impact to the environment.[10] Yogyakarta International Airport development is one of the examples of unsuitability of spatial planning with the development of NSPs. At that period, the project was disharmonized with the Regional Spatial Planning and raised the resistance of people or residents.[11]

Currently the policy of accelerating and ease NSPs has been directed at legitimizing developments that deviate from the spatial planning norms at the national, provincial, district/city levels. Legitimacy is carried out through the conception of recommendations under the authority of the Minister of Agrarian which is equated with the suitability of spatial planning.[12]

Simultaneously with the government's efforts to build NSPs in locations that are not regulated in spatial planning policies, the position of tax as controllers of spatial use is negated. Tax incentives as control instrument of spatial planning utilization was regulated based on Law Number 26 of 2007 concerning Spatial Planning *juncto* Government Regulation Number 21 of 2021 concerning Implementation of Spatial Planning.

Central government and regional government have authority to grant incentives and disincentives to control utilization of space. Incentives, one of which is in the form of tax relief, are tools to provide rewards for the implementation of activities that are in line with spatial planning. Meanwhile, disincentives in the form of imposing high taxes or charges are in accordance with the impacts caused by spatial use as an effort to prevent, limit growth, or reduce activities that are not in line with spatial planning. Specifically, there are 3 (three) goals of those measure:

- a. Increase efforts to control spatial use in realizing spatial planning according to plan;
- b. Facilitate space utilization activities so that they are in line with the plan; and
- c. Improving the partnership of all stakeholders in the context of spatial utilization in accordance with the plan.

The differences in the use of tax instruments can be seen in the table below:

Table 1. *The difference use of tax instrument between Law Number 26 of 2007 concerning Spatial Planning and Law Number 1 of 2022 concerning Financial Relations between the Central Government and Regional Governance*

| | Law Number 26 of 2007 concerning Spatial Planning | Law Number 1 of 22 concerning Financial Relations between the Central Government and Regional Governance |
|-----------------------------------|--|---|
| Used of Tax (regulation function) | Article 38: Disincentive (utilization of space against planning) | Article 96: reduction, exemption and postponement of payments on the taxpayable and/or sanctions (considering tax object and taxpayer) Article 101: fiscal incentives for ease of investment in the form of reduction, relief, and exemption, or |

| | | |
|-------|--|--|
| | | elimination of Tapayable, Retribution, and/or the sanctions. |
| Goals | high taxes or charges are in accordance with the impacts caused by spatial use as an effort to prevent, limit growth, or reduce activities that are not in line with spatial planning. | tax incentives to accelerate and facilitate the accomplishment of national strategic projects, whether funded by state finance or investment |

However, in terms of legal preference theory, this regulation can be negated by the provision of tax incentives in Law Number 1 of 2022 concerning Financial Relations between the Central Government and Regional Governance t, which open the opportunity to the Head of Regional Government to grant tax incentives explicitly for business actor in order to accelerate the accomplishment of national strategic projects. As two rules collected caused of regulating the same subject, here is the used of tax incentives, so in order to solve such conflicts, the principle *lex specialist derogate legi generali* (more specific regulations override more general regulations) is being used.[13]

In this conflict of norm, Law Number 1 of 2022 concerning Financial Relations between the Central Government and Regional Governance as the *lex specialist* (specific regulation) providing a comprehensive provision in tax field, especially local taxation. While the provision of tax as incentives and disincentive in Law Number 26 of 2007 concerning Spatial Planning only a part of general measure to control the spatial utilization policy as the *lex generali* (general regulation).[14]

As the used of *lex specialist derogate legi generali* in this conflicted norm, unplanned NSPs can be facilitate granting fiscal incentives as further regulate in Government Regulation Number 35 of 2023 concerning General Provisions for Regional Taxes and Regional Levies:

Table 2. Type of Incentives Based on Government Regulation No 35 of 2023

| Article | Type of incentives | Procedure | Authority |
|-------------|---|---|--|
| Article 99 | reduction, relief, and exemption, or elimination of Tax payable, Retribution, and/or the administrative sanctions | given at the request of the Taxpayer and given based on the position by the Regional Head. | Head of Regional Government |
| Article 118 | tariff adjustment for NSPs | proposed by the minister who has the task of organizing coordination, synchronization, and control of the affairs of the ministry of field economy to the President after getting | President based on Presidential Regulation |

Based on the elaboration and provision substance above, it can be concluded that there are 2 (two) alternative norms for providing NSP's tax incentive, they are based on article 99 and article 118 of Government Regulation Number 35 of 2023 concerning General Provisions for Regional Taxes and Regional Levies. Although, there is a legal void particularly on the presidential regulation about tariff adjustment for NSPs, the business actor still has opportunity to request a reduction, relief, exemption or elimination of tax payable for NSPs they invested on.

In context with the example delivered in the background that the Green Fuel Development project such as Green Diesel Bio Refinery Revamping, CPO Hydrogenation, and Green Refinery which were built in Cilacap, Central Java and Plaju, South Sumatra. Those high-risk business, at this point already established and do operate even there is no spatial use plan found in regional regulations and spatial planning technical regulations in Cilacap and Plaju, they are subject to tax incentives.

4.2. Notion of Ideal Tax Incentive to Accelerating National Strategic Project and Controlling Spatial Planning

The regulation about tax incentives regulated in the Law Number 1 of 2022 concerning Financial Relations between the Central Government and Regional Governance are widely flexible, thus Head of Regional Government have a discretionary power to determine about the type of tax and type of incentives grant to the business actor.[15] The flexibility of these norms can have a major impact on the environment if the regional government provides environmental tax facilities to NSPs with a high risk category, such as in the energy sector.

Organisation for Economic Co-Operation and Development (OECD) defined environment tax as: “A tax whose tax base is a physical unit (or a proxy of it) that has a proven specific negative impact on the environment. Four subsets of environmental taxes are distinguished: energy taxes, transport taxes, pollution taxes and resources taxes.[16] The Indonesia’s environmental taxes are dominantly levied in regional level both provincial or city/regency, they are: [17]

Table 3. Environment Tax in Regional Government

| Authority | Type of Tax | Tax Object |
|-----------------------|------------------------|---|
| Provincial Government | Motor Vehicle Tax | Ownership and/or control over motorized vehicles. Motorized vehicles that must be registered in the province in accordance with statutory provisions. |
| | Motor Vehicle Fuel Tax | delivery of fuel by the provider to consumers or users of Motorized Vehicles. |
| | Surface Water Tax | collection and/or utilization of Surface Water. |

| | | |
|-------------------------|--------------------------------|--|
| | Cigarette Tax | consumption of cigarettes, including cigarettes, cigars, leaf cigarettes, and other forms of cigarettes that are subject to excise |
| | Ground Water Tax | extraction and/or utilization of ground water. |
| City/Regency Government | Non-Metal and Rock Mineral Tax | Non-Metal and Rock Mineral extraction activities |
| | Swallow's Nest Tax | collection and/or exploitation of swallow's nests. |

Environmental taxes are currently developing globally and are implemented by various countries as a form of environmental protection instrument. Environmental tax is a conceptual approach that uses tax instruments to correct negative externalities[18] or corrective taxation initiated by Artur Cecil Pigou and known as Pigouvian Taxation.[19] Tax as an environmental economic instrument essentially applies a market mechanism-based approach and also has relevance to the Polluter Pays Principle. This principle is formulated in Principle 16 of the Rio Conference to implement environmental economic instruments, which reads:

National authorities should endeavor to promote the internalization of environmental cost and the use of economic instrument, taking into account the approach that polluter should, in principle, bear the cost of pollution, with due regard to the public interest without distorting international trade and investment.

Therefore the OECD further provides guidelines that: *Taxes should not be confounded neither with payments of rent nor with purchase of an environmental protection service.*[20] To follow the OECD guideline, GoI need to revised the Law Number 1 of 2022 concerning Financial Relations between the Central Government and the technical regulation, to clarify type of tax which will be given an incentive and the negative list of environmental tax to be exclude within the scope of incentives.

The use of taxes as a control mechanism for spatial planning which is negated by the local tax law which is lex specialist in nature, this imbalance needs to be addressed by formulated environmental tax as a negative list of tax facilities. Then at least the GoI provides a policy as compensation for the legalization of unplanned development of NSPs in spatial planning regulations.

The function of the environmental tax is not only as a corrective tax within the framework of a regular function, but also has a budgetary function. State revenues sourced from environmental taxes can be used to reduce other tax burdens, reduce budget deficits, finance public goods, and other distribution purposes.

Several laws and regulations have adopted the concept of earmarking in the use of environmental tax revenue funds. The negative list of environmental tax

restrictions from the scope of incentives is also aimed at ensuring the sustainability of environmental recovery funds originating from taxes. This is as stipulated in Government Regulation Number 46 of 2017 concerning Environmental Economic Instruments where the use of tax revenues as funds for pollution and/or damage prevention and environmental restoration, either in the form of: a) prevention of environmental pollution and/or damage in locations that are not the source and/or perpetrator is known; and b) restoration of the environment as a result of pollution and/or environmental damage whose source and/or treatment is unknown.

Therefore, tax facility to accelerate NSPs need to be restricted to used specific tax and retribution/charge/levy such as: a) Land and Building Tax, levied on the ownership, control, or use of vehicles by private persons or entities; b) Acquisition Fees on land and buildings, levied on the acquisition activity of land and/or building rights; c) Certain Goods and Services Tax, levied on public consumption of electrical sources and other services and d) Certain Permit Retribution, levied on the permit issuance intended to granting of permits to private persons or entities intended to control and on activities, space utilization, and maintain environmental sustainability.

5. Conclusion

The establishment of the National Strategic Project, which was not previously planned in the Spatial Planning Regulations at the national, provincial and district/city levels, does not rule out the opportunity to get tax incentives. Although in the Spatial Planning Regulation it is stated that for activities that are not in accordance with planning will be given high taxes, but by using the legal preference *lex specialist derogate legi generali*, Law Number 26 of 2007 concerning Spatial Planning was defeated by Law Number 1 of 2022 concerning Financial Relations between the Central Government and Regional Governance. So that the forms of tax facilities regulated in the regional tax law apply to NSPs even the project does not regulate yet in the Spatial Planning Regulations.

The tax facility policy for NSPs in the regional tax law has high flexibility, which bases local governments on the authority to provide discretion regarding tax facilities. This needs to be anticipated by making a policy that environmental tax is a type of tax that cannot be provided with facilities for the acceleration and convenience of NSPs. This is related to the category of NSPs that have a high risk, so that business people must still be accountable for environmental taxes as a payment for negative externalities, in accordance with the Polluter Pays Principle. Thus, the ideal concept for balancing the used of tax instrument in accelerating NPSs while having spatial use control is to regulate type of environmental taxes that collected by regional government as negative list of incentives. While clearly establish a regulation to restrict giving incentive using specific tax and retribution such as land and building tax, acquisition fees on land and buildings, certain goods and services tax, and certain permit retribution. This ideal notion concept aims to balancing the interest of NSPs and the responsibility for space utilization as well as environmental protection.

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