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The Existence of Tax Court in Indonesia Judicial System

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Abstract:

Tax Court was organized based on Act No. 14/2002 as the implementation of judicature power authorized to solve taxation lawsuits. The existence of Tax Court, following the explanation of Article 27 subsection (1) of Act No. 48/2009, is a specific court under Administrative Court as the accused subject (*subjectum litis*) is government, and the accusing subject is civil people. In addition, the accused object (*objectum litis*) is the government's judgment (*beschikking*) on taxes that disadvantages the civil people. The existence of Tax Court in Act No. 14/2002 does not reflect the independence and impartiality of judiciary organizations due to the authority of the Minister of Finance to provide organizational, administration, and financial counseling, and thus it is considered that Tax Court does not correspond to Article 24 subsection (1) of the Constitution 1945 requiring that 'the judicature power is independent'. Therefore, the systematization of Tax Court based on Act No. 24/2002 is non-constitutional.

Keywords: tax court; existence; independence; non-constitutional.

JEL Classification: K11; K22, K23; D81; G22.

Introduction

Article 1 subsection (3) of the Constitution 1945 mentions that 'Indonesia is a law-based state.' As a law-based state, any state and government officials are bound by the applied rules in implementing their tasks (Prodjodikoro 1977). In law-based states, every officials' treatment is confined by law (Joeniarto 1981). This restriction aims to avoid and/or prevent any high-handed officials (Irianto 2008).

One characteristic of law-based state is the existence of independent judicial institutions. Galang Asmara argued that the existence of such judiciaries in law-based state was crucial as there were always ones violating the law both in the part of government official and civil people (Basah 1997). The existence of the judiciary, following Basah, is one important element in law-based state as the instrument to provide justice in order to uphold the law (Soemitro 1964). In Indonesia, the judiciaries are set in Article 24 subsection (2) of the Constitution 1945, which essence is that 'the officials of judicature power are under the Supreme Court and its subordinate.' From this provision, it infers that Indonesian judiciary is implemented by the Supreme Court and Constitutional Court as the top-level judiciary (*bifurcation system*). Thus, Article 24 subsection (2) of the Constitution 1945 mentions that there are 4 (four) judiciaries under the Supreme Court, including public court, religion court, military court, and administrative court. Furthermore, under these four judiciaries, a specific court may be organized in accordance to Article 27 subsection (1) of Act No. 48/2009 about the judiciary power.

One of current specific courts in Indonesia is Tax Court, set under the Act No. 14/2002 about Tax Court. In addition, Article 2 of the Act mentions that 'Tax Court is a judiciary conducting the judicature power for taxpayers

or tax bearers seeking for justice in taxation lawsuit.' In juridical way, the provision of this article mentions that Tax Court is the implementation of judiciary power authorized to solve any taxation lawsuit. The essence of taxation lawsuit is seen in article 1 subsection (5) of Act No. 14/2002 that the lawsuit in taxation between taxpayers/tax bearers and the authorized officials due particular judgment established which may be filed as an appeal or dispute to the Tax Court based on the applied taxation law, including the dispute on the implementation of tax collection through a Forced Letter.

In Indonesia administrative system, however, the existence of this Tax Court reveals 2 (two) administrative problems. First, the potential in clarity of Tax Court as Act No. 14/2002 did not set the position of Tax Court, but in article 27 subsection (1) of Act No. 48/2009 mentioning that Tax Court is a specific court under Administrative Court of the state. Second, the existence of Tax Court in Act No. 14/2002 does not reflect any independence and impartiality, as well as the independence of judicial institutions. This is due to the authority of the Minister of Finance to provide organizational, administration, and financial counseling. Meanwhile, in taxation dispute, one disputing party is the Director General of Taxation of the Ministry of Finance, thus it concerns that it may reveal possible opportunities of misusing the authority and ignoring human rights by the officials (Huda 2018, 1). Thus, the existence of Tax Court opposes the provision of Article 24 subsection (1) of the Constitution 1945 and Act No. 48/2009 about the judiciary power, as the systemation of Tax Court applies a multiple standard; under the Supreme Court and the Ministry of Finance.

1. The Position of Tax Court in Indonesia Judiciary System

Court is a state official that functions and has authority to judge and solve particular disputes, both between civil people and between government and civil people. In law-based state, judiciaries are crucial in its existence, as any dispute should be solved through independent and impartial judiciary officials based on the applied law. Even more, the existence of independent judiciaries is the prerequisite of law-based state (rule of law). Thus, it is an important indicator for law-based state, and thus, in *a contrario*, a state may not be categorized into law-based state if it is not supported by any independent and impartial judiciary.

Following Apeldoorn, judiciaries are the institutions that function to make judgments and solve particular disputes, which have nothing interests in either cases or be part of disputing parties, but stand by itself over cases, and solving the subject of dispute under a general provision (Bahari 2001). Given that the function of courts is very vital in law-based state, Indonesia incorporates judiciaries into its administrative system. This is mentioned in the Constitution 1945, explicitly in Article 24 about the implementation of judiciary power, particularly to Article 24A about the Supreme Court, and Article 24C about Constitutional Court.

Based on these articles, in relation to the organization of judiciary power in Indonesia, it applies bifurcation system, through which the judiciary power is conducted by 2 (two) judicial institutions independently, both institutional and functional, including: the Supreme Court and the Constitutional Court. In functional context, both Article 24A subsection (1) of the Constitution 1945 *jo* Article 20 subsection (2) of Act No. 48/2009 set the authority of the Supreme Court, consisting of 'the authority to judge in cassation level, to verify the provision of regulation under the law over the law, and other authorities by the law.' Furthermore, Article 24C subsection (1) of the Constitution 1945 *jo* Article 29 of Act No. 48/2009 sets the authority of the Constitutional Court, including: 'the authority of Constitutional Court to judge on initial and final levels, which judgments is final; to verify the provision of the Constitution, to judge the dispute of the state officials' authority granted by the Constitution, to judge the dissolution of politic parties, and to judge a conflict of election result.'

The provision of Article 24 subsection (2) of the Constitution 1945 *jo* Article 18 of Act No. 48 2009 also sets that, under the Supreme Court, it has 4 (four) judiciaries including public court, religion court, military court, and administrative court. These all provisions seem correspond to Article 25 of Act No. 48/2009 about judiciary power, which basically sets on judicial field and function, as well as the authority of each of religion, military, and administrative courts. Given that the provision of Article 24 subsection (2) of the Constitution 1945 *jo* Article 18 and Article 25 of Act No. 48/2009 has limitatively set the type of judicial institutions under the Supreme Court, and thus, the organization of judicial bodies beyond the four judicial court is in-constitutional.

In those four judicial institutions, however, particularly specific judiciaries may be held. It is explicitly set in Article 27 subsection (1) of Act No. 48/2009 that 'specific courts may be organized in one of judicial courts under the Supreme Court as mentioned in Article 25.' In relation to the terminology of specific courts, Article 1 subsection (8) of Act No. 48/2009 mentions that 'specific courts are the courts with authority to do verify, judge and solve particular cases which may only be organized in one of judicial courts under the Supreme Court as set in law.' That is, the specific court may not be organized outside those four judicial courts under the Supreme Court. The kinds of specific court are seen in the explanation of Article 27 subsection (1) of Act No. 48/2009, including children court,

trade court, human right court, corruption court, industrial court, and fishery court, which all are under the public court, as well as Tax Court which is under administrative court.'

Building on the provision of Article 27 subsection (1) of Act No. 48/2009, Tax Court was held in 2002 as one of the specific courts in Indonesia judicial system. Act No. 14/2002 revoked Act No 17/1997 about the Institution of Tax Dispute Resolution. One consideration underlying the establishment of Act No. 14/2002 is mentioned in letter 'd' that the Institution of Tax Dispute Resolution is not a judicial institution under the Supreme Court; and letter 'e' that it needs Tax Court that corresponds to the system of judicial power in Indonesia to reveal justice and legal certainty in the resolution of taxation dispute.'

The organization of Tax Court as a specific court which function is to solve any tax disputes is the mandate of Act No. 6/1983 and finally amended by Act No. 28/2007 about the general provision and procedures of taxation. Article 27 subsection (1) of general and administrative law of taxation sets that 'taxpayers may file an appeal only to the Tax Court about their objection on the judgment of the director general of taxation.' Thus, Tax Court is the implementation of procedural agenda, process, and system of judicial activities in judging taxation cases along with its legal consequences (Asmara 2006). Galang Asmara argued that, at least, there were 2 (two) matters making Tax Courts need to be held, as follow.

- (a) the presence of Tax Court aimed to uphold the concept of law-based state willing to have law enforcement in taxation in case of the rights and obligations of the state and civil people in order to collect taxes by the government;
- (b) tax Court functioned as one of legal protection for taxpayers and tax bearers in case of tax collection by the government (Mustafa 2006).

In regard to the position of Tax Court, it is set in Article 2 of Act No. 14/2002, that 'Tax Court is a judicial institution implementing the judicial power for taxpayers or tax bearer seeking for justice in case of taxation dispute.' Building on this article, the position of Tax Court is defined as the officials of judicial power, thus, it confirms that Tax Court is a judicial institution functions to solve taxation disputes.

Juridically, Act No. 14/2002 does not set the position of Tax Court as mandated by Article 25 and 27 of Act No. 48/2009. It defines that Act No. 14 2002 does not consider Tax Court as a specific court under the four existing courts. However, the provision of Tax Court as a specific court in administrative court is found in the explanation of Article 27 subsection (1) of Act No. 48/2009. Thus, the provision of Article 2 of Act No. 14/2002 should be revised, as the norm sets that Tax Court is a specific court in administrative court. It aims to make the existence of Tax Court correspond to Act No. 48/2009. The position of Tax Court should be set as like the provision of Article 2 of Act No. 46/2009 about corruption court, mentioning that: 'corruption court is a specific court under public court.'

From the absolute competence of Tax Court, in order to solve taxation cases, the court is an administrative court which is specific to taxation. It is called administrative court as it matches all required elements. R. Santoso Brotodiharjo argued that a court was defined as administrative court if it satisfied the required elements including that one of the disputing parties should be in the part of the government (*bestuur*) bound due to an official's default on his/her authority, and toward the cases filed, it applied public law or administrative law (Mustafa 1979). Therefore, it notes that taxation disputes are cases in administrative law, as Brotodiharjo argued that taxation law was the part of administrative law (Brotodihardjo 2010).

According to the classification of administrative law into pure and non-pure administrative court, it notes that Tax Court in Indonesia includes pure and non-pure administrative court, as follow.

- (a) pure administrative court, related to the solution of taxation disputes (previously) by the Assembly Consideration of Taxation (1915 - 1997) and the Institution of Tax Dispute Resolution (1997 - 2001), and (currently) by Tax Court (2002);
- (b) non-pure administrative court, related to revision and/or nullification of the tax assessment by the Director General of Tax (article 16 of Act No. 28/2007 about the general provision and procedures of taxation).

Article 2 of Act No. 14/2002 mentions that 'Tax Court is the judicial institution that implements the judicial power for taxpayers or tax bearers seeking for justice in case of taxation disputes.' This provision confirms that Tax Court is the judicial institution that implements the function and authority to uphold law and justice as set in Article 24 subsection (1) of the Constitution 1945. Thus, Tax Court, as mentioned in Article 2 of Act No. 14/2002, functions as the officials of judicial power, particularly to taxation context.

The position of Tax Court in the context of administrative court is based on the nature of the tax (dispute) and the nature of the parties between civil people and the government. From the subject of dispute, those parties consist of government as the defendant whose judgment is questioned and the civil people as the plaintiff. From the object of dispute, however, both parties question the government's concrete and individual judgment (provision/

beschikking) that disadvantages civil people. From that explanation on its position, therefore, Tax Court is a specific court in administrative context. Thus, Tax Court is actually a specific judiciary from administrative court as taxation dispute is on administrative context (Ahmadi 2006). Therefore, it argues that Tax Court is, indeed, a specific judiciary in administrative court. It is due to several reasons.

First, the disputing parties (*subjectum litis*) are the state/civil people as the litigant and the government officials as the defendant. It is in accordance to the character of administrative dispute as mentioned in Article 53 subsection (1) of Act No. 5/1986 about Administrative system. The litigant is an individual or civil corporate getting disadvantageous due to the establishment of administrative judgment by government as an institution/state administration official as one establishing an administrative judgment as set under the Article 1 subsection (12) of Act No. 51/2009.

Second, the object of dispute (*objectum litis*) in Tax Court is the judgment (*beschikking*) of taxation as mentioned in Article 1 subsection (4) of Act No. 14/2002, causing a tax dispute as mentioned in Article 1 subsection (5) of Act No. 14/2002. This *objectum litis* is similar to the object of dispute in administrative court; that is the administrative judgment, as mentioned in Article 1 subsection (9) of Act No. 51/2009 causing an administrative dispute case as mentioned in Article 1 subsection (10) of Act No. 51/2009.

Third, Tax Court is a court that functions to solve taxation cases between civil people and government official due to the establishment of taxation judgment, and thus, Tax Court is to verify the validity (*rechtmatigheid*) of the judgment. It is similar to administrative judiciary that functions to verify the validity of the government official's action of establishing an administrative judgment as set under the article 47 subsection (1) of Act No. 5/1986. From those three arguments, Act No. 14/2002 needs to be revised in order to set the position of Tax Court into the administrative court.

2. The Independence of Tax Court in Indonesia Judiciary System

Article 24 subsection (1) of the Constitution 1945 sets that 'the judicial power is independent to organize a court in order to uphold law and justice' (Huda 2017, 52). The independence of judicial power is a principle in judicial context that needs to be assured by every law-based state. This principle of independence requires that judicial institutions should implement their functions without any intervention from any parties or government officials and in any kind of action, including the state. This judiciary should be independent from any interest, and thus, it should not take sides. The principle of independence in this judicial institution aims to make it independent and autonomous in implementing their function to uphold the law and justice. In positive law, this principle of independence is reflected in Article 3 subsection (1) and (2) of Act No. 48/2009, as follow.

- (1) in implementing their functions and tasks, judges and constitutional judges must uphold the independence of judiciary.
- (2) any intervention in judicial interest by other parties outside the boundary of judicial power is not allowed, but particular matters as set in the Constitution 1945.

Furthermore, this independent body is further supported by the explanation of Article 3 subsection (1) of Act No. 48/2009, that 'what it means for 'the independence of judiciary is being independent from either any other parties' intervention or any kinds of pressures both physically and psychologically.' The actual essence of justice with this principle of independence in judicial institutions is that judges, as the law enforcer for justice, should be able to be impartial to both disputing parties in order to carry out the essence of justice for them.

The judicial power, as what Moh. Mahfud M. D argued, is the authority to verify and judge as well as providing judgment for any cases filed to them in order to uphold the law and justice based on the applied law. Judicial bodies should be able to implement their function and task well, thus an objective judgment by highly enforcing the law and justice may be achieved. Therefore, they should be free from either any intervention from other parties or the government power. Furthermore, the independent judicial power is one very crucial requirement for the manifestation of law-based state. The absence of independent judicial power may affect the executive power and thus, creates opportunities of misusing their authority and ignoring any human rights by the officials.

Furthermore, to verify the independence of this judicial body, it may use 2 (two) parameters: (1) impartiality; and (2) political and governmental insularity. Judges' impartiality is seen from their commitment relying their judgment on law and facts in the court session, not based on relation between the judges and one of the disputing parties. It is not easy to detect judges' impartiality as it may only be seen through their behavior as judges *vis-à-vis*, their relation with the disputing parties, both in social and political context.

In regard to judges' impartiality, a philosopher, Jeremy Bentham, more argued that 'where is the cause of in which any the slightest departure from the rule of impartiality is, in the eye of justice and reason, anything else than criminal on the part of the judge?' (Asrun 2004). The expectation of providing justice for both disputing parties may

be realized. Thus, it expected for the Tax Court to reinforce the attempt of improving a simple, fast, and affordable public services for taxpayers. Tax Court is classified into a specific court which aims to facilitate civil people who have a legal dispute with government due to the establishment of tax judgment, and thus, solve the problem in fair, quick, and affordable way.

As a judicial body, Tax Court should also be independent from government's intervention. However, the provision of Tax Court in Act No. 14 2002 does not indicate that independence is for an ideal judicial institution. It is seen from *dual roof system* they still apply; 'the Supreme Court and the Ministry of Finance.' It is set in Article 5 of Act No. 14/ 2002, that:

- (1) technical coaching for Tax Court is conducted by the Supreme Court;
- (2) organizational, administration, and financial coaching is conducted by the Department of Finance.

These provisions make Tax Court have non-independent position, against the characteristic of judicial body in law-based state. Despite the assurance of Article 5 subsection (3) of Act No. 14/2002 that 'coaching as mentioned in subsection (1) and (2) may not eliminate the judges' independence in verifying and judging taxation cases,' that provision remain potential to eliminate the judges' freedom in judging cases/taxation dispute.

Additionally, the non-independent Tax Court based on Act No. 14/2002 may also be seen from the amount of authority of the Ministry of Finance related to Tax Court, as mentioned in some articles that the authority of the Ministry of Finance in Tax Court as follow.

- (a) Article 5, 'Organizational, administration, and financial coaching for Tax Court is conducted by the Department of Finance';
- (b) Article 8 subsection (1), 'Judges are appointed by President based on the list of prospective candidates as proposed by the Minister after having consent from the chairman of the Supreme Court';
- (c) Article 8 subsection (2), 'the chairman and the vice chairman are appointed by President from the list of judges as proposed by the Minister after having consent from the chairman of the Supreme Court';
- (d) Article 9 subsection (5), 'The procedures of pointing Ad Hoc judges in Tax Court as mentioned in subsection (2) is set by the Minister decision';
- (e) Article 13 subsection (1) 'Chairman, vice chairman, and judges are dismissed with respect from their functions by President as proposed by the Minister after having consent from the chairman of the Supreme Court because ...';
- (f) Article 13 subsection (2), 'the chairman, vice chairman, and judges are dismissed with respect from their function by President on the proposal of the Minister after having consent from the chairman of the Supreme Court as the state needs their competence for other national task';
- (g) Article 14, 'the chairman, vice chairman, and judges are dismissed without respect from their functions by President on the proposal of the Minister after having consent from the chairman of the Supreme Court due to particular reasons';
- (h) Article 16 subsection (1), 'The establishment, structure, and task procedure of the honorary panel of judges, as well as the procedures of self-defense for judges are established by the President's decision on the proposal of the chairman of the Supreme Court';
- (i) Article 17 subsection (1), 'the chairman, vice chairman, and judges will be temporarily dismissed, before being dismissed without respect, by President on the proposal of the Minister after having consent from the chairman of the Supreme Court';
- (j) Article 22 subsection (2), 'the benefit and other provisions for the chairman, vice chairman, judges, secretary, vice secretary, and substitute secretary are set under the Minister's Verdict';
- (k) Article 25 subsection (1), 'the secretary/vice secretary/substitute secretary, and secretariat staff of Tax Court are all civil servant in the Department of Finance';
- (l) Article 27, 'The function of the secretary, vice secretary, and substitute secretary are all set by the Minister's verdict';
- (m) Article 28 subsection (2) 'The secretariat task procedure of Tax Court is set by the Minister's verdict';
- (n) Article 29 subsection (4), 'The registrar, vice registrar, and substitute registrar are all appointed and dismissed by the Minister';
- (o) Article 34 subsection (2), 'To be an attorney, it should meet some conditions, including other required condition by the Minister.'

Considering these provisions, it is clear that the authority of the Minister of Finance related to Tax Court is broad. It is not consistent with the principle of independence requiring a separation of power, both functional and institutional, particularly between the Ministry of Finance and Tax Court. This broad authority create the potential of government's intervention through the Ministry of Finance toward Tax Court and thus the independence of Tax

Court may not be realized, given that the Ministry of Finance (i.e., Director General of Taxation) is one party that will always be the defendant of taxation dispute.

It is clear that the provisions in Act No. 14/2002 oppose the principle of independence for judicial body as set in Article 24 subsection (1) of the Constitution 1945 and Act No. 48/2009, thus, the provisions may be considerably non-constitutional. Therefore, to realize an independent and acquitted Tax Court, it needs to alter the provision that relates to 'dual roof' coaching into one roof system coaching under the authority of the Supreme Court. In addition, it needs to set on the abolition of authority of the Ministry of Finance related to Tax Court in Act No. 14/2002.

Conclusions

Based on Article 2 of Act No. 14/2002, Tax Court is a judicial body that implements the judicial power to solve tax disputes. However, it does not limitatively determine the function of Tax Court as mentioned in Article 17 subsection (1) of Act No. 48/2009, but only as the explanation of Article 27 subsection (1) of Act No. 48/2009 that Tax Court is a specific court in Administrative Court. It is due to a reason that Tax Court and Administrative Court have particular similarities, including (a) the *subjectum litis* is civil people as the litigant and government official as the defendant; (b) *objectum litis* is the judgment (*beschikking*); c) both Tax Court and Administrative Court have similar function to verify the validity (*rechtmatigheid*) of the government's treatment.

The regulation for Tax Court as set in Act No. 14/2002 does not reflect the independence of judicial bodies that is mentioned in Article 24 subsection (1) of the Constitution 1945 and Act No. 48/2009. It is seen from the coaching by the Supreme Court and the Ministry of Finance as set in Article 5 subsection (1) and (2) of Act No. 14/2002. In addition, the authority of the Ministry of Finance related to Tax Court is very broad, which may affect the principle of independence.

Act No. 14/2002 needs to be amended, related to the clarity of Tax Court's function as a specific court under the administrative court. The alteration related to the independence of Tax Court is necessary by altering 'dual roof' into 'one roof' coaching, which the authority of coaching the Tax Court is on the Supreme Court.

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