

ULTIMUM REMEDIUM PRINCIPLE IN INDONESIAN TAX CRIME – IMPACT AND CHALLENGES POST- OMNIBUS LAW

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Abstract

The tax laws are built to ensure that every citizen obeys their obligation on tax. Or, in other perspectives, to guarantee the state does not lose the right to collect tax from the people. Tax laws are part of the state administrative laws. As a consequence, the penalty that is equipped with tax law is also known as administrative sanctions. However, since tax is an essential state element, tax law provided a criminal penalty to give a more complex impact and the value of a deterrent effect (known as administrative penal law). Every tax jurisdiction has characteristics and depends on the state's main objectives and preferences. Indonesia's tax regime prioritizes tax collection and the recovery of state losses rather than sending the taxpayer to jail. This concept is known as ultimum remedium or the last remedy principal. After the Covid-19 pandemic, Indonesia tries to raise the economy through many breakthroughs in tax law, including the enactment of Law of the Republic of Indonesia N0.11 of 2020 on job creation (also known as omnibus law) and Law of the Republic of Indonesia No.7 of 2021 on Harmonization on Tax Regulation. Both regulations have the same spirit to boost Indonesia's economy through fiscal policy, including relaxation of the tax penalty. With its impact and challenges, this policy is expected to create a broader opportunity for Indonesia tax authorities to collect more tax.

Keywords: *Administrative Penal Law, Tax Crime, Ultimum Remedium Principle, Omnibus Law.*

1. INTRODUCTION

Taxes are multidimensional. Therefore, the term "tax" is challenging to have a single meaning appropriate for all purposes and contexts. Generally, a tax can be interpreted as a levy the state enforces on a person or entity. A more complex definition comes from the international tax glossary, which defined tax as a government levy, not in return for a specific benefit and not imposed by fine or penalty (e.g., for non-compliance with the law), except in some cases related to tax offenses".¹ The OECD, a highly reputable international organization in cooperation and economic development, defines tax as compulsory, unrequited payment to the government.² Meanwhile, in the legal context, According to Soemitro, tax defines as an agreement based on a law that requires people with certain conditions to pay a certain amount of money to the state treasury that can be forced to finance the public interest.³

Officially, the General Tax Provisions and Procedures Law (from now on referred to as "KUP Law") defines tax as a mandatory contribution to the state owed by an individual or entity of a coercive nature under the Law without direct remuneration and is used for state

¹ Larking, Barry. *International Tax Glossary*. Herne: Verl. Neue Wirtschafts-Briefe, 2005.

² "Glossary of Tax Terms." OECD. Accessed January 10, 2022. <https://www.oecd.org/ctp/glossaryoftaxterms.htm>.

³ Soemitro, Rohmat. *Dasar-Dasar Hukum Pajak Dan Pajak Pendapatan 1944*. Bandung, Jawa Barat: PT. Eresco, 1977..

purposes for the greatest prosperity of the people. This definition confirms that such coercive taxes can only be applied under the Act. The law referred to in the context of Indonesia as a country based on people's sovereignty is the output of executive decisions that the people's representatives in parliament have approved. This spirit explains that taxes are not a product of power but an agreement between the government as the executive and the people through its representatives.

Indonesia is a *rechtsstaat* or a state based on a law that is explicitly stated in the fundamental constitution of the 1945 Constitution Article 1 paragraph (3). According to Stahl in Asshidiqie, a rule of law country has 4 (four) essential identities, namely

1. protection of Human Rights;
2. separation or division of powers;
3. government based on law; and
4. independent judicative institution.

As a rule of law country, it is appropriate for the law to be used as a commander by prioritizing law enforcement as an instrument of regulating public order. Law enforcement is carried out as a manifestation of fairness and as a guarantor that every state element obey all the regulations.⁴

Since 1983, Indonesia has carried out tax reforms by implementing a self-assessment tax system. Through this system, taxpayers are active by being given the trust to calculate, pay, and self-report the taxes owed. With the implementation of the self-assessment system, tax debt arises not only because of a tax provision but because of a law. As a contra of this trust, the tax authorities are authorized to supervise, audit, and enforce the law on the implementation of tax obligations by taxpayers. The enforcement of such laws is not limited to the provision of administrative rules such as fines, but more than that can be an investigation of tax crimes.

The tax law, as part of state administrative law and under public law family, is purely administrative legislation. However, since taxes as state revenues have a critical position, tax laws are also equipped with criminal sanctions to provide the value deterrent effect. This is commonly referred to as the Administrative Penal Law. According to Indriyanto Seno Adji, in the context of criminal law, administrative penal law is all legislative products in the form of legislation -within the scope of- State Administration law equipped with criminal sanctions. The administrative penal law is increasingly used and relies on Indonesia's administrative laws and regulations, such as banking, and the environment, including taxes.⁵

Applying criminal sanctions to the rules of Indonesian tax law has several characteristics. One of them is that Indonesian tax law is considered a derivative of restorative justice. In Article 8 paragraph (3) and Article 44B of the KUP Law, criminal sanctions can be replaced with administrative sanctions. The priority of using administrative sanctions over criminal sanctions is in line with applying the principle of *ultimum remedium*.

⁴ "Konsep Negara Hukum - Pn-Gunungsitoli.go.id." Accessed December 31, 2021.

https://www.pnGunungsitoli.go.id/assets/image/files/Konsep_Negara_HukumIndonesia.pdf.

⁵ Indriyanto Seno Adji, Makalah disampaikan sebagai Sumbangsih Tulisan untuk Pelatihan Pidana & Kriminologi dengan Topik "Asas Asas Hukum Pidana & Kriminologi Serta Perkembangannya Dewasa Ini" pada pada hari Minggu sampai dengan Kamis , tanggal 23 Februari – 27 Februari 2014 Jam 08. 00 – Jam 17. 00 WIB di The Rich Hotel, Yogyakarta .

According to Sudikno Mertokusumo, the term *ultimum remedium* is the last tool.⁶ The Minister of Justice of the Republic of Indonesia, Yasona Laoly, interprets the application of criminal sanctions as the final settlement in a law enforcement effort and settling the case in other forms such as negotiations, mediation, or administrative sanctions.⁷ Tax laws are drawn to ensure that state revenues from the taxation sector can be collected. The tax law does not aim to bring the taxpayer to prison to be punished for not paying taxes. Therefore, wherever possible, the main objective is the payment of taxes, not imprisonment of the taxpayer.

Another distinctive feature of the tax criminal characteristic is not only related to an element of the act considered a violation but also a condition is known as "can cause losses to state revenues." This is reflected in the application of Article 38 and Article 39 of the KUP Law, which not only regulates acts that are included in tax crimes but also clearly includes the terminology "can cause losses to state revenues" as an element that must be fulfilled in the article. This condition is different from the general criminal code, which prioritizes acts as violations but is in line with the spirit of the Tax Law, namely the collection of state revenue in the tax sector.

Indonesia made a breakthrough by revising around 80 laws and more than 1,200 articles using the Omnibus Law method. Law No. 11 of 2020, or the Job Creation Law (known as UU Ciptaker), contains 11 clusters, one of which revises the Tax Law and is included in the ease of doing business cluster. In general, according to President Joko Widodo, the purpose of the omnibus law is primarily to lower the cost of starting a business, cutting the red tapes and bureaucratic nitty-gritty in investment. The Omnibus Law aims to facilitate, encourage, and incentivize industrialization in Indonesia.⁸ Another thing that is also put forward is the efforts to recover the Indonesian economy after being hit by the Covid-19 pandemic. Specifically related to taxation, the Job Creation Law aims to carry out tax reforms that can ultimately attract investment and encourage economic growth. A critical step in the tax reform program is the relaxation of rules, including law enforcement rules for tax crimes. To strengthen this step, Law Number 7 of 2021 concerning Harmonization of Tax Regulations (known as UU HPP) has also been established, which relaxes tax sanctions more profoundly and provides convenience to taxpayers in the context of economic recovery and attracting investment.

Departing from the above conditions, this scientific paper will deductively study three main problems. The research questions that will be answered are (1) what is the position of criminal sanctions in Indonesian tax administrative law? (2) how is the application of the *ultimum remedium* principle in the investigation of tax crimes? (3) how does the

⁶ Mertokusumo, S. (2014). *Penemuan Hukum : Sebuah Pengantar*. Liberty - Yogyakarta.

⁷ Pernyataan dalam seminar sebagaimana dikutip oleh Heriani, F. N. (n.d.). *Perlu penegasan Norma Ultimum remedium Soal pengenaan sanksi di Aturan Turunan UU cipta Kerja*. hukumonline.com. Retrieved April 18, 2023, from https://www.hukumonline.com/berita/a/perlu-penegasan-norma-i-ultimum-remedium-i-soal-pengenaan-sanksi-di-aturan-turunan-uu-cipta-kerja-lt5fe9c7c822f4e?utm_source=website&utm_medium=internal_link_klinik&utm_campaign=ultimum_remedium_ciptaker

⁸ *Naskah Lengkap Pidato Presiden Joko Widodo Dalam pelantikan periode 2019-2024*. JEO Kompas.com. (n.d.). Retrieved July 21, 2022, from <https://jeo.kompas.com/naskah-lengkap-pidato-presiden-joko-widodo-dalam-pelantikan-periode-2019-2024>

promulgation of the Job Creation Law and the Tax Harmonization Law affect the investigation of tax crimes? At the end of the paper, a conclusion will be presented, complementing recommendations to resolve legal issues found during the research.

2. RESEARCH METHODS

According to Soekanto, legal research is a scientific activity based on specific methods, systematics, and thoughts that aim to study a particular legal symptom or several symptoms by analyzing it.⁹ For that, research is also held on the legal facts to strive for a legal solution. Meanwhile, according to Homes, as quoted by Marzuki, each science has its method.¹⁰ Van Peursen, as quoted by Ibrahim, translated the notion of method literally, from the beginning of the method being interpreted as a path to be taken, into an investigation or research that takes place according to a specific plan.¹¹

Research on tax crimes uses qualitative research methods with a normative type of legal research. Normative law research is carried out by examining library materials and secondary data, often also referred to as doctrinal research, where the law is often conceptualized as what is written in laws and regulations (law in books) or conceptualized as rules or norms that are a benchmark for decent human behavior. According to Marzuki, normative legal research is a process of finding the law, the legal principles, and the legal doctrines to answer legal problems. The object of study is the laws, philosophies, and regulations of tax law and is complemented by a real case approach.¹²

3. ANALYSIS AND DISCUSSION

3.1. Criminal Penalties in Indonesian Tax Law

Tax law becomes part of government administration for tax collection purposes and coercible obligations of citizens. Even though the tax law is part of the State Administrative Law, tax law has its separate law and is not subject to the State Administrative Law. According to Ritonga, as quoted by Gunadi, there are fundamental differences between legal subjects, objects, and dispute resolution authority between tax and state administrative law. However, tax law is still part of public law. It can be identified from the characteristic of tax law, which predominantly regulates the relationship between the state and citizens or regulates the public interest.¹³

With the implementation of tax reform in 1983, the Indonesian tax system separated formal and material taxation provisions. The Law on General Provisions and Tax Procedures (KUP Law) is prepared as Indonesia's formal tax law. KUP law explicitly regulates the provisions of tax crimes in Chapter VIII including Articles 38, 39, 39A, 40, 41, 41A, 41B, 41C, 43, and 43A. The following section will be outlined the articles governing tax crimes in the Law on General Provisions and Tax Procedures. To simplify the discussion

⁹ Soekanto, S. (2006). *Pengantar Penelitian hukum*. Penerbit Universitas Indonesia (UI-Press).

¹⁰ Marzuki, Peter Mahmud. *Penelitian Hukum*. Jakarta: Kencana, 2005.hal.6

¹¹ Ibrahim, J. (2007). *Teori dan Metodologi Penelitian Hukum Normatif*. Banyumedia Publishihing.

¹² Marzuki, *Penelitian ...*, Op.Cit.,hal 11

¹³ Gunadi. (2020). *Pemeriksaan, investigasi, Dan Penyidikan pajak*. Koperasi Pegawai Kantor Pusat Direktorat Jenderal Pajak bekerjasama dengan MUC Consulting.hal.84

and comparative studies, the report cited in this section is before the enactment of the Job Creation Law and the Tax Regulation Harmonization Law.

The article on tax crimes begins with Article 38 letters a and b of the KUP Law, which states that: whomsoever, due to his negligence:

- a. Fails to file the Tax Return; or
- b. Files an incorrect or incomplete Tax Return, or attaches incorrect information which may causes losses revenue of the state and the act is an act after the first act as referred to in Article 13A, fined at least 1 (one) time the amount of tax owed that is not or underpaid, and at most 2 (two) times the amount of tax owed that is not or underpaid, or punished by imprisonment for a minimum of 3 (three) months or a maximum of 1 (one) year".

Furthermore, Article 39 paragraph (1) states that: whomsoever deliberately: Not registering to be given a Taxpayer Identification Number or not reporting his business to be confirmed as a Taxable Person for VAT purposes;

- a. Abusing or illegal using the Taxpayer Identification Number or Taxable Person for VAT purposes number;
- b. Fails to file the Tax Return;
- c. Files a false or incomplete Tax Return and or information;
- d. Refuse to conduct tax audit as referred to in Article 29;
- e. Show record books or other documents that are forged or falsified or do not describe the actual circumstances;
- f. Fails to conduct the bookkeeping or recording in Indonesia, or fails to show or borrow the book, records, or other documents;
- g. Does not store books, records, or other documents that become the bookkeeping or recording and other documents that are managed electronically or it is managed in an online application program in Indonesia as outlined in Article 28; or
- h. Does not pay the tax that has been withheld or collected

thus causes losses to state's revenue shall be punished with imprisonment at least for 6 (six) months and a maximum of 6 (six) years and a fine of at least 2 (two) times the amount of tax owed that is not or underpaid, and maximum 4 (four) times the amount of tax owed that is not or underpaid;

The fundamental difference between Articles 38 and 39 lies in the intent of the violation act. Article 38 is based on criminal acts committed for negligence, whereas article 39 is based on criminal offenses committed intentionally. This difference in intention of the criminal act gives additional sanctions consequences to the perpetrator.

Furthermore, in paragraph (2), it is stipulated that the criminal penalties as referred to in paragraph (1) are multiplied 2 (two) times if a person commits another illegal act in the field of taxation before 1 (one) year, starting from the completion of serving a sentence imposed. This suggests an additional penalty if it turns out that the punishment given does

not have a deterrent effect on the perpetrator. This provision also expects a change in the behavior of the perpetrator of the crime if he has been subject to criminal penalties.

Article 39 paragraph (3) provides more detail for criminal acts previously regulated in paragraph (1), specifically against restitution or tax compensation applications. In the paragraph, it is stipulated that every person who attempts to commit a criminal act of abusing or using without the right of a Taxpayer Identification Number or Taxable Person for VAT purposes number as referred to in paragraph (1) point b, or files the incorrect or incomplete tax return and /or information, as referred to in paragraph (1) letter d, in order to apply for restitution or make tax compensation or tax crediting, shall be punished with imprisonment for a minimum of 6 (six) months and a maximum of 2 (two) years and a fine of at least 2 (two) times the amount of restitution requested and/or compensation or crediting made and a maximum of 4 (four) times the amount of restitution requested and/or compensation or crediting made". This article also corroborates the argument about why the Act chose to use the terminology of "loss on state revenue" rather than "unpaid tax." Losses on state revenues have a broader meaning related to taxes owed and include restitution and unauthorized tax compensation.

Article 39A letters a and b specifically regulate the criminal violation of tax invoices and tax transaction evidence. In the article, it is stipulated that any person who knowingly:

- a. Issue and/or use tax invoices, evidence of tax collection, evidence withholding tax, and/or evidence of tax deposits that are not based on actual transactions; or
- b. Issuing tax invoices but not yet confirmed as a Taxable Person for VAT purposes, sentenced to a minimum of 2 (two) years imprisonment and a maximum of 6 (six) years and a fine of at least 2 (two) times the amount of tax in the tax invoice, proof of tax collection, proof of tax withholding and/or proof of tax deposit at most and a maximum of 6 (six) times the amount of tax in the tax invoice, proof of tax collection, proof of withholding of taxes, and/or proof of tax deposit". Unlike Articles 38 and 39 of the KUP Law, Article 39A does not list losses in state revenues as a precondition element. Article 39A focuses more on acts of violation, namely misuse of tax invoices and evidence of tax transactions. This is in line with the general criminal offense code since abuse of invoices and evidence of tax transactions can be aligned with acts of forgery or fraud.

KUP law also regulates tax crime provisions for particular circumstances. One is related to gathering tax information from other institutions by tax authorities. The provisions of Article 41 A state that: "Any person who is obliged to provide information or evidence requested as referred to in Article 35 but deliberately does not provide information or evidence, or gives information or evidence that is not true is punished with a maximum imprisonment of 1 (one) year and a maximum fine of Rp. 25,000,000.00 (twenty-five million rupiah)".

As a reference, Article 35 paragraphs (1) and (2) of the KUP Law itself regulates : (1) If in carrying out the provisions of tax laws and regulations, information or evidence is needed from banks, public accountants, notaries, tax consultants, administrative offices, and or / other third parties, who have a relationship with taxpayers conducted tax inspections, tax collections or investigators of criminal acts in the field of taxation, upon written request from the Director General of Taxes, the parties are obliged to provide the requested information or evidence. (2) In the parties referred to in paragraph (1) bound by the obligation to keep confidential, for examination purposes, tax collection purposes, or tax investigation purposes, the confidentiality obligation is waived. Especially for banks, the confidentiality obligation is waived upon written request from the Minister of Finance.

Meanwhile, the provisions of Article 41 C paragraphs (1), (2), (3), and (4) of the KUP Law state that: (1) Everyone who deliberately does not fulfill the obligations as referred to in Article 35 A paragraph (1) shall be sentenced to a maximum of 1 (one) year imprisonment or a maximum fine of Rp. 1,000,000,000,00 (one billion rupiah); (2) Any person who intentionally causes non-fulfillment of the obligations of officials and other parties as referred to in Article 35 A paragraph (1) shall be punished with imprisonment for a maximum of 10 (ten) months or a maximum fine of Rp. 800.000.000,-(eight hundred million rupiah); (3) Any person who deliberately does not provide data and information requested by the Director General of Taxes as referred to in Article 35 A paragraph (2) shall be sentenced to a maximum of 10 (ten) months imprisonment or a maximum fine of Rp. 800,000,000,- (eight hundred million rupiah); (4) Any person who intentionally misuses tax data and information which may cause losses to the state revenue shall be sentenced to a maximum of 1 (one) year imprisonment or a maximum fine of Rp. 500,000,000,-(five hundred million rupiah).

In Article 35 A, paragraphs (1) and (2) of the KUP Law itself stipulates that: (1) Every government agency, association institution, and other parties, must provide data and information related to taxation to the Directorate General of Taxes, whose provisions are regulated by a Government Regulation by taking into account the requirements as referred to in Article 35 paragraph (2); (2) If the data and information as referred to in paragraph (1) are insufficient, the Director General of Taxes is authorized to collect data and information for the benefit of State revenues whose provisions are regulated by a Government Regulation by taking into account the requirements as referred to in Article 35 paragraph (2).

Article 41 B of the KUP Law specifically regulates threats to parties who deliberately obstruct or complicate the investigation of criminal acts in the field of taxation. The parties that are considered obstruct or complicate tax investigation will be punished with a maximum imprisonment of 3 (three) years and a maximum fine of Rp. 75,000,000.00 (seventy-five million rupiah)".

Moreover, Article 43 paragraphs (1) and (2) of the U KUP regulate the liability of parties that are considered to have participated in a tax crime, namely: (1) The provisions as referred to the Article 39 and Article 39 A, apply to representatives, attorneys, employees of

taxpayers or other parties who order to commit, who participate in committing, who advocates, or who help commit criminal acts in the field of prosecution. (2) The provisions referred to in Article 41 A and Article 41 B shall also apply to those who order to commit, who participate in committing, who advocates, or who assist in committing criminal acts in the field of taxation. Article 40 specifies, "A criminal tax offense cannot be prosecuted after ten years from the time of the tax payable, the expiration of the tax period, the expiration of the part of the tax year, or the expiration of the relevant tax year."

The formulation of articles related to tax crime has comprehensively addressed many aspects of violations that may occur in the tax system. In addition, some provisions of tax crimes are also considered sufficient power to the Directorate General of Taxes as the Indonesian tax authority to carry out duties with control and respect in collecting state revenue through taxes.

3.2. *Ultimum Remedium* in Tax Crimes

After an overview of the articles regulating tax crimes in the KUP Law, the next section will describe a deep understanding of how *ultimum remedium* is carried out in resolving tax crimes. Some of the literature finds out that the term *ultimum remedium* was first conveyed by Mr. Modderman, the Dutch Minister of Finance, in answering a question from Mr. Mackay, a Dutch parliamentarian, regarding the legal basis for the need for a sentence for a person who has violated the law.¹⁴ Modderman stated: "... that "the punishable" is the first consideration of all law violations. This is the *sine qua non* (a condition that should not be absent). Secondly, what is "punishable" is a law violation which by experience cannot be dispensed in any other way. The punishment should be a last resort (*ultimum remedium*). Indeed, against every criminal threat, there is an objection. Everyone who is healthy-minded will understand this without further explanation. This does not mean that criminal threats will be eliminated. Still, we must always consider the advantages and disadvantages of criminal threats to be an effort by healers and must take care not to make the disease worse.

As quoted by Zenno, Van de Bunt suggests that criminal law as *ultimum remedium* has three meanings: a The application of criminal law only to people who ethically violate the law is very severe. b. Criminal law is an *ultimum remedium* because the sanctions of criminal law are more powerful and harsher than the sanctions of other laws, often even bringing side effects. It should be applied if the sanctions of other laws cannot solve the violation problem (the last remedy). c. Criminal law is an *ultimum remedium* since the administrative official who first knows about the breach are the ones who are prioritized to take action over criminal law enforcement.

Furthermore, according to Arief¹⁵, in general, criminal law has limitations and weaknesses as a means of overcoming crime because

¹⁴Zenno, M. P. (2017). Penerapan Prinsip *ultimum Remedium* Dalam Tindak Pidana Korupsi. *Jurnal Yudisial*, 10(3), 257. <https://doi.org/10.29123/jy.v10i3.266>

¹⁵Arief, B. N. (2003). *Kapita Selekta Hukum Pidana*. Citra Aditya Bakti.hal.88.

1. The causes of crime are complex and beyond the scope of criminal law.
2. Criminal law is only a tiny part (subsystem) of the means of social control that are unlikely to address the problem of crime as a very complex humanitarian and societal problem (as a sociopsychological, sociopolitical, socioeconomic, sociocultural, and so on the situation).
3. The use of criminal law in tackling crime is only symptomatic treatment. Therefore criminal law is not a causative treatment.
4. Criminal law sanctions are "remedium" with contradictory/paradoxical properties, harmful elements, and side effects.
5. The penal system is fragmentary and individual/personal, not structural/functional.
6. Limitations on the types of criminal sanctions and the system of formulating criminal sanctions that are rigid and imperative.
7. The work/functioning of criminal law requires more varied means of support and demands more high costs.

The experts' opinion clearly directs that the application of criminal sanctions is the last resort and is only used if other areas of law have been deemed unable to solve the problem. Especially when it is related to tax law, which mainly collects state revenue from the tax sector, the recovery of state revenue losses takes precedence over imprisoning taxpayers. To provide a complete picture of the principle of *ultimum remedium*, the following will be explained the articles that taxpayers can use to avoid criminal sanctions of taxation. These provisions are regulated in Article 8 paragraph (3) and Article 44 B of the KUP Law. Article 8 paragraph (3) provides that: Although a tax audit action has been carried out, an investigation has not been carried out regarding Taxpayer violation as referred to in Article 38, the taxpayer's violation will not be investigated if the taxpayer by his own will disclose the untruthfulness of his actions accompanied by repayment of the lack of payment of the amount of tax owed along with 150% (one hundred and fifty percent) administration penalty. Disclosure of tax crime following Article 8 paragraph (3) can be made by taxpayers when a preliminary investigation is being carried out (which in Indonesian taxation terms is known as the "Bukper" audit). At the preliminary investigation stage, the tax officer will collect evidence and investigate the model of a tax crime before it is forwarded to the next level, namely tax investigation. If the taxpayer at this stage has admitted to committing a tax crime, he is allowed to disclose untruths by paying several administrative sanctions, as mentioned before. Article 8 paragraph (3) KUP law applies the principle of *ultimum remedium* in the preliminary investigation stage, where an investigation of a tax crime can not be carried out if the taxpayer is willing to settle with the form of payment of administrative sanctions.

The Omnibus Law and the Harmonized Tax Regulations law extend the use of "excuse reason" of article 8 paragraph (3). The amendment now includes the act of (a) failing to file the tax return, (b) Filing the incorrect or incomplete tax return, or attaching incorrect information. The deadline was also revised from "before the start of the investigation" to "as long as the start of the investigation has not been notified to the Public Prosecutor through

the investigating officials of the State Police of the Republic of Indonesia.” The amount of the sanction is stated in a separate paragraph (paragraph (3a), which says that the disclosure of tax violation as referred to in paragraph (3) is accompanied by repayment of the shortfall in payment of the amount of tax actually owed along with 100% (hundred percent) administrative sanctions.

The taxpayer still has the opportunity to use the “excuse reason” even preliminary investigation is completed, and the tax investigation process has started. This action is regulated in applying the second phase of the *ultimum remedium* principle through Article 44B of the KUP Law. Under Article 44B, it is stated that due to state revenue purposes, the Attorney General may stop the investigation of tax crimes at the request of the Minister of Finance. In the next paragraph, it is stipulated that the termination of the investigation is only carried out after the taxpayer pays off the tax debt that is not paid or that should not be returned, along with administrative sanctions of 4 (four) times the tax that is not or underpaid, or should not be returned. This provision is being relaxed through Harmonized Tax Regulations law by dividing several levels of sanctions. The scheme of penalty are as follow :

- a. losses on state revenues as referred to in Article 38 plus administrative sanctions 1 (one) time the number of losses on state revenues;
- b. losses on state revenues as referred to in Article 39 plus administrative sanctions 3 (three) times the number of losses on state revenues;
- c. the amount of tax in the tax invoice, proof of tax collection, proof of tax withholding, and/or proof of tax deposit as referred to in Article 39A plus administrative sanctions 4 (four) times the amount of tax in the tax invoice, proof of tax collection, proof of tax withholding, and/or proof of tax deposit.

These various relaxations are indeed carried out with multiple considerations to prioritize fairness and provide more significant opportunities for the state to collect revenue from the tax sector. However, relaxing tax crime sanctions must conduct very carefully. A potential lousy side impact and the harmful situation lead to degrading authority, respectfulness, and a non-compliant character of taxpayers.

3.3. Impact and Challenges of the Job Creation Law and Harmonization of Tax Regulations Law on the application of *ultimum remedium*

The Job Creation Law and the Harmonized Tax Regulations Law both have the spirit to spur the national economy, which has fallen quite profoundly due to the Covid-19 pandemic. Since it was detected at the end of 2019, the infectious disease caused by the SARS-Cov-2 virus has quickly spread and become an extraordinary world event. Globally, the Covid-19

pandemic caused world economic growth to contract by 3.27% in 2020.¹⁶ Even in some countries, in the second quarter of 2020, there was a contraction to reach 13.3% in Singapore, 16.9% in the Philippines, and 18.6% in France.¹⁷ In fact, before the pandemic, the world economic growth forecast for 2020 was still in the range of 3.4%.¹⁸ It is estimated that Covid-19 will erode around US\$ 8.5 trillion from the world economy during 2020 – 2021.¹⁹

This condition inevitably also hit Indonesia. In the forecast quarter, signs of Covid-19 disruption in the economy were seen with the economic growth rate of only 2.97%, or much lower than the growth of the last few years, around 5%. To face this challenging condition, the government swiftly launched various policy breakthroughs to maintain stability and efforts to recover the national economy. These steps include by issuing Law No.2 of 2020 concerning State Financial System Policies for Handling Covid-19 Pandemic and/or in the context of dealing with threats that endanger national economy or financial stability.

Many countries in the world are using fiscal stimulus to save their countries' economies. In Indonesia, economic rescue is carried out with the National Economic Recovery program, one of which targets solving challenges in the form of limited administrative capacity and fiscal policy. In the academic text of the Tax Harmonization Law, it is stated that in addition to the challenges in the economic sector caused by the Covid-19 pandemic that has not been controlled, global fiscal conditions, and limited national fiscal space, there are limited regulations in legislation that have not provided legal certainty, low voluntary compliance of taxpayers, not optimal tax revenues, and the lack of creation of justice and equality. Furthermore, in the fourth point, it is stated that one of the main problems that are targeted is the existence of a border regulation regarding the application of the principle of *ultimum remedium* in Article 44B of the KUP Law, which results in the recovery of losses to state revenues to be not optimal, because the payment of losses to state revenues and/or sanctions when the case has been transferred to the court or at the time of trial, did not overturn the prosecutor's charges. This condition caused the principle of *ultimum remedium* not to apply to the defendant.²⁰

From the academic paper, it is clear that the government is trying to widen the efforts of *ultimum remedium* to optimize state revenue. Taxpayers are given a broader opportunity to use the “excuse policy” to escape from criminal penalties by paying administrative sanctions. On one occasion, the Director of Taxation I of the Directorate General of Taxes, Hestu Yoga, said that the *ultimum remedium* policy in the Harmonized Tax Regulations Law is in line with the Job Creation Law.²¹ The various substances of the HPP Law are in line with the objectives of the Job Creation Law, for example, regarding the relaxation of

¹⁶ JHU CSSE, COVID-19 Dashboard by the Center for Systems Science and Engineering (CSSE) at Johns Hopkins University (JHU), diakses dari <https://coronavirus.jhu.edu/map.html>, pada tanggal 21 July 2022.

¹⁷ IMF, World Economic Outlook April 2021, Washington, DC: International Monetary Fund, 2021, hlm. 7.

¹⁸ IMF, <http://imf.org/>, retrieved 9 April 2021

¹⁹ IMF, World Economic Outlook Oktober 2019, Washington, DC: International Monetary Fund, hlm. 9.

²⁰ Direktorat Jenderal Pajak, & Tim Penyusun Naskah Akademik, NASKAH AKADEMIK RANCANGAN UNDANG-UNDANG TENTANG PERUBAHAN KELIMA ATAS UNDANG-UNDANG NOMOR 6 TAHUN 1983 TENTANG KETENTUAN UMUM DAN TATA CARA PERPAJAKAN (n.d.).hal.7

²¹ Susanti, S. D. (2021, November 3). *DJP: Kebijakan "ultimum remedium" UU Hpp Selaras Dengan UU cipta Kerja*. Antara News. Retrieved July 21, 2022, from <https://www.antaraneews.com/berita/2500017/djp-kebijakan-ultimum-remedium-uu-hpp-selaras-dengan-uu-cipta-kerja>

sanctions in taxation and the broader excuses for tax crime. According to Hestu²², from the benchmarks of other countries and the results of discussions with the taxpayers association, a fairer relaxation of sanctions actually increases the taxpayer's compliance. Moreover, they are willing to pay the tax and its fines voluntarily. The leading spirit is allowing the taxpayer who is willing to pay the tax bill and the penalty for the state revenue purposes.

The author appreciates the steps taken by the Indonesian tax authorities in relaxing tax criminal penalties to optimize state revenues. However, it should be noted that a complete and credible implementation rule must also support the provision of relaxation. The relaxation of criminal sanctions should not bring new problems in implementing tax criminal investigations. One of the challenges that concern the author is the relaxation of the arrangements at the initial investigation stage ("bukper" audit). Before the enactment of the Job Creation Law, the rules for implementing the initial investigation examination were the Minister of Finance Regulation Number PMK-239 / PMK.03 / 2014 concerning Procedures for Examining Preliminary Evidence of Criminal Acts in the Field of Taxation. The regulation is amended by the Regulation of the Minister of Finance Number 18 / PMK.03 / 2021 as a mandate for the implementation of the Job Creation Law in the Income Tax laws, Value Added Tax, and Sales Tax on Luxury Goods laws, as well as General Provisions and Tax Procedures laws. In the latest regulation, the tax authority provides relaxation of payments made by taxpayers in order to reveal tax violations through Article 8 paragraph (3) of the KUP Law mechanism. To facilitate the comparative study, the table below describes differences in treatment related to the payment of disclosure of untruths regulated in PMK 239/PMK.03/2014 and PMK 18/PMK.03/2021.

	PMK 239/PMK.03/2014	PMK 18/PMK.03/2021
(1)	If the Preliminary investigation audit is followed up with the Investigation, payment for the disclosure of untruthful acts that do not meet the provisions as referred to in Article 23 paragraph (4), paragraph (5), and paragraph (6) and/or not following the actual circumstances does not eliminate all losses in state revenue.	Suppose the Preliminary Investigation audit is followed up with the Investigation. In that case, the payment for the disclosure of untruthfulness of the act that does not meet the provisions referred to in Article 23 paragraph (4), paragraph (5), and paragraph (6) and/or not following the actual circumstances, is taken into account as a deduction of losses on state revenues at the investigation stage.
(2)	The payment, as referred to in paragraph (1), may be taken into account as a deduction of the value of the loss on state income to the extent that the payment is made before the notification of the start of the investigation is submitted to the public prosecutor through the investigating officer of the National Police of the Republic of Indonesia.	Deleted
(3)	Payments that meet the provisions as referred to in paragraph (2) cannot be requisitioned by the taxpayer.	Payment for disclosure of untruthfulness of the act as referred to in paragraph (1) cannot be transferred or requisitioned by the taxpayer.
(4)	The amount that can be considered as a deduction from the value of losses on state income, as	Deleted

²² ibid

	PMK 239/PMK.03/2014	PMK 18/PMK.03/2021
	referred to in paragraph (2), is two-fifths of the payment amount in the context of disclosing the tax violations.	
(5)	An example of calculating the amount that can be taken into account as a deduction for the value of losses on state income, as referred to in paragraph (4) as stated in the Appendix, is an integrated part of this Ministerial Regulation.	Deleted

From the table above, it can be seen that the difference in enthusiasm in treating payments made by taxpayers in the context of disclosing untruths based on Article 8 paragraph (3) of the KUP Law. PMK 239/PMK.03/2014 expressly states that taxpayer payments in revealing untruths cannot necessarily eliminate losses in state revenues. This is in line with the application of sanctions gradually, where the disclosure of tax violations at the preliminary investigation (Bukper examination) stage requires to meet the administrative sanction of 150%. In the context of this consistency, in paragraph (4), it is stated that the amount that can be taken into account as a deduction for the value of losses in state income, as referred to in paragraph (2), is two-fifths of payment amount in the context of disclosing the tax violations.

An example is an illustration of a taxpayer committing a tax crime with a loss value on state income of Rp. 100,000,000.00 . So to cover the loss of state revenue in the context of disclosing untruths with this amount, in essence, taxpayers are required to pay a tax principal of Rp. 100,000,000.00 plus a penalty of 150%, or Rp 150,000,000.00, and total payment amount is Rp. 250,000,000.00. From the value of Rp.250,000,000,00 two-fifths of the amount is taken into account or equal to Rp. 100,000,000.00. Since the calculated value has been equal to the total loss on state revenues, disclosing such untruths is acceptable.

Turn to another example by still using PMK.239 / PMK.03 / 2014, where taxpayers commit tax crimes with a loss value on state income of Rp. 100,000,000.00 and pay state losses of Rp. 100,000,000.00. According to the rules of paragraph (4) of the PMK, only two-fifths of the parts are taken into account or Rp. 40,000,000.00. Because the payment is considered ineligible to cover the value of the loss on state income against the taxpayer, the disclosure of untruth is not acceptable. The process continues to the next stage, tax crimes investigation, with a state loss value of the lack of Rp. 60,000,000.00.

The next example is the Minister of Finance Regulation application after the Job Creation Law or PMK 18 /PMK.03/2021. Taxpayers commit tax crimes with a loss value on state income of Rp. 100,000,000.00 and pay state losses of Rp. 100,000,000.00. Based on PMK 18/PMK.03/2021, the value is directly entirely a deduction from state revenue losses so that the value of losses in state income after this payment becomes Nil.

Several challenges arise with this condition. The first challenge is that taxpayers take advantage of the loopholes by not carrying out their tax obligations in the hope of conducting a preliminary investigation and simply paying the tax principal without paying interest

administrative sanctions to complete all their tax obligations. This will undoubtedly reduce taxpayers' compliance and the tax authorities' respectfulness. The second challenge is the confusion of the Tax Investigators which in the middle of carrying out investigations or overseeing the prosecution of tax criminal cases where the principal tax had been paid before. With the PMK 18/PMK.03/2021, the loss to state revenues will automatically be nil, and the investigation or prosecution cannot be continued.

At the end of November 2022, Ministry of Finance has issued new regulation PMK 177/PMK.03/2022 which partially revised PMK 18/PMK.03/2021. This new regulation stipulates that payments for disclosing untruths made by taxpayers in Bukper examinitaion not automatically deduct all the lose on state income. To align with the sanctions of Article 8 paragraph (3) UU HPP, the payment only calculated 50% to reduce the lose on state income (previously two-fifths in PMK 2014). This particular step actually fix the loopholes contained in PMK 18/PMK.03/2021. However, according to Article 32 PMK177/PMK.03/2022, the regulation only applies after 60 (sixty) days since it was promulgated and does not apply retroactively in the cases of 2021 and 2022.

4. CONCLUSION

From the discussion and analysis above, there are several conclusions:

1. Tax Law is an administrative law with criminal sanctions (administrative law penal).
2. In its primary purpose as a collector of state revenues from the taxation sector, applying criminal sanctions in the Tax Law is the last resort (ultimum remedium) by first prioritizing administrative sanctions and recovery of state revenue losses.
3. The Job Creation Law and the Harmonized Tax Regulations Law open spacious opportunities for taxpayers to apply the ultimum remedium principle to optimize state revenues and recover the national economy.
4. The relaxation of sanctions, including criminal sanctions, poses new challenges, especially in terms of increasing taxpayer compliance and maintaining the authority of tax authorities.

REFERENCES

Arief, B. N. (2003). *Kapita Selektu Hukum Pidana*. Citra Aditya Bakti.hal.88

Direktorat Jenderal Pajak, & Tim Penyusun Naskah Akademik, NASKAH AKADEMIK RANCANGAN UNDANG-UNDANG TENTANG PERUBAHAN KELIMA ATAS UNDANG-UNDANG NOMOR 6 TAHUN 1983 TENTANG KETENTUAN UMUM DAN TATA CARA PERPAJAKAN (n.d.).

“Glossary of Tax Terms.” OECD. Accessed January 10, 2022. <https://www.oecd.org/ctp/glossaryoftaxterms.htm>.

Gunadi. (2020). *Pemeriksaan, investigasi, Dan Penyidikan pajak*. Koperasi Pegawai Kantor Pusat Direktorat Jenderal Pajak bekerjasama dengan MUC Consulting.

IMF, World Economic Outlook April 2021, Washington, DC: International Monetary Fund, 2021.

IMF, <http://imf.org/>, retrieved 9 April 2021

IMF, World Economic Outlook Oktober 2019, Washington, DC: International Monetary Fund.

Indriyanto Seno Adji, Makalah disampaikan sebagai Sumbangsih Tulisan untuk Pelatihan Pidana & Kriminologi dengan Topik “Asas Asas Hukum Pidana & Kriminologi Serta Perkembangannya Dewasa Ini” pada pada hari Minggu sampai dengan Kamis , tanggal 23 Februari – 27 Februari 2014 Jam 08. 00 – Jam 17. 00 WIB di The Rich Hotel, Yogyakarta .

JHU CSSE, COVID-19 Dashboard by the Center for Systems Science and Engineering (CSSE) at Johns Hopkins University (JHU), diakses dari <https://coronavirus.jhu.edu/map.html>, pada tanggal 21 July 2022.

“Konsep Negara Hukum - Pn-Gunungsitoli.go.id.” Accessed December 31, 2021. https://www.pngunungsitoli.go.id/assets/image/files/Konsep_Negara_HukumIndonesia.pdf.

Larking, Barry. *International Tax Glossary*. Herne: Verl. Neue Wirtschafts-Briefe, 2005.

Marzuki, Peter Mahmud. *Penelitian Hukum*. Jakarta: Kencana, 2005.

Naskah Lengkap Pidato Presiden Joko Widodo Dalam pelantikan periode 2019-2024. JEO Kompas.com. (n.d.). Retrieved July 21, 2022, from <https://jeo.kompas.com/naskah-lengkap-pidato-presiden-joko-widodo-dalam-pelantikan-periode-2019-2024>

Soekanto, S. (2006). *Pengantar Penelitian hukum*. Penerbit Universitas Indonesia (UI-Press).

Soemitro, Rohmat. *Dasar-Dasar Hukum Pajak Dan Pajak Pendapatan 1944*. Bandung, Jawa Barat: PT. Eresco, 1977.

Susanti, S. D. (2021, November 3). *DJP: Kebijakan "ultimum remedium" Uu Hpp Selaras Dengan UU cipta Kerja*. Antara News. Retrieved July 21, 2022, from <https://www.antaraneews.com/berita/2500017/djp-kebijakan-ultimum-remedium-uu-hpp-selaras-dengan-uu-cipta-kerja>

Zenno, M. P. (2017). Penerapan Prinsip ultimum Remedium Dalam Tindak Pidana Korupsi. *Jurnal Yudisial*, 10(3), 257. <https://doi.org/10.29123/jy.v10i3.266>