The Tax Disputes and Litigation Review

Third Edition

Editor
Simon Whitehead

Law Business Research

The Tax Disputes and Litigation Review

The Tax Disputes and Litigation Review
Reproduced with permission from Law Business Research Ltd.

This article was first published in The Tax Disputes and Litigation Review - Edition 3
(published in February 2015 – editor Simon Whitehead).

For further information please email
Nick.Barette@lbresearch.com

The Tax Disputes and Litigation Review

Third Edition

Editor
Simon Whitehead

Law Business Research Ltd

THE LAW REVIEWS

THE MERGERS AND ACQUISITIONS REVIEW

THE RESTRUCTURING REVIEW

THE PRIVATE COMPETITION ENFORCEMENT REVIEW

THE DISPUTE RESOLUTION REVIEW

THE EMPLOYMENT LAW REVIEW

THE PUBLIC COMPETITION ENFORCEMENT REVIEW

THE BANKING REGULATION REVIEW

THE INTERNATIONAL ARBITRATION REVIEW

THE MERGER CONTROL REVIEW

THE TECHNOLOGY, MEDIA AND
TELECOMMUNICATIONS REVIEW

THE INWARD INVESTMENT AND
INTERNATIONAL TAXATION REVIEW

THE CORPORATE GOVERNANCE REVIEW

THE CORPORATE IMMIGRATION REVIEW

THE INTERNATIONAL INVESTIGATIONS REVIEW

THE PROJECTS AND CONSTRUCTION REVIEW

THE INTERNATIONAL CAPITAL MARKETS REVIEW

THE REAL ESTATE LAW REVIEW

THE PRIVATE EQUITY REVIEW

THE ENERGY REGULATION AND MARKETS REVIEW

THE INTELLECTUAL PROPERTY REVIEW

THE ASSET MANAGEMENT REVIEW

THE PRIVATE WEALTH AND PRIVATE CLIENT REVIEW

THE MINING LAW REVIEW

THE EXECUTIVE REMUNERATION REVIEW

THE ANTI-BRIBERY AND ANTI-CORRUPTION REVIEW

THE CARTELS AND LENIENCY REVIEW

THE TAX DISPUTES AND LITIGATION REVIEW

THE LIFE SCIENCES LAW REVIEW

THE INSURANCE AND REINSURANCE LAW REVIEW

THE GOVERNMENT PROCUREMENT REVIEW

THE DOMINANCE AND MONOPOLIES REVIEW

THE AVIATION LAW REVIEW

THE FOREIGN INVESTMENT REGULATION REVIEW

THE ASSET TRACING AND RECOVERY REVIEW

THE INTERNATIONAL INSOLVENCY REVIEW

THE OIL AND GAS LAW REVIEW

THE FRANCHISE LAW REVIEW

THE PRODUCT REGULATION AND LIABILITY REVIEW

THE SHIPPING LAW REVIEW

THE ACQUISITION AND LEVERAGED FINANCE REVIEW

THE PRIVACY, DATA PROTECTION AND CYBERSECURITY LAW REVIEW

www.TheLawReviews.co.uk

PUBLISHER
Gideon Roberton

BUSINESS DEVELOPMENT MANAGER
Nick Barette

SENIOR ACCOUNT MANAGERS
Katherine Jablonowska, Thomas Lee

ACCOUNT MANAGER
Felicity Bown

PUBLISHING COORDINATOR
Lucy Brewer

MARKETING ASSISTANT
Dominique Destrée

EDITORIAL COORDINATOR
Shani Bans

HEAD OF PRODUCTION
Adam Myers

PRODUCTION EDITOR
Claire Ancell

SUBEDITOR
Janina Godowska

MANAGING DIRECTOR
Richard Davey

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

www.TheLawReviews.co.uk

ISBN 978-1-909830-38-7

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

BAKER & McKENZIE LLP

BOWMAN GILFILLAN

CUATRECASAS, GONÇALVES PEREIRA

DANNY DARUSSALAM TAX CENTER

DLA PIPER WEISS-TESSBACH RECHTSANWÄLTE GMBH

FLICK GOCKE SCHAUMBURG

GIDE LOYRETTE NOUEL

GREENWOODS & HERBERT SMITH FREEHILLS

HANNES SNELLMAN ATTORNEYS LTD

HERBERT SMITH FREEHILLS

HOCHE SOCIÉTÉ D'AVOCATS

HWUASON LAW FIRM

JOSEPH HAGE AARONSON LLP

KYRIAKIDES GEORGOPOULOS LAW FIRM

LOYENS & LOEFF

MAISTO E ASSOCIATI

MASON HAYES & CURRAN

McEWAN, ROBERTS, DOMINGUEZ & CARASSAI

MORAIS LEITÃO, GALVÃO TELES, SOARES DA SILVA & ASSOCIADOS, RL

MORRISON & FOERSTER LLP

MPC LEGAL, SOLICITORS & ADVOCATES

NISHIMURA & ASAHI

OPF PARTNERS

PÉREZ BUSTAMANTE & PONCE, ABOGADOS

PWC LEGAL CIS BV

ROSCHIER ADVOKATBYRÅ

SELE FROMMELT & PARTNER ATTORNEYS AT LAW LTD

SYCIP SALAZAR HERNANDEZ & GATMAITAN

TAUIL & CHEQUER IN ASSOCIATION WITH MAYER BROWN LLP

WARDYŃSKI & PARTNERS

CONTENTS

EDITOR'S PREFACE

The objective of this book is to provide tax professionals involved in disputes with revenue authorities in multiple jurisdictions with an outline of the principal issues arising in those jurisdictions. In this, the third edition, we have continued to concentrate on the key jurisdictions where disputes are likely to occur for multinational businesses.

Each chapter provides an overview of the procedural rules that govern tax appeals and highlights the pitfalls of which taxpayers need to be most aware. Aspects that are particularly relevant to multinationals, such as transfer pricing, are also considered. In particular, we have asked the authors to address an area where we have always found worrying and subtle variations in approach between courts in different jurisdictions, namely the differing ways in which double tax conventions can be interpreted and applied.

It is noticeable in this third edition that the past year has seen a general increase in litigation as tax authorities in a number of jurisdictions take a more aggressive approach to the collection of tax; in response, no doubt, to political pressure to address tax avoidance. In the UK alone we have seen the tax authority vested with broad new powers not only of disclosure but even to require tax to be paid in advance of any determination by a court that it is due. The provisions empower the revenue authority, an administrative body, to compel payment of a sum, the subject of a genuine dispute, without any form of judicial control or appeal. A further announcement has just been made to introduce a 'diverted profits tax' to impose an additional tax in the UK when it is felt that a multinational is subject to too little corporation tax. These are, perhaps, extreme examples, reflective of the parliamentary cycle, yet a general toughening of stance seems to be felt. In that light, this book provides an overview of each jurisdiction's anti-avoidance rules and any alternative mechanisms for resolving tax disputes, such as mediation, arbitration or restitution claims.

We have attempted to give readers a flavour of the tax litigation landscape in each jurisdiction. The authors have looked to the future and have summarised the policies and approaches of the revenue authorities regarding contentious matters, addressing

important questions such as how long cases take and situations in which some form of settlement might be available.

We have been lucky to obtain contributions from the leading tax litigation practitioners in their jurisdictions. Many of the authors are members of the EU Tax Group, a collection of independent law firms, of which we are members, involved particularly in challenges to the compatibility of national tax laws with EU and EEA rights. We hope that you will find this book informative and useful.

Finally, I would like to acknowledge the hard work of my colleague Alice McDonald in the editing and compilation of this book.

Simon Whitehead
Joseph Hage Aaronson LLP
London
February 2015

Chapter 16

INDONESIA

David Hamzah Damian[1]

I INTRODUCTION

Tax disputes in Indonesia involve local government administration by the revenue authority of the province and regency, and central government taxes administered by the Ministry of Finance through the Directorate General of Taxes (DGT) and the Directorate General of Customs and Excise (DGCE). Procedures for dispute resolution are governed by Local Taxes Law at administrative level for local government taxes; by Customs Law and Excises Law for taxes administered by the DGCE; and by the General Rules of Taxation Law (the GRT Law) for taxes administered by the DGT.

The number of tax disputes filed for resolution in the Tax Court for 2013 (until the end of October 2013) amounted to 6,826 applications, which were added to the existing 9,515 unresolved applications.[2] The large number of tax disputes filed for resolution in the Tax Court is the result of enforcement of official assessment in Indonesia when an assessment result is deemed incorrect by a taxpayer. Typically, increased official assessment is caused by a high tax revenue target. Up to November 2014, the tax office only achieved 75.73 per cent of the 1.07 quadrillion rupiah target in the revised 2014 national budget.[3]

The official assessment by the DGT, for instance, is usually performed by tax audit. The quality of the tax audit is determined by its key indicators: high tax revenue contribution and refund discrepancy. Official assessment by the DGT is required

1 David Hamzah Damian is the partner of tax compliance and litigation services at Danny Darussalam Tax Center.

2 www.setpp.depkeu.go.id/Ind/Statistik/StatBerkas.asp. Accessed on 15 December 2014.

3 www.thejakartapost.com/news/2014/12/02/tax-office-sees-no-letup-year-end-approaches.html.

whenever a taxpayer requests a refund. The DGT also has a range of factors used to define industry sectors, outlined as follows:

a industry sectors that demonstrated a low level of compliance in previous years;
b industry sectors that contribute significantly to the economy;
c industry sectors that contribute significantly to tax revenue;
d industry sectors expected to boom in 2014; and
e industry sectors with high growth rate.

In this chapter, we will provide a summary of tax dispute resolution procedures under the Indonesian tax system, focusing on the central government taxes administered by the DGCE and the DGT. Since the tax dispute statistics for local government taxes are relatively small, we do not provide explanations for them.

II COMMENCING DISPUTES

i Taxes administered by the DGCE

Generally, tax disputes administered by the DGCE begin with the assessment of the import and export declaration, customs facilities requests or renewal, and unloading activities declared in a certain area. The DGCE assesses them and can issue:

a a customs office assessment, resulting in an import duties tariff or value assessment, and other items;
b a customs audit, resulting in assessment other than that of customs tariff or value, and penalties; or
c a customs audit, resulting in a customs tariff and duties assessment.

Assessments resulting from the above, other than (c), could be opposed by filing an objection letter to the DGCE within 60 days of the assessment date. This generally requires bonds equivalent to the amount of taxes or duties assessed to be provided. The DGCE will make a decision regarding the taxpayer's objection within 60 days after receipt of the objection letter. If the DGCE has not made a decision regarding the objection within 60 days, the taxpayer's objection will be deemed granted and bonds will be released back. A customs tariff and duties re-assessment and objection decision can only be appealed to the Tax Court within 60 days after the date of assessment or objection decision. When filing an appeal to the Tax Court on the DGCE objection or customs tariff and duties assessment (resulting from an audit), the taxpayer is required to pay the full amount of assessed taxes.

ii Taxes administered by the DGT

Taxes administered by the DGT include income tax (corporate income tax and individual income tax), VAT and sales tax of luxury goods. Pursuant to Article 3 Paragraph 1 of the GRT Law, the self-assessment system must be completed by the taxpayer by filing tax returns and paying taxes due without reliance on the DGT assessment. DGT assessments subject to dispute with taxpayers can be classified as follows:

a a tax collection notification letter;
b a tax assessment letter (and withholding tax receipt); and
c other tax letters (i.e., private letters).

Generally, tax collection notification letters and tax assessment letters are the result of tax audits or tax verification. Tax verification, although not standardised in the GRT Law, is included in Government Regulation (GR) No. 74 (2011). Other tax letters issued by the DGT could be subject to dispute, depending on the content of each letter. Tax collection notification letters and tax assessment letters issued based on tax verification will only cover a certain area (e.g., revenue) and will not cover all areas of a particular type of tax. Although tax collection notification letters or tax assessment letters have been issued based on tax verification, the DGT can still audit taxpayers and issue such assessments again.

A tax audit is generally initiated by a taxpayer's request for a refund. Almost every tax refund request is followed by a tax audit. The tax refund audit timeline is 12 months from the date the tax return requesting a refund is filed. A taxpayer's refund request is deemed granted if the DGT fails to issue a tax assessment letter within 12 months. In a non-tax refund audit, although there is a timeline in its procedure, an audit exceeding such timeline cannot be invalidated. A taxpayer who meets certain criteria can receive an advance tax refund, but the DGT still has the authority to audit and issue an assessment. In the case of a tax assessment letter issued in relation to the previously administered advance tax refund, if the tax assessment letter issued shows that the taxpayer has been underpaid, the unpaid tax is added with a penalty of 100 per cent. The DGT can also audit a taxpayer based on selective criteria, according to DGT audit policy for a certain year. Only recently has the DGT focused on auditing certain transactions such as related party transactions, corporate restructuring and certain areas of industry such as agriculture and mining.

During an audit, a tax audit officer will perform direct and indirect tests as governed by DGT audit procedures. In some cases, the tax audit officer will perform indirect testing such as reconciliation of tax accounts with financial accounts on a tax adjustment basis. However, tax laws require that tax adjustment by the tax officer be based on valid and competent evidence, which in our view does not include the results of indirect testing. Tax Court judges confirmed by Supreme Court judges also hold this view, thus reconciliation of tax accounts with financial accounts would not qualify as evidence.[4]

Pursuant to Article 12 Paragraph 3 of the GRT Law, the DGT can only issue a tax assessment letter if it has evidence that the tax disclosed in the tax return is incorrect. This sets the foundation that the burden of proof under the Indonesian tax system lies with the tax authority. The notion that the burden of proof lies with the DGT has been confirmed in a civil review decision by Supreme Court judges.[5] However, this would not be the case for a taxpayer who does not maintain proper accounts and records. The DGT can issue a tax assessment letter with an underpaid amount and add a 50 per cent penalty in case of income tax and a 100 per cent penalty in case of withholding tax, VAT and sales tax of luxury goods.

Prior to a tax audit, the taxpayer can amend his or her tax return resulting in overpaid tax or tax loss, within three years of the end of the tax period. An amendment

4 See Supreme Court Decision No. 492/B/PK/PJK/2010.

5 See Supreme Court Decision No. 161/B//PK/PJK/2010 and 79/B/PK/PJK/2005.

resulting in underpaid tax has no time limit, yet it is subject to a 2 per cent penalty for each month. During a tax audit, the taxpayer can voluntarily disclose his or her error in the tax return by using Article 8 Paragraph 4 of the GRT Law, and pay the resulting unpaid tax and a 50 per cent penalty of the unpaid tax prior to submission of disclosure. However, such disclosure is not binding on the DGT.

Prior to the final findings of a tax audit, the taxpayer can request a quality assurance review to the higher level of the DGT. The basis for requesting a quality assurance review is if there is a violation of the law and its application made by the tax audit officer. The quality assurance team will issue a legally binding decision as a basis for the final findings of the tax audit and its tax assessment letter.

On the DGT tax collection notification letter, the taxpayer can file for administrative remedies pursuant to Article 36 of the GRT Law as follows:

a penalty reduction or write-off (Article 36 Paragraph 1a of the GRT Law);
b reduction or cancellation of the tax collection notification letter (Article 36 Paragraph 1c of the GRT Law); and
c cancellation of the tax collection notification letter resulting from a tax audit that was completed without the taxpayer receiving temporary audit findings and a final audit closing conference letter (Article 36 Paragraph 1d of the GRT Law).

After a DGT tax assessment letter, the taxpayer can file administrative remedies pursuant to Article 36 of the GRT Law as follows:

a penalty reduction or write-off (Article 36 Paragraph 1a of the GRT Law);
b reduction or cancellation of a tax collection notification letter (Article 36 Paragraph 1b of the GRT Law); and
c cancellation of a tax assessment letter resulting from a tax audit that was completed without the taxpayer receiving temporary audit findings and a final audit closing conference letter (Article 36 Paragraph 1d of the GRT Law).

Administrative remedies set out in Article 36 Paragraph 1 of the GRT Law are generally resolved within these timelines:

a filing an application for the first time within an indefinite timeline;
b a DGT decision is made within six months of receipt of the first application;
c a second application is filed within three months of the DGT decision on the first application; and
d a DGT decision is made within six months of receipt of the second application.

A taxpayer's first or second application is deemed granted if the DGT fails to issue a decision letter within six months of the application being received.

Upon a DGT decision on the first or second taxpayer application of Article 36 Paragraph 1 of the GRT Law, the taxpayer can file a lawsuit to the Tax Court appealing the decision. The lawsuit should be made within 30 days of the decision.

Further to the above, on the DGT tax assessment letter and withholding tax receipt, the taxpayer can request administrative remedies pursuant to Article 25 of the GRT Law by filing an objection to the DGT within three months of the tax assessment letter being sent, or since the date of withholding tax receipt. The three-month timeline is not applicable when the taxpayer is able to demonstrate a *force majeure* situation. Upon filing a tax objection, the administrative remedies set out in Article 36 Paragraph 1 of

the GRT Law will be denied as long as the two remedies are closely related. Pursuant to Article 26 Paragraph 4 of the GRT Law, the burden of proof still lies with the DGT, unless the tax assessment was issued based on the grounds of insufficient accounts or records.

The taxpayer's objection will be deemed granted if the DGT fails to issue an objection decision letter within 12 months of the objection letter being received. Upon the DGT objection decision, the taxpayer can file an appeal to the Tax Court.

As for other letters issued by the DGT, such as tax audit instruction letters or private letters, such letters can be resolved by filing a lawsuit with the Tax Court. Generally, the Tax Court will look into the case and decide that such letter is a subject to be resolved in the Tax Court provided that certain criteria are met, especially if such letter has resulted in specific tax consequences for the taxpayer.[6] The lawsuit for such letter should be filed within 30 days of the date the letter was sent.

A seizure letter as a result of tax collection forces the taxpayer to surrender an amount of money or assets to settle taxes owed. The taxpayer can file a lawsuit on such seizure letter within 14 days of the date of the letter in the following situations:

a the taxpayer has filed for dispute resolution on the taxes due and is in financial distress, thus requesting that tax collection including seizure be halted until the relevant dispute resolution has been issued; or

b the process of seizure is procedurally flawed, yet could result in reprocessing the seizure.

Unpaid taxes or penalties set out in a tax collection notification letter should be followed by active tax collection efforts, including those that end in a seizure letter. On the other hand, collection of unpaid taxes and penalties set out in a tax assessment letter should be postponed pursuant to the taxpayer's objection to the DGT. However, such unpaid taxes and penalties are subject to a 50 per cent penalty of the unpaid amount if the DGT issue a decision of partially granting or denying the taxpayer's objection. A 50 per cent penalty is not imposed if the taxpayer paid the unpaid taxes and penalties prior to objection, or if the taxpayer filed a tax appeal to the Tax Court. Two per cent interest for each month on an unpaid tax assessment letter is not imposed if the taxpayer files an objection to the DGT.

III THE COURTS AND TRIBUNALS

Tax dispute resolution at the judicial level is first settled in the Tax Court. If the taxpayer or tax authority want to challenge the Tax Court decision, either or both could file a civil review to the Supreme Court. The Tax Court will only be able to accept an application for lawsuit or appeal from the taxpayer.

The Tax Court is part of the administrative court under the judicial power of the Supreme Court of Indonesia, pursuant to Article 27 Paragraph 1 of the Judicial

6 See Supreme Court Decision No. 110/B/PK/PJK/2008 and Supreme Court Decision No. 141/B/PK/PJK/2010.

Authority Law. It is located in Jakarta and uses several cities as its place of trials or hearings, including Jakarta, Yogyakarta and Surabaya. For the purpose of developing its judiciary techniques, the Tax Court is managed by the Supreme Court, while for the purpose of developing its organisation, administration and finance it is managed by the Ministry of Finance. Although it is managed by two different institutions, Tax Court judges are independent in resolving tax disputes (Article 5 of the Tax Court Law).

Full Tax Court decisions are not provided by the Tax Court. Instead, the Tax Court provides a summary of a court decision, available on its website.[7] Contrary to that, a full Supreme Court decision, even one concerning a tax dispute, is provided by the Supreme Court on its website.[8]

Pursuant to Article 81 of the Tax Court Law, the Tax Court is required to issue a decision on an appeal within 15 months (12 months plus a three-month extension), and on a lawsuit within nine months (six months plus a three-month extension). Tax Court decisions that exceed such timeline will not cause the decision to be invalidated by the Supreme Court.[9]

In a lawsuit, the taxpayer is not required to pay the unpaid taxes as a procedural requirement, while in an appeal the taxpayer is required to pay at least 50 per cent of the unpaid taxes (Article 36 Paragraph 4 of the Tax Court Law). When an appeal is made on decisions or assessments by the DGCE, the unpaid taxes must be paid in full. For appeals made on objection decisions by the DGT, the unpaid taxes in dispute are not required to be paid as the unpaid taxes are deemed postponed until one month after the tax court decision is made (Article 27 Paragraph 5a of the GRT Law). Prior to appeal on the DGT objection decision, the taxpayer is only required to pay the amount of unpaid taxes agreed during the tax audit.

If the Tax Court decision is considered unfavourable to either taxpayer or tax authority, either or both could file a civil review application to the Supreme Court. The grounds for such application are (Article 91 of the Tax Court Law):

a the tax court decision was made based on deception by the counterparty, which was only known after the case was decided or tax court decision was made based on unauthentic evidence adjudicated by a civil court;

b there is new written evidence which is decisive, and if known during the court proceedings will result in a different decision;

c *ultra petita* decision;

d part of the requisition has not been decided without consideration; and

e the tax court decision clearly violated the applicable laws.

Civil review application is required to be filed within three months of:

a discovery of deception or a civil court decision adjudicating that there is an unauthentic evidence (Article 91a of the Tax Court Law);

7 www.setpp.depkeu.go.id/Ind/News/Risalah.asp.

8 putusan.mahkamahagung.go.id/.

9 See Supreme Court Decision No. 274/B/PK/PJK/2011.

b discovery of new evidence, of which the date of discovery must be made under oath and authorised by a competent authority (Article 91b of the Tax Court Law); or

c the tax court decision was sent (Article 91c–e of the Tax Court Law).

IV PENALTIES AND REMEDIES

Besides the use of tax audits for official assessment, tax audits can be used for the purpose of collecting preliminary evidence where a tax crime is suspected. Although a tax audit has been completed, provided that a tax crime investigation has not commenced, the taxpayer could voluntarily disclose the inaccuracy and pay any underpaid tax along with a penalty of 150 per cent of the underpaid tax. Thus, the tax crime investigation will not commence.

The punishment for a tax crime would be imprisonment and a financial penalty. Generally, the director of a company and his or her accomplices will be held accountable for the tax crime, and only the person or company charged with the tax crime will bear the punishment. In the case of a Tax Court decision that denies or partially grants an appeal, the taxpayer is subject to a penalty of 100 per cent from the amount of unpaid tax less the tax paid prior filing an objection to the DGT. Payment after filing an objection to the DGT will not be considered in the penalty computation. On the other hand, if a Tax Court decision partially or fully grants an appeal on an underpaid objection decision, the taxpayer cannot request interest on the taxes paid prior to objection or appeal.

V TAX CLAIMS

i Recovering overpaid tax

As explained in Section II, *supra*, a taxpayer can request a tax refund by stating the request in the tax return.

Where a foreign company's income tax exceeding its tax limitation in a tax treaty is being withheld, such an overpayment could be recovered through application by the Indonesian taxpayer to the DGT.

ii Challenging administrative decisions

The principle of equal treatment is applicable as grounds in resolving tax disputes, as explained in Article 31a of the Income Tax Law, Article 16b of the Law on VAT and Sales Tax on Luxury Goods and Article 28d Paragraph 1 of the Indonesian Constitution. To confirm this, a Supreme Court decision upheld a Tax Court decision allowing a taxpayer's appeal against the DGT objection decision on the grounds of the principle of equal treatment.[10]

10 See Supreme Court Decision No. 566/B/PJK/2013.

VI COSTS

The Tax Court does not have the power to adjudicate costs related to the legal proceedings to the taxpayer or the tax authority. However, the Supreme Court can adjudicate the cost of a civil review application in the amount of 2.5 million rupiah, to be borne by the losing party.

VII ALTERNATIVE DISPUTE RESOLUTION

Indonesian tax laws do not provide for arbitration or mediation for tax disputes between taxpayers and tax authorities in Indonesia. The same applies for advance rulings. However, the taxpayer could request a letter to confirm certain tax rules or tax treatment of a transaction. The DGT is not bound to respond to such a confirmation letter. If the DGT responds, a private letter will be issued and would be legally binding under the principles of legitimate expectation. In many cases, the DGT can also arrange a consultative hearing with the taxpayer, and provide a non-written explanation that is not legally binding.

During a tax dispute resolution at the administrative or court level, both the taxpayer and the tax authority can disagree on something without mediation.

VIII ANTI-AVOIDANCE

Indonesian tax laws do not have a general anti-avoidance rule with a straightforward meaning. There has been discussion by scholars that the principle of substance over form implicitly embodied in Article 4 Paragraph 1 Income Tax Law, and in Indonesian accepted accounting standards, is the Indonesian general anti-avoidance rule. The principle of equal treatment, explained in Article 31a of the Income Tax Law and Article 16b of the Law on VAT and Sales Tax on Luxury Goods, is also argued to be the Indonesian general anti-avoidance rule.

The Indonesian Income Tax Laws also embody specific anti-avoidance rules:

a thin capitalisation rules (Article 18 Paragraph 1 and Article 18 Paragraph 3 of the Income Tax Law). Although mentioned specifically in the Income Tax Law, there is no particular debt-to-equity ratio;

b transfer pricing rules that regulate that (Article 18 Paragraph 3 of the Income Tax Law) related party transactions should be based on an arm's-length principle by applying transfer pricing methods, namely comparable uncontrolled price, cost-plus, resale price, profit split and transactional net margin method;

c CFC rules (Article 18 Paragraph 2 of the Income Tax Law). Profits of offshore companies owned by one or more Indonesian taxpayers can be deemed as dividends received by the Indonesian taxpayer;

d indirect sale of shares (Article 18 Paragraph 3c of the Income Tax Law); and

e limitations on the benefit of tax treaty (DGT Regulation Nos. 61/2009, 62/2009, 24/2010, and 25/2010). The rules specify criteria and forms to be filed by foreign taxpayers in order to be entitled to a treaty benefit. In one of the forms, the questionnaire is a checklist concerning beneficial ownership.

IX DOUBLE TAXATION TREATIES

Indonesia has concluded tax treaties with 65 countries, that prevail over Indonesian domestic tax laws according to Article 32A of the Income Tax Law. In 2014, Indonesia ratified the Convention on Mutual Administrative Assistance in Tax Matters and treaties on exchange of information with the governments of Bermuda, the Isle of Man, Guernsey, and Jersey. Although Indonesia is not a party to the Vienna Convention on the Law of Treaties, it has a law concerning international treaties that governs that international treaties shall be applied in good faith. This is similar to what is directed in the Vienna Convention. In many Tax Court cases concerning limitation on benefits of tax treaties, the Tax Court has unanimously held that the domestic rules of limitation on benefits of tax treaties shall not be applied excessively, other than that which has been agreed in the tax treaty. Moreover, in a Tax Court decision that was upheld by the Supreme Court, the judges took a literal approach to the interpretation of 'paid to' in a tax treaty as 'cash or asset disbursement'; thus, interest accrued and payable but not yet paid is not taxable.[11]

With respect to policymaking, the Indonesian government is trying to renegotiate several tax treaties that are not beneficial to Indonesia, and to promote automatic exchange of information in the tax treaty.

X AREAS OF FOCUS

As mentioned previously, tax disputes mostly come from the audit of a tax return with refund request. Refund discrepancy is the primary key performance indicator of a tax audit; thus, the tax refund will most likely be reduced. Transfer pricing is still the main focus of a tax audit, followed by the mining and agricultural industry, which contributes significantly to the tax revenue. Corporate restructuring involving transfer of intangible properties and workforce, both domestic and international, is also targeted.

XI OUTLOOK AND CONCLUSIONS

The newly elected president, Joko Widodo, plans to boost the taxes-to-GDP ratio from 12 per cent to at least 16 per cent. Joko Widodo has also requested from the Finance Minister an additional 600 trillion rupiah in tax revenue in the 2015 revised budget, from the 1.4 quadrillion rupiah in the 2015 budget. Such a huge increase will be followed by acts of enforcement. Aside from the main area of focus of tax audit, several significant initiatives have been planned or discussed, including:

a the ability of the DGT to access all bank accounts data (including corporate and personal); and

b enforcement with regard to underground economies.

11 See Supreme Court Decision No. 164/B/PK/PJK/2010.

Appendix 1

ABOUT THE AUTHORS

DAVID HAMZAH DAMIAN

Danny Darussalam Tax Center

David Hamzah Damian is the partner of tax compliance and litigation services at Danny Darussalam Tax Center. His expertise is wide, ranging across all areas of transfer pricing and customs, and all aspects of Indonesian taxation. He is well known for his research and advocacy skills, in particular for analysing cases and arguing appeals. He regularly handles cases in the Tax Court, and has a strong track record in tax appeal proceedings in transfer pricing, VAT, corporate income tax and customs cases, both in written submissions and at hearings.

David received his Bachelor's degree in fiscal administration from the University of Indonesia. He has passed two out of three examination papers for the Advance Diploma in International Taxation from the Chartered Institute of Taxation, UK, including Advance International Taxation: Singapore Option; and Principles of International Taxation, and has therefore been awarded a certificate in Principles of International Taxation. He has completed certificate C of the Indonesian Tax Consultant Examination, and is licensed to practice as a registered tax consultant. He holds a licence to practise as a tax attorney in the Tax Court.

DANNY DARUSSALAM TAX CENTER

Menara Satu Sentra Kelapa Gading
5th Floor (Unit 0501) and 6th Floor (Units 0601 and 0602)
Jl Bulevar Kelapa Gading LA3 No. 1
Summarecon Kelapa Gading
Jakarta 14240
Indonesia
Tel: +62 21 2938 5758
Fax: +62 21 2938 5759
david@dannydarussalam.com
www.dannydarussalam.com