

Responsibilities of the Board of Commissioners as Tax Bearer for Limited Liability Company Taxpayer

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Abstract

Tax collection in Indonesia carried out based on the procedures stipulated in the Regulation of the Minister of Finance of the Republic of Indonesia Number 189/PMK.03/2020 concerning Procedures for Implementing Tax Collection on the Amount of Taxes Accrued ("PMK No.189/PMK.03/2020"). In PMK No.189/PMK.03/2020, the Board of Commissioners can be the Tax Bearer of a Limited Liability Company (Perseroan Terbatas "PT"), whereas in Article 32 of Law Number 28 of 2007 concerning General Provisions and Procedures for Taxation, it is not regulated that the Board of Commissioners may become the Tax Bearer. Then, when viewed from Law Number 40 of 2007 concerning Limited Liability Companies as amended by Law Number 11 of 2020 concerning Job Creation, the organ authorized to represent a Limited Liability Company (PT) is the Board of Directors. The problem of this research is how the arrangement of the Board of Commissioners as the Tax Bearer if it is viewed from the applicable laws and regulations. The normative juridical method is the research method used in this research. This research uses secondary data consisting of primary legal sources, secondary legal sources, and tertiary legal sources. From the results of this research, it is concluded that the regulation regarding the responsibilities of the Board of Commissioners in PMK Number 189/PMK.03/2020 is an implementation of Law Number 19 of 1997 concerning Tax Collection with Distress Warrant. In addition, the arrangement is in line with the arrangement of the responsibilities of the Board of Commissioners in the Limited Liability Company Law, as reviewed from Article 69 paragraph (3) jo. Article 114 paragraph (3) of the Limited Liability Company Law which regulates the Board of Commissioners is jointly and severally responsible if the resulting financial statements are incorrect and/or misleading. Nevertheless, the Ministry of Finance is deemed

Kata kunci:

Dewan Komisaris, Hukum Pajak, Penanggung Pajak, Perseroan Terbatas, Wajib Pajak.

necessary to make some improvements to the deficiencies in the provisions of PMK Number 189/03/2020.

Keywords: *Board of Commissioners, Tax Law, Tax Bearer, Limited Liability Company, Taxpayer.*

Abstrak

Penagihan pajak di Indonesia dilakukan berdasarkan tata cara yang diatur dalam Peraturan Menteri Keuangan Republik Indonesia Nomor 189/PMK.03/2020 tentang Tata Cara Pelaksanaan Penagihan Pajak atas Jumlah Pajak Yang Masih Harus Dibayar ("PMK No.189/PMK.03/2020"). Dalam PMK No.189/PMK.03/2020, Dewan Komisaris dapat dijadikan Penanggung Pajak Perseroan Terbatas ("PT"), padahal dalam Pasal 32 Undang-undang Nomor 28 Tahun 2007 tentang Ketentuan Umum dan Tata Cara Perpajakan, Dewan Komisaris tidak diatur sebagai Penanggung Pajak. Kemudian, apabila ditinjau dari Undang Nomor 40 tahun 2007 tentang Perseroan Terbatas yang diubah dengan Undang- Undang Nomor 11 tahun 2020 tentang Cipta Kerja, organ yang berwenang mewakili suatu PT adalah Direksi. Permasalahan penelitian ini adalah bagaimana pengaturan Dewan Komisaris sebagai Penanggung Pajak ditinjau dari peraturan perundang-undangan yang berlaku. Metode yuridis normatif merupakan metode penelitian yang digunakan dalam penelitian ini. Penelitian ini menggunakan data sekunder yang terdiri atas sumber hukum primer, sumber hukum sekunder, dan sumber hukum tersier. Dari hasil penelitian ini disimpulkan bahwa pengaturan terkait tanggung jawab Dewan Komisaris dalam PMK Nomor 189/PMK.03/2020 merupakan pelaksanaan dari Undang-Undang Nomor 19 Tahun 1997 tentang Penagihan Pajak dengan Surat Paksa. Selain itu, pengaturan dimaksud selaras dengan pengaturan tanggung jawab Dewan Komisaris dalam UU PT, sebagaimana ditelaah dari Pasal 69 ayat (3) jo. Pasal 114 ayat (3) UU PT yang mengatur Dewan Komisaris bertanggung jawab secara tanggung renteng apabila laporan keuangan yang dihasilkan tidak benar dan/atau menyesatkan. Meskipun demikian, Kementerian Keuangan dinilai perlu untuk melakukan beberapa perbaikan terhadap kekurangan atas ketentuan PMK Nomor 189/03/2020.

Kata Kunci: *Dewan Komisaris, Hukum Pajak, Penanggung Pajak, Perseroan Terbatas, Wajib Pajak.*

PRELIMINARY

Indonesia as a state of law recognizes legal subject as who has the right and can act under the law or in other words who is capable according to the law.¹ Not only human or natural person as a legal subject. However, legal subject also includes legal entity (*rechtsperson*).² "Human is not the only legal subject. In legal traffic, something else that is not human is needed which will be the subject of law".³ According to R. Subekti, "a legal entity is an entity or association that can have rights and act like a human being, and has its own wealth, can be sued or can sue before a judge".⁴ From these theories it can be seen that legal subject is not only an individual, but also an association or entity that is granted the status of a legal entity may become the subject of a legal relationship.

One form of legal entity in Indonesia is a Limited Liability Company (PT). Limited Liability Company (PT) is regulated in Law Number 40 of 2007 concerning Limited Liability Companies ("Company Law")⁵ as amended by Law Number 11 of 2020 concerning Job Creation ("Job Creation Law"). In Article 109 of the Job Creation Law, it is stated that:⁶

"Limited Liability Company (PT), hereinafter referred to as the Company, is a legal entity which is a capital partnership, established based on an agreement, conducting business activities with the authorized capital which is entirely divided into shares or Individual Legal Entity that fulfill the criteria for Micro and Small Enterprises as regulated in the laws and regulations concerning Micro and Small Enterprises."

From this provision, it can be concluded that Limited Liability Company (PT) is a legal subject in the form of a legal entity established by person(s) as a capital partnership based on an agreement.

In the Indonesian economy, Limited Liability Company (PT) has a great contribution in building the national economy. One of the contributions of

¹ Kansil C.T.S et.al, *Modul Hukum Perdata*, (Jakarta: Pradnya Paramita, 1995), page 82

² Chaidir Ali, *Badan Hukum*, (Bandung: Alumni, 1991) page 11.

³ Sudikno Mertokusumo, *Mengenal Hukum: Suatu Pengantar*. (Yogyakarta: Dahaya Atma Pusaka, 2010), page 92.

⁴ Chaidir Ali, *Badan Hukum*, page 19.

⁵ Indonesia, Law on Limited Liability Companies (Company Law), Law No. 40 of 2007, State Gazette No. 106 of 2007. Supplement to State Gazette No. 4756.

⁶ Indonesia, Law on Job Creation, Law No. 11 of 2020, State Gazette no 245, 2020. Supplement to State Gazette No 6573. Article 109.

Limited Liability Company (PT) is the payment of taxes on its business activities. State revenue from the taxation sector is very important for the administration of the state and the welfare of the people.⁷ Limited Liability Company (PT) is a taxpayer as stipulated in Article 1 paragraph (2) of Law Number 28 of 2007 concerning the Third Amendment to Law Number 6 of 1983 concerning General Provisions and Procedures for Taxation ("Law 28/2007"). The provisions of Article 1 paragraph (2) of this Law define Taxpayer as:⁸"an individual or entity, including taxpayer, tax withholder, and tax collector, who have tax rights and obligations in accordance with the provisions of tax laws and regulations." Furthermore, the definition of entity is regulated in the provisions of Article 1 paragraph (3) of Law 28/2007.⁹ Based on the provisions of Article 1 paragraph (3) of Law 28/2007, it can be concluded that taxpayer do not only include human or individual, but also includes business entity, among others: partnership (civil partnership, limited partnership and firm) and legal entity (Limited Liability Company (PT)).

As a legal entity, the rights and obligations are attached to the Limited Liability Company (PT) itself. Limited Liability Company (PT) is a legal subject that assumes rights and obligations. However, Limited Liability Company (PT) cannot carry out its own activities. This is because Limited Liability Company (PT) does not have a center of consciousness like humans.¹⁰ Therefore, the Company Law regulates the Organ of the Limited Liability Company (PT). In Article 1 number 2 of the Company Law, it is stated that the Company's organs are the General Meeting of Shareholders ("GMS"), the Board of Directors and the Board of Commissioners. The Company Law then defines the three organs which is the General Meeting of Shareholders, The Board of Director and the Board of Commissioners.¹¹

With regard to exercise the rights and obligations of taxation, Article 32 paragraph (1) of Law 28/2007 regulates the management that can represent a

⁷ Indonesia, Law on Third Amendment to Law No. 6/1983 on General Provisions and Procedures for Taxation, Law No. 28/2007 (UU 28/2007), State Gazette No 85 of 2007 Supplement to State Gazette No 4740. Article 1 point 1.

⁸ *Ibid.* Article 1 number 2.

⁹ *Ibid.* Article 1 number 3.

¹⁰ Chaidir Ali, Badan Hukum, page 185.

¹¹ Indonesia, article 1 number 6 of Company Law.

Limited Liability Company (PT).¹² This representative has responsibility personally and/or jointly and severally for tax payments as referred to in Article 32 paragraph (2) of Law 28/2007.

In the provision of Law 28/2007, there is no detailed definition of who the management can represent the entity as regulated in Article 32 paragraph (1) of Law 28/2007 in point (1). Strict and clear regulation of the boundaries of the “management” is very important. This is because the representative of the Limited Liability Company (PT) is also appointed as the Tax Bearer as stipulated in Article 1 number 28 of Law 28/2007.¹³ In connection with this provision, with reference to the provisions of Article 1 paragraph (2) of Company Law in conjunction with Article 109 of Job Creation Law, the representative of a Limited Liability Company (PT) as taxpayer is the Board of Directors. As regulated in Article 97 paragraph (1) in conjunction with Article 92 paragraph (1) and (2) of Company Law and Article 98 of Company Law, the board of directors has unlimited and unconditional authority in managing and representing a Limited Liability Company (PT) inside and outside the court. Interestingly, in Article 7 paragraph (2) of the Regulation of the Minister of Finance Number 189/PMK.03/2020 concerning Procedures for Implementing Tax Collection on the Amount of Taxes Accrued (“PMK Number 189/PMK.03/2020”), the Board of Commissioners is listed as one of the Tax Bearers representing the Limited Liability Company (PT). Article 7 paragraph (2) letter a of PMK Number 189/PMK.03/2020 stipulates that:¹⁴

“The implementation of Tax collection actions to the management as referred to in paragraph (1) letter b shall be carried out on:

2. The Board of Commissioners which includes:

- a) main commissioner or president commissioner or equivalent position;
- b) vice president commissioner or equivalent position; and/or
- c) other commissioners.

shall be personally and/or jointly and severally responsible for all Tax Payables and Tax Collection Fees”

¹² Indonesia, article 32 number (1) of Law 28/2007.

¹³ Ibid, article 1 number 28.

¹⁴ Ministry of Finance, Regulation of the Minister of Finance concerning Procedures for Implementing Tax Collection on the Amount of Taxes Accrued. PMK Number 189/PMK.03/2020, Article 7 paragraph (2) letter 1 point 2.

Meanwhile, Law 28/2007 does not regulate the Board of Commissioners as the management of a Limited Liability Company (PT) which is appointed as the Tax Bearer. In Law 28/2007, the Commissioner is only used as an example or model in the explanation of Article 32 paragraph (4) of Law 28/2007.¹⁵ It can be understood that the Board of Commissioners can be made as a Tax Bearer if it “actually has the authority to determine policies and/or make decisions in carrying out company activities”. Regarding this limitation, PMK Number 189/PMK.03/2020, does not explicitly regulate thereof.

The provisions in PMK Number 189/PMK.03/2020 which include the Board of Commissioners as the Tax Bearer without regulatory restrictions have the potential to cause problems. The Board of Commissioners who have carried out their duties in accordance with the articles of association of the Limited Liability Company (PT) and are not the controller may be appointed as the Tax Bearer who is personally and/or jointly and severally responsible for personal assets. Meanwhile, Law 28/2007 and Company Law are not regulated that way. Issues regarding the arrangement of the Board of Commissioners in the provision of PMK Number 189/PMK.03/2020 as a Tax Bearer is important to be analyzed. Based on the foregoing, the problem in this research is: how the arrangement of the Board of Commissioners as the Tax Bearer in terms of the applicable laws and regulations?

RESEARCH METHODS

The form of this research is normative juridical research. Normative juridical research is research that is focused on examining the application of positive legal rules or norms.¹⁶ This research examines the existing facts on positive legal provisions regarding taxation law and company law. The data used in this research is secondary data. Secondary data is data obtained through literature or documentation searches.¹⁷ The secondary data used in this research were obtained from primary legal sources, secondary legal sources and

¹⁵ Indonesia, Op.Cit. Explanation of Article 32 paragraph (4) of Law 28/2007

¹⁶ Johnny Ibrahim, *Teori dan Metodologi Penelitian Hukum Normatif* (Malang:Bayumedia Publishing, 2006), page 295.

¹⁷ Sri Mamudji, et.al., *Metode Penelitian dan Penulisan Hukum*. (Yogyakarta: Dahaya Atma Pusaka, 2010) page 12.

tertiary legal sources.¹⁸ Primary legal sources are legal materials, the contents of which are binding on the community.¹⁹

Secondary legal sources are materials that provide information or matters relating to the content of primary sources and their implementation.²⁰ Secondary legal sources in this research include literature books related to tax and corporate law, internet articles, journals related to the problems under study, among others:

- a. Civil Law Module, written by Kansil C.T.S et.al;
- b. The Board of Commissioners Its Role as an Organ of the Company, written by Moenaf H. Regar;
- c. Taxation: Theory and Cases, written by Siti Resmi;
- d. Legal Research and Writing Methods, written by Soerjono Soekanto and Sri Mamudji.

Tertiary legal sources are legal materials that are complementary in nature to provide instructions and explanations for primary and secondary legal materials.²¹ The tertiary legal material used in this research is Black's Law Dictionary.

The technique of processing and analyzing legal materials in this study has the form of prescriptive-analytical research results, which is studying the purpose of law, values of justice, validity of the rule of law, legal concepts, and legal norms.²²

EXPLANATION

1. Responsibilities of the Management of Limited Liability Company (PT) Related to Taxation

¹⁸ Soerjono Soekanto dan Sri Mamudji, *Penelitian Hukum Normatif (suatu Tinjauan Singkat)*, Jakarta: Raja Grafindo Persada, 2004, page 12.

¹⁹ *Ibid*, page 12.

²⁰ *Ibid*. page 13.

²¹ *Ibid*. page 13.

²² Bambang Sunggono, *Metode Penelitian Hukum*, Jakarta: PT. Raja Grafindo Persana, 2001

A Limited Liability Company (PT) is a legal entity, which means it can become a legal subject, namely the bearer of rights and obligations under the law.²³ Exceptions and limitations related to this are strictly regulated in the laws and regulations.²⁴ Regarding taxes, according to Law 28/2007, the management is a representative of corporate taxpayers in the form of a Limited Liability Company (PT) who carries out their rights and obligations in taxation.²⁵ However, the provisions regarding the management who are the representatives of the Limited Liability Company (PT) are not further regulated in Law 28/2007. Due to the fact that Law 28/2007 does not stipulate in more detail regarding the management who is responsible for a Limited Liability Company (PT) and is the representative of a Limited Liability Company (PT) taxpayer, then the meaning of the management of the Limited Liability Company (PT) can refer to the Company Law which regulates the management of the Limited Liability Company (PT).

In Company Law, the Board of Directors is an organ of a Limited Liability Company (PT) which is fully responsible for the management of a Limited Liability Company (PT) and is authorized to represent a Limited Liability Company (PT),²⁶ including the responsibility for paying taxes for a Limited Liability Company (PT). Thus, the organ responsible for paying taxes for Limited Liability Company (PT) is the Board of Directors. Meanwhile, the Board of Commissioners is the organ in charge of providing advices and supervising the Board of Directors so that it runs in accordance with the company's articles of association.²⁷ The Board of Commissioners in a Limited Liability Company (PT) does not carry out the management. However, the responsibility of the Board of Commissioners is limited to providing advices and supervising the management of the company carried out by the Board of Directors.

Juridically, any and all valid agreements signed by members of the Board of Directors of the Limited Liability Company (PT) bind the Limited Liability

²³ Yetty Komalasari Dewo. *Pemikiran Baru tentang Persekutuan Komanditer (CV): Studi Perbandingan KUHD dan WvK Serta Putusan-Putusan Pengadilan Indonesia dan Belanda*, (Jakarta: RajaGrafindo, 2016), page 266.

²⁴ Chaidir Ali, *Badan Hukum*, page 166.

²⁵ Indonesia, Article 31 paragraph (1) of Law 28/2007.

²⁶ Indonesia, Article 97 Paragraph (1) jo. Article 92 paragraph (1) dan (2) UU PT dan article 98 paragraph (1) of Company Law.

²⁷ Indonesia, Article 108 paragraph (1) of Company Law.

Company (PT) as a law (*pacta sunt servanda*).²⁸ The member of the Board of Directors of the Limited Liability Company (PT) made and signed the agreement for and on behalf of the Limited Liability Company (PT). This is because, legally, the member of the Board of Directors of the Limited Liability Company (PT) has the authority to manage the Limited Liability Company (PT) and to represent the actions (for and on behalf of) the Limited Liability Company (PT) inside and outside the court. This is clearly and unequivocally stipulated in Article 92 paragraph (2) and Article 98 paragraph (1), (2) and (3) of Company Law.

Although the Board of Directors of a Limited Liability Company (PT) is given the authority to manage and represent a Limited Liability Company (PT). However, the provisions of Article 97 paragraph (5) of the Limited Liability Company (PT) Law.²⁹

The provision of Article 97 paragraph (5) of Company Law is known as the Business Judgment Rule principle. This means that in the context of the management of a Limited Liability Company (PT) by the (members) of the Board of Directors of the Limited Liability Company (PT), the Company Law adheres to and adopts the principles of the Business Judgment Rule. Black's Law Dictionary defines the Business Judgment Rule as:³⁰ "The presumption that in making business decision not involving direct self-interest or self-dealing, corporate directors act in the honest belief that their actions are in the corporation best interest." Can be interpreted as an action in making a business decision that does not involve self-interest, honesty and considering the best for the company

In addition to the above, the provision of Article 69 paragraph (4) of the Company Law stipulates that if there is a situation that is detrimental to the company, the Board of Directors and the Board of Commissioners can be released from the company's responsibility if they can prove that the situation is not their fault. Approval of the annual report including its endorsement as well as the report on the supervisory duties of the Board of Commissioners shall be carried out by the GMS.³¹

The management based on the provision of PMK Number 189/03/2020 becomes the tax bearer of the corporate taxpayer who must be personally or

²⁸ Article 1338 paragraph (1) of Indonesian Civil Code.

²⁹ *Ibid*, article 97 paragraph (5).

³⁰ Bryan A. Garner 2010, *Black's Law Dictionary*, America, West, Thomson Group, page 212

³¹ *Ibid*, Article 69 paragraph (1)

jointly and severally responsible for paying off tax payable and tax collection fees. This is different from the regulation in the Company Law which contains a very fundamental principle, which is the status of a Limited Liability Company (PT) as a legal entity causing the law to treat a Limited Liability Company (PT) as an independent individual regardless of the shareholders or management, this is known as separate legal personality.³²

For corporate taxpayer with legal entity such as Limited Liability Company (PT), tax rights and obligations are with the Limited Liability Company (PT) as a legal subject. The organ or individual (*natuurlijk persoon*) behind the Limited Liability Company (PT) is only the subject who manages and carries out tax obligations on behalf of the Limited Liability Company (PT), for the sake of and for the benefit of the Limited Liability Company (PT). Thus, the term "responsible for tax payments" must be interpreted as limited to the obligations as management for tax payments from the Limited Liability Company (PT). On the other hand, the term "payment" in relation to this Tax Bearer is not regulated in detail so that it seems as if there is a transfer of tax payment obligations and their responsibilities, which were originally the obligations of the Taxpayer himself to become the obligations of the management and the Tax Bearer.

In the corporate taxpayer registration form as regulated in the Regulation of the Director General of Taxes Number Per-20/Pj/2013 concerning Procedures for Registration and Provision of Taxpayer Identification Number and Revocation of Inauguration of Taxable Entrepreneurs, as well as Changes in Data and Transfer of Taxpayer ("PerDirjen 20/ 2013"), there is an obligation for every Corporate Taxpayer which includes a Limited Liability Company (PT) to appoint one person who is the Chairman of the Company to serve as the "Person in Charge".³³ Although there are no more detailed rules regarding who the Responsible Person is in the registration form, the form contains the phrase "Identity of the Chairman / Person in Charge" so that in practice the person in charge is the chairman of the company or the Board of Directors. However,

³² H. Zaeny Asyhadie dan Budi Sutrisno, 2012, *Hukum Perusahaan & Kepailitan*, Penerbit Airlangga, Jakarta, page 70.

³³ Directorate General of Taxes, Regulation of the Directorate General of Taxes concerning Procedures for Registration and Granting of Taxpayer Identification Number and Revocation of Inauguration of Taxable Entrepreneur, as well as Changes in Data and Transfer of Taxpayer, Perdirjen No Per-20/Pj/2013, appendix.

regarding this, there are no laws and regulations that regulate certain responsibilities for subjects written as Responsible Persons as stated in the PerDirJen 20/2013 form. Based on this, the rules regarding the Tax Bearer still refer to the rules contained in Law 28/2007 and PMK Number 189/PMK.03/2020. The person in charge contained in the form is only a NPWP (Taxpayer Identification Number) registration requirement.

Based on the definition of the provisions of Article 1 paragraph (6) of Company Law which was later amended by Article 109 of the Job Creation Act, it can be seen that the main task of the Board of Commissioners is to supervise the management of a Limited Liability Company (PT) carried out by the Board of Directors and to provide advice to the Board of Directors. The Board of Commissioners has its own duties which as the organ of the company but not as representatives of shareholders or interested parties.³⁴ If the Board of Commissioners consists of more than 1 (one) person, the decisions cannot be made independently. This is based on Article 108 paragraph (3) and paragraph (4) of Company Law:³⁵ So that if there is an error made in the decision of the Board of Commissioners, all members of the Board of Commissioners shall be responsible for the decision of the Board of Commissioners. Each member of the Board of Commissioners shall not act alone.

As for the personal responsibility of each member of the Board of Commissioners as well as the joint and several responsibilities of all members of the Board of Commissioners, if it is related to the mistakes of the Board of Commissioners, it can be found that there are 4 (four) articles in the Company Law which expressly regulates this matter. The four articles in sequence are as follows:

1. Article 69 paragraph (3) of Company Law³⁶
2. Article 72 paragraph (6) of Company Law³⁷
3. Article 114 paragraph (3) of Company Law³⁸
4. Article 115 paragraph (1) of Company Law³⁹

³⁴ Moenaf H. Regar, *Dewan Komisaris Peranannya sebagai Organ Perseroan*. Jakarta: Bhumi Aksara. page 40.

³⁵ Indonesia, Article 108 paragraph (3) of Company Law.

³⁶ *Ibid*, Article 69 paragraph (3).

³⁷ *Ibid*, Article 72 paragraph (6).

³⁸ *Ibid*, Article 114 paragraph (3).

³⁹ *Ibid*, Article 115 paragraph (1).

Basically, the Board of Commissioners does not have an executive or management function. This can be seen in the functions and duties stipulated in Article 108 paragraph (1) of Company Law. It can be interpreted that even though the articles of association of the Limited Liability Company (PT) determine the actions of the Board of Directors that require the approval of the Board of Commissioners, it is the function of the Board of Commissioners as a supervisor.⁴⁰

The Board of Commissioners in carrying out their duties must also be guided by three principles, as follows:

1. The trust given by the company to him (fiduciary duty). Fiduciary duty is an action for and on behalf of another person, which represents the interests of another person which is the highest standard in law.⁴¹
2. The principle that shows the ability and prudence of the actions of the Board of Commissioners (duty of care). Duty of care is a precautionary attitude in carrying out the company's supervisory duties in accordance with the precautionary standards commonly carried out by ordinary people, if this precautionary attitude is ignored by the Board of Commissioners in carrying out its duties, then he is considered guilty.⁴²
3. duties that are based on the provisions of the law (statutory duties), the Board of Commissioners is required to comply with the laws and regulations⁴³

If the Board of Commissioners violates the above principles, based on Article 114 paragraph (3) of the Company Law, the Board of Commissioners may be held personally responsible for losses to the company, including taxes.

2. Regulation of PMK Number 189/PMK.03/2020 related to Tax Bearer

State revenue from the taxation sector is very important for the administration of the state and the welfare of the people. In its implementation, the Tax Payable⁴⁴ arises because of the issuance of a Tax Assessment Letter (SKP)

⁴⁰ *Ibid*, Article 108 paragraph (1).

⁴¹ Try Widiyono, *Direksi Perseroan Terbatas: Keberadaan, Tugas, Wewenang & Tanggung Jawab: Berdasarkan Doktrin Hukum & UUPT*. Bogor: Ghalia Indonesia. 2005. page 38.

⁴² M Yahya Harahap, *Hukum Perseroan Terbatas*, Sinar Grafika, Jakarta, 2009. Page 379.

⁴³ *Ibid*, page 379.

⁴⁴ Tax payable is tax that still have to be paid including administrative sanctions in the form of interest, fines, or increases as stated in the tax assessment letter or similar letter based on the

by the tax authorities or because of circumstances, events that can cause Tax Payable and Tax Collection Fees to be paid by the Taxpayer.⁴⁵ To ensure the fulfillment of these taxpayer obligations, the Government through the Directorate General of Taxes ("DGT") collects Tax Payables to taxpayers who have unpaid Tax Payables.⁴⁶

PMK Number 189/03/2020 is an implementing regulation of Law Number 19 of 1997 concerning Tax Collection with Distress Warrants as amended by Law Number 19 of 2000 ("PPSP Law"). This can be understood from the section "Considering" letter E of PPSP Law. Section "Considering" letter E states that Article 10 A of PPSP Law reads, "The procedure for the implementation of instant and simultaneous collection, and the implementation of the Distress Warrants shall be stipulated by a Ministerial Decree or a Regional Head Decree."⁴⁷ Then, the Article 10 paragraph (4) letter h of PPSP Law explains.

⁴⁸

Thus, PMK Number 189/03/2020 does not refer to Law 28/2007 but to the PPSP Law regarding the arrangement of the Board of Commissioners as a Tax Bearer of the Limited Liability Company (PT).

PMK Number 189/PMK.03/2020 established in order to guarantee the fulfillment of the rights and obligations of the Tax Bearer and as a guideline and legal certainty for the DGT to carry out tax collection.⁴⁹ This PMK established as an implementation of the provisions of Article 10A of PPSP Law and refers to Law 28/2007.⁵⁰

provisions of the tax laws and regulations; Tax payable is tax that must be paid within the tax period, tax year or part of the tax year in accordance with the provisions of the applicable tax laws; Tax obligation is obligation that must be obeyed by taxpayer such as obligation to register themselves, payment obligation, obligations in the event of being examined, obligation to provide data. (Law 28/2007)

⁴⁵ Siti Resmi, *Perpajakan: Teori dan Kasus*, book 1, Edition 6: Salemba Empat, Jakarta, 2011 Page 2.

⁴⁶ PMK Number 189/03/2020, Section considering letter a.

⁴⁷ Law Number 19 of 2000 concerning Amendment to Law Number 19 of 1997 concerning Tax Collection with Distress Warrant (PPSP Law), Number 19 of 2000, State Gazette Number 2000/129, Supplement to State Gazette Number 3987, Article 10 A.

⁴⁸ Ibid, Article 10 paragraph (4) letter h.

⁴⁹ PMK Number 189/03/2020, Section considering letter a.

⁵⁰ Ibid, Section considering letter e.

In Article 1 paragraph (4) PMK Number 189/PMK.03/2020 can be interpreted that there are 2 (two) types of taxpayers, namely Personal Taxpayer and Corporate Taxpayer who have obligations as taxpayer, tax withholder, and tax collector. This research has the scope of research on corporate taxpayers.

When referring to the legal construction of the definition of corporate taxpayer as regulated in Article 1 paragraph (3) of PMK Number 189/PMK.03/2020 as described above, the subject of corporate taxpayer is not identical with the legal subject, because the subject of corporate taxpayer in Article 1 paragraph (3) of PMK Number 189/PMK.03/2020 includes firm, limited partnership and civil partnership as the meaning of corporate taxpayer, while firm, limited partnership and civil partnership are not the legal subject. Limited partnership is regulated in Article 19 of the KUHD.

From article 19 of the KUHD above, it can be seen that the responsibility of a limited partnership is attached to an active partner or company and not to an entity or limited partnership. Therefore, the limited partnership is not legal subject because they are not given the status of a legal entity in the provisions of the KUHD that regulate it.

Furthermore, Article 1 paragraph (5) of PMK Number 189/PMK.03/2020 defines a Tax Bearer.⁵¹ PMK Number 189/PMK.03/2020 defines Tax Bearer not only for taxpayer but also for representative of taxpayer who exercise the rights and fulfill the tax obligations in accordance with the provisions of the laws and regulations.

The definition of Tax Payable is regulated in Article 1 paragraph (8) of PPSP Law.⁵² Tax Payable is a debt that arises specifically, because the State (creditor) is bound and cannot choose freely, who will be the debtor, as in civil law. This happens because Tax Payable arises because of the law.⁵³ Therefore, the collection of Tax Payable is not only applied to the Taxpayer himself but also to the representative of the Taxpayer if the Taxpayer is unable to make Tax Payable payments.⁵⁴

⁵¹ *Ibid*, Article 1 paragraph (5).

⁵² Indonesia, Article 1 paragraph (8) of PPSP Law.

⁵³ Dr. Suparnyo, S.H., MS, *Hukum Pajak Suatu Sketsa Asas*, page 53.

⁵⁴ PMK Number 189/03/2020, Article 5 and Article 7.

The implementation of Tax collection actions against the Tax Bearer for corporate taxpayers is carried out to:⁵⁵

1. Relevant corporate taxpayer
2. Management of taxpayer

which means that the representative of corporate taxpayer is management as regulated in PMK Number 189/PMK.03/2020. The management of corporate taxpayer according to Article 7 PMK Number 189/03/202 consists of⁵⁶ the management of corporate taxpayer is a Limited Liability Company (PT), namely the Board of Directors, the Board of Commissioners and people who actually have the authority to be personally and/or jointly and severally for all Tax Payable and Tax Collection Fees, while shareholders are only responsible proportionally based on the share ownership portion of the Tax Payable of corporate taxpayer.⁵⁷ Based on the rules above, there are provisions regarding the payment of Tax Payables that must be borne by individuals or jointly and severally, but it is not regulated regarding a clear portion of responsibility, it is feared that it will cause problems during implementation, including the order of the Tax Bearer to bear the Tax Payable.

The implementation of tax collection actions is carried out sequentially. This is as regulated in Article 7 paragraph 4 of PMK Number 189/PMK.03/2020⁵⁸ which is: "The implementation of tax collection actions as referred to in Article 4 paragraph (1) is carried out on the Tax Bearer of Corporate Taxpayer as referred to in paragraph (1) and paragraph (2) sequentially." From the above provisions, it can be understood that when a Tax Payable arises, then the first collection will be made to the Taxpayer himself. If the property or assets of the Taxpayer are not sufficient to pay the Tax Payable, then the next responsible for paying the Tax Payable is the Board of Directors. Furthermore, the collection of Tax Payable is made to the Board of Commissioners. After the Board of Commissioners, the party to be billed is the person who actually has the authority to make decisions. Finally, the collection is made to the shareholders.⁵⁹

⁵⁵ Ibid, Article 7.

⁵⁶ Ibid, Article 7 paragraph (2).

⁵⁷ Ibid, Article 7 paragraph (2) letter a number 4.

⁵⁸ Ibid, Article 7 paragraph (4).

⁵⁹ Ibid, Article 7 paragraph (4).

The inclusion of the Board of Commissioners as a Tax Bearer in PMK Number 189/PMK.03/2020 becomes a legal problem that is not simple. This is because the duties and responsibilities of the Board of Commissioners are as supervisors of the Board of Directors (Article 114 paragraph (1) Company Law) which if members of the Board of Commissioners have carried out their duties in accordance with the Articles of Association of the Limited Liability Company (PT) and, referring to Article 69 paragraph (4) of Company Law, the Tax Payable is not due to his fault then the relevant member of the Board of Commissioners should be freed from the responsibility to bear Tax Payable.⁶⁰ In addition, PMK Number 189/PMK.03/2020 does not clearly regulate the mechanism and limits of the Board of Commissioners as a Tax Bearer.⁶¹

The tax payable arises when the SKP is issued by the DGT. So as long as there is no SKP, there is no Tax Payable, even though the subjective, objective and time requirements have been met, this theory is applied to the official assessment system.⁶² Therefore, the collection of Tax Payable generally begins with an audit. Based on the Regulation of the Minister of Finance Number 17/PMK.03/2013 dated 7 January 2013 regarding Audit Procedures. One of the purposes of the audit is to check whether the taxpayer fulfills his tax obligations.

Taxpayer can be audited by DGT based on risk analysis from DGT.⁶³ This means that the DGT can determine which taxpayers will be audited and what year of accounting/financial statements will be audited. For example: In 2022, the DGT conducted an audit of the 2017 tax report for taxpayer of Limited Liability Company (PT) A, whereas in 2017 and 2022, Limited Liability Company (PT) A had different compositions of the Board of Directors and Board of Commissioners. To determine which management will take collection action first, PMK Number 189/PMK.03/2020 regulates in Article 7 paragraph (6).⁶⁴

This provision seems to be an injustice to the management whose names are listed in the last deed. The management is not the party making the financial statements in question. In fact, the management concerned may not know the financial statements in the audit year.

⁶⁰ Indonesia, Article 69 paragraph (4) of Company Law,

⁶¹ PMK No 189/03/2020 Article 7 paragraph (5).

⁶² Dr. Suparno, S.H., MS, *Hukum Pajak Suatu Sketsa Asas*, page 55.

⁶³ PMK Number 17/PMK.03/2013, Article 1.

⁶⁴ PMK Number 189/03/2020 Article 7 paragraph (6).

Regarding this Tax Payable, the Tax Bearer, both the taxpayer and his representative, will be billed to be responsible for the Tax Payable. The definition of collection according to Article 1 paragraph (9) of PPSP Law is⁶⁵ not only limited to collection of money to pay Tax Payable, but also confiscation, prevention and hostage taking. According to the PPSP Law, the definition of Confiscation is⁶⁶ "Tax bailiff's actions to control Tax Bearer goods, to be used as collateral to pay off Tax Payables according to the laws and regulations". Then the definition of Prevention is⁶⁷: "a temporary ban on certain Tax Bearers from leaving the territory of the Republic of Indonesia based on certain reasons in accordance with the laws and regulations". The definition of hostage-taking is⁶⁸ "Temporary restraint of a Tax Bearer's freedom by placing him/her in a certain place"

Based on the foregoing, the consequences of the Tax Bearer are very severe, in addition to being required to pay Tax Payable personally or individually and jointly, the State can also confiscate property, as well as prevent and take the Tax Bearer hostage to pay off Tax Payable and Tax Collection Fees. Because of this very heavy burden, PMK Number 189/PMK.03/2020 should regulate clearly and in detail regarding the Tax Bearer, so that tax collection action can be carried out against the right person who should be responsible.

3. Board of Commissioners as Tax Bearer of the Limited Liability Company (PT)

One of the duties and responsibilities of the Board of Commissioners is regulated in Article 114 paragraph (2) of the Company Law, If the Board of Commissioners is negligent or makes a mistake by not carrying out its duties as stipulated in Article 114 paragraph (2) of the Company Law, the Board of Commissioners is also responsible in the event of a loss.⁶⁹ The definition of "take responsibility" is that the Board of Commissioners does not stand alone but depends on the mistakes made by the Board of Directors in managing it. This is implied in the explanation of Article 114 paragraph (3) of Company Law which explains that if the Board of Commissioners is guilty or negligent in the

⁶⁵ Indonesia, Article 1 paragraph (9) of Law PPSP.

⁶⁶ *Ibid*, Article 1 paragraph 14.

⁶⁷ *Ibid*, Article 1 paragraph 20.

⁶⁸ *Ibid*, Article 1 paragraph 21.

⁶⁹ *Ibid*, Article 114 paragraph (3).

management carried out by the Board of Directors, the Board of Commissioners is only responsible to the extent of its errors or omissions.⁷⁰

If it is related to the provision of PMK number 189/PMK.03/2020, it is very difficult to measure the limits of errors or omissions by the Board of Commissioners if the Limited Liability Company (PT) taxpayer has a tax payable because in the PMK Number 189/PMK.03/2020 it is not explicitly regulated on this matter. The regulation regarding the responsibilities of the management in the PMK Number 189/PMK.03/2020 only stipulates that the Board of Commissioners is appointed as the Tax Bearer successively after the action of collection for the tax payable of the Limited Liability Company (PT) taxpayer to the Board of Directors.⁷¹

Tax Payable arises when the SKP is issued by the DGT originating from the results of the tax audit.⁷² If during the tax audit it is found that there is an unpaid tax obligation, the financial statements reported by the taxpayer to the DGT in the Annual Tax Return (SPT) shall be considered incorrect. If it is related to a Limited Liability Company (PT), then according to Article 69 paragraph (3) of Company Law, the Board of Commissioners can be blamed.⁷³ Adopting the provision in the Company Law, PMK Number 189/PMK.03/2020 includes the Board of Commissioners in third place in the implementation of collection actions as a Tax Bearer after the taxpayer himself and the board of directors.⁷⁴ This means that the collection is made to the taxpayer first. If the Limited Liability Company (PT) assets are not sufficient, then the next collection action shall be carried out to the Board of Directors, and then the Board of Commissioners who is jointly and severally responsible.

Tax Payable can also arise when the taxpayer goes bankrupt. If the assets of the Bankrupt Limited Liability Company (PT) are insufficient, then the Tax Payable can be held jointly and severally accountable to the Board of Directors and the Board of Commissioners as referred to in Article 115 paragraph (1) of Company Law.

⁷⁰ *Ibid*, Explanation Article 114 paragraph (3).

⁷¹ PMK number 189/PMK.03/2020, Article 7 paragraph (4).

⁷² Indonesia, Article 1 number 8 of Law PPSP,.

⁷³ *Ibid*, Article 69 paragraph (3).

⁷⁴ PMK Number 189/03/2020, Article 7 paragraph (4).

Tax is an obligation that must take precedence in every company transaction with a third party, for example if there is income to the company, the tax liability must be paid first compared to others. If there is a tax obligation that has not been or is not paid, then it is a mistake or negligence of the Board of Directors as management and the Board of Commissioners as supervisor.

In essence, the regulation regarding the responsibilities of the Board of Commissioners in PMK number 189/PMK.03.2020 has taken into account the rules stipulated in the Company Law, especially regarding the responsibilities of the Board of Commissioners to third parties. However, what is polemic is that if there is a change or replacement of the Board of Commissioners of a Limited Liability Company (PT) taxpayer, the tax collection is carried out first against the Board of Commissioners whose the name is listed in the deed of last amendment and then the previous Board of Commissioners (year of audit).⁷⁵ This is an injustice to the members of the Board of Commissioners whose names are listed in the deed of amendment.

Regarding the above, there is a regulation in Article 7 paragraph (5) letter (g) of PMK Number 189/03/2020 concerning Tax Bearer, no tax collection action is taken if "Tax Bearer can convince the Official by proving that his position cannot be burdened with Tax Payable and Tax Collection Fees." This adopts the provision of Article 69 paragraph (4) of Company Law⁷⁶.

Based on these rules, if the Board of Commissioners considers that they have carried out their duties properly and in accordance with the provisions in the Articles of Association of the Limited Liability Company (PT) or are not involved in transactions carried out during the current year's audit because they have not served as the Board of Commissioners, the Board of Commissioners must convince and prove to the DGT that the position of the Board of Commissioners cannot be burdened with tax payable and tax collection fees.

The shortcoming of PMK Number 189/03/2020 related to the above is that it is not regulated in the event of a dispute over evidence to the DGT. For example, if the DGT rejects the application of the Board of Commissioners even though it has proven that their position cannot be burdened with tax payable, it is not known what next steps should be taken by the new Board of Commissioners.

⁷⁵ PMK Number 189/03/2020 Article 7 paragraph (6).

⁷⁶ Indonesia, Article 68 paragraph (4) of Company Law.

CONCLUSION

Based on the above analysis, it can be concluded that:

The arrangement of the Board of Commissioners as a Limited Liability Company (PT) Tax Bearer in the provisions of PMK Number 189/03/2020 refers to the PPSP Law. The arrangement related to the responsibilities of the Board of Commissioners in PMK Number 189/PMK.03/2020 are in line with the arrangement for the responsibilities of the Board of Commissioners in the Company Law. This can be studied from Article 69 paragraph (3) in connection with Article 114 paragraph (3) of Company Law which regulates the Board of Commissioners is jointly and severally responsible if the resulting financial statements are incorrect and/or misleading. In determining the tax payable one of the data used by the tax authorities is the taxpayer's financial statements. If the Taxpayer is determined to have tax payable, while the financial report in the Tax Return (SPT Wajib Pajak) states that the tax has been paid, the Financial Statement can be considered incorrect. The Board of Commissioners can also be held accountable as a tax bearer which must be jointly and severally responsible thereof (Article 7 paragraph (2) letter a number 2 of PMK Number 189/PMK.03/2020).

There are several shortcomings in the regulation of PMK Number 189/03/2020, as follows:

- a. PMK Number 189/03/2020 only regulates the order of parties who can be held liable as Tax Bearer of the Limited Liability Company (PT), including the Board of Commissioners. However, it is not clearly and explicitly regulated regarding the mechanism and limits of the Board of Commissioners as Tax Bearer of the Limited Liability Company (PT). It is feared that this will cause problems in the implementation of the PMK.
- b. PMK Number 189/03/2020 prioritizes the last management (the management listed in the last amendment deed) to take action to collect the tax payable first without considering that the management is not the party making the financial statements.
- c. Another shortcoming of PMK Number 189/03/2020 is that there is a rule that states that the Board of Commissioners shall not be burdened with tax payable if they can convince and prove it to the DGT, but this is not regulated further.

SUGGESTION

Based on the conclusions above, the suggestion that can be given to the Ministry of Finance of the Republic of Indonesia is to make improvements to the deficiencies in the provisions of PMK Number 189/03/2020 as described in the conclusions.

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