

Access to Justice Based on Expert Testimony in Tax Crimes: An Integrated Criminal Justice System Perspective in Indonesia

Setia Untung Arimuladi^{1*}

Program Doktor Ilmu Hukum Universitas Diponegoro, Semarang, Indonesia

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Abstract

Several cases of criminal acts in the field of taxation show differences in calculating losses in state revenue between prosecution and judge's decisions; several decisions acquit or punish a defendant. There is still ambiguity in treatment between the application of criminal tax sanctions or administrative tax sanctions, so it is necessary to and urges to conduct a study of access to justice in terms of setting expert statements in tax crimes based on the principle of equality before the law and the principle of checks and balances in building a solid integrated criminal justice system. Two main conclusions were drawn based on case studies and literature reviews using the normative juridical method, the access to justice, and the progressive legal models. First, experts in calculating losses on state income and experts on tax regulations in taxation are still dominated by internal employees of the Directorate General of Taxes (DGT), which of course will reduce the value of the independence of the experts' statements because they cannot be separated from conflicts of interest with their institutions. Second, experts who provide information in a tax crime must be competent, independent, capable, and objective in providing information and opinions so that it needs to be made in the form of a cross-institutional ad hoc team with accountability in the form of a report on the results of the examination. It is necessary and urgent to provide legal certainty in access to justice for expert testimony to update the rules regarding procedures for expert testimony in tax crimes.

A. Introduction

Expert testimony is one of the evidence that can be used to convince judges, as the position of the evidence is at number two in Article 184 paragraph (1) of the Criminal Procedure Code. Expert statements also play an essential role in handling tax crime cases, where in general, the expert statements used so far consist of at least an expert on tax regulations and an expert in calculating losses on state income.

Experts' statements in several cases of criminal acts in the field of taxation may differ in their statements which can lighten or

incriminate the defendant in the trial. Even expert testimony can cause differences in the number of losses in state revenue, both between prosecutions and judges' decisions. This practice shows that the tendency of conflict over the idea of Justice is still a central issue related to Expert Statements in tax crimes (Sinaga *et al.*, 2020), considering that the basis for collecting taxes must be based on the law as Article 23A of the 1945 Constitution of the Republic of Indonesia has emphasized that all tax collections must be based on the Act.

The central issue of justice in taxes re-



lated to the potential for conflicts of justice in-laws and regulations can be caused by several things, such as whether or not the application of legal principles and rules in tax law reform, the tendency of law enforcement (taxes) to maintain the *status quo* (Syofyan and Hidayat, 2004), and questioning what injustices are considered legitimate in the process of imposition of taxes and after imposition of taxes (Murphy and Nagel, 2002). More specifically on the central issue of justice from expert statements in tax crimes, several verdicts are considered not to fulfill a sense of justice for certain parties, both against the defendant and the public prosecutor, such as decisions regarding differences in the calculation of losses in state income and decisions regarding differences in understanding of the position of the tax law as administrative penal law (Sinaga and Hermawan, 2020). This also cannot be separated from the right of the suspect or defendant to propose Witnesses and Experts who can mitigate, and or the dualism of regulation between administrative losses and losses (on state income) (Sinaga, 2018), and ambiguity of internal regulations in the field of taxation, and external tax regulations—the same hierarchy in the order of legislation.

Several tax crime cases whose decisions reflect differences in expert statements are considerations of the urgency of writing this study. Supreme Court cassation decision no. 2583 K/PID.SUS/2016 and the decision of the Palembang District Court No. 394/Pid.sus/2015/PN.Plg is several case studies of tax crimes regarding ambiguity (uncertainty, ambiguity) (KBBI Daring, 2021) in justice in Indonesia's integrated criminal justice system (ICJS). The Supreme Court's cassation decision Number 2583 K/PID.SUS/2016 imposed imprisonment and a fine of Rp. 41.15 billion to the defendant for intentionally using a tax invoice not based on an actual transaction for the Tax Return for the Tax Period of January 2007 to September 2009, resulting in a tax loss of Rp. 15.13 billion. The defendant had good faith in repaying the state loss of Rp. 8.27 billion when the preliminary evidence was being examined. The defendant's mitigating circumstances were strengthened by two expert statements, namely the State Budget

and Public Finance Lawyer who explained, among other things, that the spirit of the state financial regime (including taxes) was an administrative settlement because the state prioritized state revenue (information), and the Criminal Expert who emphasized that at the administrative stage of settlement, there is an installment process, which is good faith. Therefore there is no intention to commit a tax violation, and there is an excuse for forgiveness (Sinaga and Hermawan, 2020).

The decision of the Palembang District Court No. 394/Pid.sus/2015/PN.Plg dated December 15, 2015, which acquitted the defendant from the charges and the claim for loss of state income of Rp. 99.39 billion, with one of the considerations being expert testimony, as presented by the criminal expert, which states that a crime is carried out if the administrative element cannot be fulfilled by the taxpayer and causes state financial losses due to the nature of tax law which is part of civil law trade and the nature of the tax authorities (collecting as much tax as possible) as well as regulating in order to maximize tax collection, and the statement of the Expert Calculating Losses on State Revenue which apparently could not explain how and how much state losses occurred as a result of the actions of the defendant (Sinaga, 2018). The two examples of these decisions show the ambiguity of justice where the decision of the Palembang District Court No. 394/Pid.sus/2015/PN.Plg explicitly applies legal certainty in the context of tax law as an administrative law penalty so that the process of investigating criminal acts in the taxation sector is carried out as a final measure (*ultimum remedium*), in contrast to the Supreme Court's cassation decision Number 2583 K/PID.SUS/2016 shows the good faith of the defendant who has repaid the state loss of Rp. 8.27 billion of the total principal tax loss of Rp. 15.13 billion.

Several decisions acquit certain defendants in tax crimes, some literature that criticizes the correct application of the principles and rules of tax law, the tendency to implement laws that maintain the *status quo*, and the legitimacy of injustice in taxes, as well as

the ambiguity of justice in the application of administrative penalties. Law, indicating the need and urgency to conduct a study of access to justice for expert testimony in tax crimes. This study will attempt to answer two problem formulations, namely: 1) how is the legal formulation related to expert testimony in taxation acts in Indonesia, and 2) the results of access to justice studies in terms of definitive expert statements in handling tax crime cases in Indonesia.

B. Method

Considering that this study aims to explain legal formulations related to expert statements in taxation acts in Indonesia and produce access to justice study results in definitive expert statements in handling tax crime cases in Indonesia, this study is adequate to use the normative juridical method. This is based on Sidharta's thinking which asserts that the scope of this method covers the inventory, presentation, interpretation, systematization, and evaluation of specific positive laws that apply in a particular society or country using concepts, categories, theories, classifications, -classification, and methods, which are directed to answer the existing problem formulation (Sidharta, 2009). The discussion of the problems in this study is limited to the data based on secondary data, namely data obtained indirectly from the first source, the scope of which is primary legal material, secondary legal material, and tertiary legal material (Amirudin and Asikin, 2009).

C. Results and Discussion

1. Evidence of Expert Statements in Criminal (Law) in Indonesia

Evidence in tax crimes in criminal law has an absolute position, which is based on several positive laws that apply in Indonesia. Based on Article 6 paragraph (2) of Law Number 48 of 2009 concerning Amendments to Law Number 16 of 1970 concerning Basic Provisions of Judicial Power, it has been formulated that "No one can be sentenced to a crime, except in court, because the valid evidence according to the law, he is convinced that a person who is considered to

be responsible has been guilty of the act he is accused of." This provision is in line with Article 183 of Law Number 8 of 1981 concerning the Criminal Procedure Code, which has stated that "A judge may not impose a crime on a person unless with at least two valid evidence he obtains the belief that an act crime occurred and that the defendant is guilty of committing it." The legal evidence according to the provisions of Article 6 paragraph (2) of the Law on Judicial Power and the Articles of the Criminal Procedure Code has been confirmed in the provisions of Article 184 paragraph (1) of the Criminal Procedure Code, which states five valid evidence, namely witness testimony, expert testimony, letters, instructions, and testimony of the defendant.

More specifically, regarding evidence of expert testimony, Article 1 number (28) of the Criminal Procedure Code and Article 186 of the Criminal Procedure Code have confirmed expert testimony. Article 1 number (28) of the Criminal Procedure Code defines expert testimony as "information given by someone who has special expertise on things needed to make light of a criminal case for examination. Then, Article 186 of the Criminal Procedure Code confirms that expert testimony is what an expert states in a court session, as in the Elucidation of Article 186 it explains that this expert testimony may also have been given at the time of examination by investigators or public prosecutors as outlined in the form of a report and made by remembering the oath at the time he accepted the position or job. Alternatively, suppose it is not given at the time of examination by the investigator or public prosecutor, then at the time of examination in court. In that case, he is asked to provide information, and it is recorded in the minutes of examination, which is given after he has made an oath or promise before a judge. Of course, this definition clearly emphasizes that "expert testimony" is not "expert witness," considering that "expert testimony" does not directly witness the occurrence of criminal cases that occur, while "expert witnesses" witness themselves, as stated in Article 1 number (27) of the Indonesian Criminal Code. The Law on Criminal

Procedure and the Constitutional Court Decision Number 65/PUU-VIII/2010 has defined a witness as anyone who has seen, heard, experienced, and who has direct knowledge of the occurrence of a crime for the sake of justice and balance between investigators who are facing each other. With the suspect or defendant (Hasanah, 2019).

It has been confirmed that Article 1 number (28) and Article 186 of the Criminal Procedure Code have not yet been fully implemented fairly in handling tax crimes, as an example of the case is found in the Supreme Court's cassation decision no. 2583 K/PID.SUS/2016 and the decision of the Palembang District Court No. 394/Pid.sus/2015/PN.Plg dated December 15, 2015. One of the problems that always arises is the question of whether the experts, who generally consist of experts on tax regulations and experts in calculating losses on state revenues, have always been from Internally, the Directorate General of Taxes and the institution that investigates tax crimes, namely the Civil Servant Investigator of the Directorate General of Taxes, is a manifestation of the legitimacy of conflict of interest that can ignore substantive justice to taxpayers? Then, this question will continue to develop into the extent to which the qualifications and authority of the expert testimony from the internal Directorate General of Taxes tend to incriminate the suspect or defendant in the trial.

Until now, the Directorate General of Taxes does not yet have rules regarding the procedure for providing expert information as several other agencies have, such as the State Audit Board Regulation Number 1 of 2020 concerning Investigative Audits, Calculation of State or Regional Losses, and Provision of Expert Information (which revokes the State or Regional Losses). Regulation of the Supreme Audit Agency Number 3 of 2010 concerning Procedures for Providing Expert Information). The Directorate General of Taxes only has a regulation in Regulation of the Minister of Finance Number 86/PMK.03/2013 concerning Procedures for Granting Written Permits to Officials and Experts to Provide Information and Show Written Evidence from

or concerning Taxpayers. Matters concerning the independence of expert testimony who have been appointed by the suspect or defendant and ordered by the judge in making light of a tax crime are hampered considering the provisions of Article 2 and Article 3 of the Regulation of the Minister of Finance Number 86/PMK.03/2013 stipulates that in the context of an investigation, prosecution, cooperation with other agencies, or the presiding judge of the session for examination in court in criminal or civil cases related to taxation issues, other parties outside the Directorate General of Taxes who require written information and evidence from or about the Taxpayer may submit a written request to the Minister of Finance. Moreover, Article 5 paragraph (6) of the Regulation of the Minister of Finance Number 86/PMK.03/2013 confirms that the request can be rejected, where the refusal is notified in writing to the party submitting the request. Of course, suppose certain taxpayers who are in the process of a tax crime need an expert (for example, a criminal expert or expert on state finance or forensic accounting expert or information and technology expert) in providing justice to him. In that case, this will be an obstacle considering that the suspect or defendant has the right to submit evidence. Mitigating it, including expert statements that can explain the actual problems that occur (including the results of calculating losses on state income), so that all interested parties in the trial can see clearly and the statements of each expert in order to convince the judge and for the sake of justice and balance. Between investigations that have to deal with the human rights of the suspect/defendant.

2. The integrated criminal justice system in tax crimes

In law enforcement or tax crime investigations, law enforcers must understand that tax criminal investigations must be carried out in the context of an *ultimum remedium* that still upholds the principle of presumption of innocence (Sinaga, 2017), considering that the authenticity of law enforcement in the field of taxation must be oriented towards ensuring the principle of equality before the

law and the principle of checks and balances, as a unit in an integrated criminal justice system. The matter of an integrated criminal justice system has also been stated in the Law on Justice which has required the operation of judicial bodies in Indonesia in the form of an integrated network called the "Criminal Justice System."

The integrated criminal justice system involves law enforcement agencies, each of which has its function and must carry out law enforcement based on the proportional principle, which consists of components of investigation, prosecution, court, and correctional facilities which must be operated in the form of a network, thus requiring the principle of equality before the law: law and the principle of checks and balances (Bolifaar and Sinaga, 2020). The principle of equality before the law is a principle whose validity is indisputable, with legal doctrines that are neutral, impartial, impersonal, and objective (Samekto, 2005), and the principle of checks and balances, as a system that monitors each other in a balanced way considering that state administrators tend to expand, extend, and abuse of power by ignoring the rights of the people (Fuady, 2009). This is based on the idea that if the integration in the integrated criminal justice system does not work well, it is estimated that there will be difficulties in self-assessing the success or failure of each of these institutions, there will be difficulties in solving the main problems of the institution itself, and will lead to responsibility each institution becomes less clear (Dananjaya, 2014).

The guarantee of the principle of equality before the law and the principle of checks and balances in handling tax acts shows that the Integrated criminal justice system is an instrument of social control of the community against some behaviors that are considered very dangerous. The principle of equality before the law and the principle of checks and balances in the integrated criminal justice system will be a force to control crimes that occur and punish those who violate the law (Siegel, 2011) based on transparency, participation, and accountability principles considering that every action and deed is the

manifestation of the legal obligation concept to every competent person to be responsible (Pramugar and Sinaga, 2021). Because it must be realized that the occurrence of an integrated criminal justice system in the handling of a tax crime will only cause injustice to certain parties, which in this case is related to expert testimony which is very important in several vital points of a tax crime, such as convincing judges about the amount of loss, which is related to tax crimes (not losses related to administrative sanctions) and to convince judges related to tax crimes that they have complied with the *ultimum remedium* principle, as the taxation law is administrative penal law.

3. Access to Justice in Expert Statements as a Progressive Handling of Tax Crimes

There are still differences in the calculation of the amount of loss in state revenue between the investigation of criminal acts in the field of taxation that have been declared complete and the judicial decisions at the first instance, appeal, cassation, or judicial review (such as the Supreme Court cassation decision No. 2583 K/PID.SUS /2016 and the decision of the Palembang District Court No. 394/Pid.sus/2015/PN.Plg dated December 15, 2015), the right of the suspect/defendant to propose Witnesses/Experts who can relieve him, as well as differences in the perspective of understanding the regulations regarding losses (on state revenues from the tax sector and the different points of view on tax crimes as administrative law penalties (Sinaga, 2018), indicate that expert testimony in tax crimes must shift to a progressive legal character, as its character shows rejection of any efforts to maintain the status quo because the law must always is in the process of continuing to be, for se something broader and more significant, namely the law whose quality of perfection can be verified into factors of justice, welfare, and concern for the people (Rahardjo, 2009).

Of course, efforts to produce expert testimony in handling progressive tax crimes will be sufficient if the state has a legal system that is accessible to the public to defend their

rights and resolve disputes under the general supervision of the state, where the legal system must be accessible in a balanced way by the public. Everyone and the legal system must lead to fair outcomes, both for individuals and society. The legal system must be accessible in a balanced way by everyone, and the legal system that must lead to fair results is a function of access to justice (Bedner and Vel, 2012). Furthermore, the United Nations Development Program (UNDP) defines access to justice as the ability of people to seek and obtain remedies through formal or informal justice institutions and according to human rights standards. The existence of a judicial system in question will serve to recognize the community's right to remedy when it is disputed because this is very important in the context of inequality of power (UNDP).

Access to justice expert testimony on the fulfillment of the *ultimum remedium* principle and the fulfillment of elements (can) cause losses (to income) of the state in the tax crime provisions as formulated in Article 38, Article 39 paragraph (1), Article 39 paragraph (3), Article 39A Law Number 16 of 2009 concerning General Provisions and Tax Procedures, and Article 24 and Article 25 paragraph (1) of Law Number 12 of 1994 concerning Land and Building Taxes must include access to justice expert statements on formal and material truths.

Access to justice expert information on the formal truth regarding the applicable tax laws and regulations governing the procedure for providing expert information. The current rules that apply in terms of expert statements are formulated in Article 34 of Law Number 16 of 2009 which states that experts appointed by the Director-General of Taxes and every official are prohibited from informing other parties of everything. Known or notified to him by the Taxpayer in the context of his position or work to carry out the provisions of the tax laws and regulations, except for officials and experts who act as witnesses or expert witnesses in court hearings, or officials and experts determined by the Minister of Finance to provide information to officials of state institutions or government

agencies authorized to conduct audits in the field of state finances. Then, the procedure for granting written permission to officials and experts to provide information and show written evidence from or about taxpayers is further regulated in the Minister of Finance Number 86/PMK.03/2013. Of course, this implementing rule is not formally ideal in terms of access to justice from expert statements referring to the critical point as the ability of people to seek and obtain remedies through formal or informal justice institutions and by human rights standards. Several matters relating to access to justice for expert testimony should include matters such as in the case of carrying out information according to their expertise, having the authority to ask to be shown documents and data by their competence, authority to report on the results of the examination, the obligation to maintain confidentiality, and guarantees to obtain legal assistance by the provisions—laws, and regulations when providing expert testimony.

Access to justice expert information on material truth regarding the truth of expert substance based on searching, testing, and scientific considerations and expertise in making light of a tax crime and convincing judges in the trial. Some of these include, among others, the ability to understand and relate their expertise to tax crimes suspected or indicted against a suspect/accused, the ability to interpret, construct and reconstruct a collection of documents, information, data, and evidence to be presented in a relevant manner in court, the ability to present their expertise findings clearly, objectively, independently, and proportionally, and have specific certificates that show that they have attended education and training by their expertise.

In particular, the statements of experts in calculating losses on state income and experts on tax regulations in tax crimes who have been internal experts from the Directorate General of Taxes can be criticized if they refer to conflicts of interest, capability, and independence. The criticism of the conflict of interest refers to the obligation of the basic legal principles of public officials (in this case, internal experts and tax investigators

as the employees of the DGT) to always act objectively and without potentially touching interests (Lux, 2002). Then, capability refers not only to other people's satisfaction with what someone does, but about what someone does, in what position someone is to do it (especially related to what or how the opportunity and independence in doing something) and how the available resources that enable a person to function (Nussbaum, 1999). Furthermore, the independence of the experts with the target is very important because it must be able to resolve the issue of how independent the experts are with respect to the need to test allegations that experts are willing to harm their reputation and form their opinion to continue to support matters related to the target, including in terms of compromising their independence and provide opinions in accordance with the target management (Bugeja, 2005). It is imperative that disclosure of the expert's relationship with the target is essential to assessing their independence as Bugeja (2005) has emphasized that the expert must be independent, whose rejection as an expert can be done if there are several of the following, among others, the expert has a significant financial interest with one of the parties, the expert (potentially) participates in strategic planning work to either party, or an expert is part of or acts as a lawyer, banker, financial consultant, tax adviser, employee, or accountant for either party.

Progressive legal breakthroughs are needed in order to provide justice for all parties in the Integrated Criminal Justice System and the rights of the suspect/defendant so that expert testimony on calculating losses on state revenue is in the form of a cross-institutional team, which at least consists of tax auditors, auditors The Supreme Audit Agency, the auditors of the Financial and Development Supervisory Agency, and the auditors of the Public Accounting Firm who are capable and free from conflict of interest and have adequate legal education and training. Thus, a strong opinion is generated in the form of a report made by expert competency standards that are presented in a clear, objective,

and the easily traceable manner in describing offenses, evidence, transactions in recording/bookkeeping, and contradicting facts (Sinaga, 2018). Likewise, tax regulations experts are cross-institutional teams of at least tax officials and academics from universities with tax centers with adequate legal and tax education and training.

D. Conclusion

This study yields two conclusions. First, expert testimony in tax crimes is still dominated by the authority of the Tax Civil Servant Investigator, who only focuses on experts in calculating losses on state income and experts on tax regulations who are internal employees of the Directorate General of Taxes. Whereas progressive law always rejects the status quo because it can reduce the value of independence and cannot be separated from conflicts of interest because these experts cannot be separated from the institution's interests. Second, so that experts who provide information in a tax crime must be competent, independent, and objective in providing information and opinions, it is necessary to regulate experts, which in handling tax crime cases can extend to expert statements, such as experts in calculating losses on income. State, tax regulation experts, criminal experts, state finance experts, Information Technology forensic experts, so a cross-institutional *ad hoc* team is needed. In order for the update to demonstrate competence and independence of the expert team, it is hoped that the expert team for calculating losses on state revenues will at least consist of a tax auditor, an auditor from the Supreme Audit Agency, an auditor from the Financial and Development Supervisory Agency, and an auditor from a Public Accounting Firm. The expert team on tax regulations must at least consist of internal tax employees and academics from a university who have adequate legal and tax education and training. It is recommended that there be a renewal of the rules regarding the procedure for expert testimony in tax crimes with the pattern of access to justice.

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