

Analisis penerapan konsep Limitation On Benefits dalam menentukan Beneficial Owner sebagai upaya mencegah praktek Treaty Abuse melalui pembentukan special Purpose Vehicle di Tax Haven Country

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Abstrak

Sejalan dengan semakin berkembangnya perdagangan antar negara dan semakin intensifnya transaksi antar negara, maka transaksi perdagangan dan arus investasi dari satu negara ke negara lain juga semakin banyak, di sisi lain masing-masing negara mempunyai yuridiksi perpajakan yang berbeda sehingga mengakibatkan terhambatnya interaksi antar negara tersebut yang berarti menghambat penciptaan iklim investasi yang kondusif bagi investor asing. Setiap negara mempunyai undang-undang pajak yang berbeda dalam hal menentukan hak pemajakan internasionalnya, baik yang menyangkut obyek maupun subyek pajak. Hal ini mengakibatkan terjadinya pengenaan pajak berganda apabila dua yuridiksi pajak tersebut berinteraksi sebagai akibat dari terjadinya economical cross boorder transaction. Oleh karena itu suatu perjanjian penghindaran pajak berganda (tax treaty) antara dua negara sangat penting untuk memecahkan permasalahan tersebut. Melihat kenyataan tersebut, diperlukan suatu proses kompromi untuk membagi hak pemajakan antar dua negara tersebut terhadap economical cross boorder transaction yang dalam bentuk perjanjian dimana pada hakikatnya merupakan distributive rules. Perjanjian perpajakan yang semula bertujuan untuk menghindari pengenaan pajak berganda pada akhirnya justru dimanfaatkan oleh wajib pajak, khususnya perusahaan multinasional untuk memaksimalkan laba karena berpotensi dilakukannya praktik penghindaran pajak internasional (internasional tax avoidance) yang disebabkan oleh perbedaan isi dari setiap perjanjian antara treaty partner yang dikenal sebagai treaty shopping atau treaty abuse. Dalam hubungan inilah muncul istilah: tax avoidance, treaty shopping, dan beneficial owner, dimana tax avoidance merupakan tindakan menghindari pajak dengan cara yang tidak sesuai dengan original spirit perumus kebijakan pajak, akan tetapi karena ketentuan pajaknya belum diatur dengan jelas, maka terhadap praktik penghindaran pajak tersebut, pihak otoritas pajak tidak dapat berbuat apa-apa, kecuali diatur mengenai anti avoidance rule. Fakta di lapangan tentang praktik treaty shopping yang sempat menjadi isu publik dan dimuat di media massa, antara lain dilakukan oleh PT Indofood Sukses Makmur melalui pembentukan Special Purpose Vehicle (SPV) bernama Indofood International Finance, Ltd. di Mauritius sebagai sebuah negara berpredikat Tax Heaven Country (THC). Selain itu terdapat juga beberapa perusahaan yang mempraktikkan treaty shopping, yaitu: PT Indosat, PT Excelcomindo Pratama, Paiton Energy, ArindoGlobal, PT Indocement Tunggal Prakarsa, anak perusahaan HeidelbergCement AG. Pokok permasalahan dalam tesis ini adalah kajian Anti Treaty Shopping Rule didalam tax treaty Indonesia dengan tax haven country, dengan menjelaskan definisi Beneficial owner didalam setiap treaty. Dampak dari tidak adanya Anti Treaty Shopping Rule tersebut terhadap tax avoidance melalui rekayasa transaksi bisnis dari dan ke luar negeri, dengan menutupi informasi tentang identitas sebenarnya dari pelaku utama yang sebetulnya mempunyai hak yaitu Beneficial Owner. Hal ini yang menyebabkan suburnya SPV-SPV yang bermunculan yang tidak sesuai dengan spirit pembuat kebijakan perpajakan tetapi hanya untuk menghindari pajak. Dalam rangka menganalisis pokok masalah tersebut, Penulis merumuskannya dalam bentuk pertanyaan sebagai berikut : (i) Bagaimana teknik-teknik treaty abuse dilakukan sehubungan dengan

pembentukan Special Purpose Vehicle di Tax Haven Country? (ii) Apakah konsep Limitation On Benefits dalam OECD, United Nation dan USA Model untuk menentukan beneficial owner bisa diterapkan didalam pembuatan tax treaty antara Indonesia dengan Tax Haven Country sehingga mempunyai peranan dalam mencegah treaty abuse? Untuk menjawab rumusan pertanyaan di atas.

Penulis melakukan penelitian dengan pendekatan analisis data kualitatif dengan tipe penelitian deskriptif (descriptive research) dimana penulis menguraikan data yang berupa informasi dan teori yang diperoleh dari studi kepustakaan, kemudian melakukan analisis data tersebut untuk memecahkan pokok permasalahan yang telah dirumuskan sehingga dapat ditarik kesimpulan memberikan saran dan pemahaman atas konsep Anti Treaty Shopping dalam upaya pencegahan treaty abuse dalam perpajakan internasional. Dengan demikian penelitian ini tidak menguji sebuah teori atau mencari korelasi dari dua atau lebih variabel, tetapi mendeskripsikan suatu permasalahan yang diangkat dari suatu masalah pokok.

Sumber data dalam penelitian ini adalah data primer yang diperoleh dari hasil wawancara dan data sekunder yang diperoleh dari literatur, buku, dokumen, dan jurnal penelitian yang memiliki relevansi dengan tema penelitian ini. Untuk mencapai tingkat obyektifitas yang optimal, wawancara dilakukan terhadap narasumber sebagai berikut: Direktorat Jenderal Pajak selaku otoritas pajak di Indonesia, praktisi perpajakan internasional serta masyarakat pembayar pajak (dalam hal ini pendapatnya diwakili oleh konsultan pajak).

Dalam penelitian ini Penulis dapat menarik kesimpulan bahwa penyebab utama terjadinya praktik treaty shopping adalah karena di dalam tax treaty Indonesia dengan THC tidak didefinisikan dengan jelas pengertian mengenai Beneficial Owner serta tidak terdapat definisi dan syarat sebagai pengujian untuk menentukan siapa yang berhak menikmati treaty benefit tersebut. Oleh karena itu Penulis menyarankan bahwa sudah saatnya Direktorat Jenderal Pajak, memperjuangkan Anti Treaty Shopping Rule dengan memasukkan konsep Limitation on Benefit ayat-ayat dalam pasal 4 tentang pengertian "Residence" sebagai bagian yang tidak terpisahkan dari setiap tax treaty Indonesia dengan tax haven country.

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In line with the development of inter-state trade and more intensive of inter-state transaction, then trade transaction and investment flow from one state to other one also increase, on the other hand each country also has different jurisdiction of taxation so that causing impediment of inter-state interaction which means to cause trouble for the creation of conducive investment climate for foreign investor. Each country has different law of taxation in the case of determining its right of international taxation both relating to object and subject of tax. This case causes the occurrence of imposition of double taxation in the event that those two tax jurisdictions carry out interaction caused by the occurrence of economical cross border transaction. Therefore, an agreement for prevention of double taxes (tax treaty) between two states is very important in order to solve such problem. Based on such condition, compromise process is needed in order to divide taxation right between such two countries against economical cross border transaction in the form of agreement that in principle constitutes distributive rules. Taxation agreement that originally has purpose to prevent imposition of double taxation, but further is even utilized by tax payer, especially by multinational company in order to optimize profit because it has potency for conducting practice of international tax avoidance caused by the different of content of each agreement between treaty partner known as treaty shopping or treaty abuse. In this context, then the terms appear like: tax avoidance, treaty shopping, and

beneficial owner, where tax avoidance constitutes action to avoid tax by method that is not pursuant to the original spirit of formulator of tax policy, but due to its tax provision has not been adjusted clearly, then against such practice of tax avoidance, tax authority can do nothing, except if it is adjusted concerning anti avoidance rule. The fact in field concerning the practice of treaty shopping that once became public issue and published in mass media, was conducted among others by PT Indofood Sukses Makmur through the establishment of Special Purpose Vehicle (SPV) called Indofood International Finance, Ltd., in Mauritius as a country well known with its designation as Tax Heaven Country (THC). Besides, also there are some companies practicing treaty shopping i.e.: PT. Indosat, PT. Excelcomindo Pratama, Paiton E nergy, Arindo Global, PT. Indocement Tunggul Perkasa, subsidiary of Heidelberg Cement AG. The main issue in this thesis is the study concerning Anti Treaty Shopping Rule in tax treaty of Indonesia with tax heaven country, by explaining definition concerning Beneficial owner in each treaty. The impact of absence of Anti Treaty Shopping Rule against tax avoidance through business transaction engineering from and to abroad, by hiding information concerning actual identity of the main player that actually has right i.e., Beneficial Owner. It is this case that has caused fertility for the appearance of many SPVs the growth of which is not pursuant to the spirit of tax policy maker but it is only a tax avoidance. In the framework to analyze such main issue, the writer formulates it in the form of questions as follows: (1) How about the technique of treaty abuse is conducted relating to the establishment of Special Purpose Vehicle in Tax Heaven Country? (ii) What is the concept of Limitation On Benefits in OECD, United Nations and USA Model in order to determine that beneficial owner can be applied in the establishment of tax treaty between Indonesia and Tax Heaven Country so that having role in the prevention of treaty abuse?

In order to answer the formulation of the above questions, the writer has carried out research by the approach of qualitative data analysis with the type of descriptive research where the writer describes data in the form of information and theory obtained from study of literature, then conducting analysis against such data in order to solve the main issue that has been formulated so that conclusion can be made for the purpose to provide suggestion and understanding concerning the concept of Anti Treaty Shopping in the effort to prevent treaty abuse in international taxation. Thereby, this research does not evaluate theory or look for correlation from two or more variables but describing a problem obtained from main issue.

The source of data in this research is that primary data obtained from the result of interview and secondary data obtained from literature, books, documents and research journal having relevancy with the theme of this research. In order to reach the level of optimum objectivity, interview was conducted against resource persons as follows: Directorate General of Tax as Tax Authority in Indonesia, practitioner of international taxation and community of tax payers (in this case their opinion is represented by tax consultant).

In this research, the writer can make conclusion that the main reason for the occurrence of practice of treaty shopping because in tax treaty of Indonesia with THC there is no clear definition concerning the understanding of Beneficial Owner and the absence of definition and requirement for the purpose of evaluation in order to determine who has right to enjoy such treaty benefit. Therefore, the writer suggests that currently it is time for Directorate General of Tax to take action to establish Anti Treaty Shopping Rule by insertion of concept of Limitation on Benefit of paragraphs contained in Article 4 concerning the understanding of 'Residence' as the integral part from each tax treaty of Indonesia with tax heaven country.