

Juridical Analysis of Relationship Between Beneficial Owner Concept & Implementation of Double Taxation Avoidance Agreement (Case Study of Decision Number 736/B/PK/PJK/2013)

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Abstract. *The concept of beneficial ownership emerged in the 1977 OECD Model to address tax issues, specifically to identify the true recipients of passive income such as dividends, interest, and royalties for tax deduction purposes. This concept distinguishes between legal owners and those who actually control and benefit from income. Globalization has increased cross-border transactions, creating both positive impacts, like increased tax revenue, and negative impacts, such as tax avoidance and international double taxation. Double Taxation Avoidance Agreements (DTAA) aim to mitigate these issues by delineating tax responsibilities between countries. In Indonesia, the beneficial owner concept was incorporated into tax regulations to prevent treaty abuse and ensure appropriate tax benefits. This study analyzes Judicial Review Decision Number 736/B/PK/PJK/2013, focusing on the case of PT Indosat Tbk and Indosat Finance BV (IFC BV) regarding the determination of beneficial ownership for tax purposes. The findings indicate that IFC BV met the beneficial owner criteria, thus entitled to DTAA benefits, exempting it from Indonesia's Income Tax Article 26 withholding. The case underscores the importance of clear beneficial ownership determination in international tax agreements to prevent abuse and ensure fair taxation.*

Keywords: *Agreement; Avoidance; Double; Taxation.*

1. INTRODUCTION

The term *beneficial owner* initially began to appear in the Organization for Economic Cooperation and Development Model (1977) due to tax issues.¹ The beneficial owner concept began as an effort to limit individuals who are considered to receive tax deductions in a third country for dividend, royalty and interest income. This is in line with what Vogel stated, "However, what is clear is that from 1977 onwards, the taxing rights of the source state on dividends, interest and royalties can only be reduced if the resident of the other contracting state, i.e. the state of residence, is considered the beneficial owner of the income".² In general, the recipient of passive income such as dividends, interest, and royalties is a person who owns property. However, in business practice, the person who owns the assets formally (legal owner) may not be the actual

¹ OECD Model Tax Convention on Income and Capital (Apr. 11, 1977), Models IBFD.

² K.K, Vogel, *Double Taxation Conventions*, (The Netherlands: Wolters Kluwer, 2015), pg.10-15.

recipient of income (beneficial owner).³ Even though the person formally owns the property (legal title), he is not authorized over the property and the income that arises because he is not the actual owner of the property.

In this era of globalization, the world seems borderless where foreign business actors establish cooperative relationships to conduct and increase cross-border transactions. In line with the development of international transactions, this not only has a positive impact but also a negative impact. The positive impact is that it can increase a country's revenue from the taxation sector.⁴ Through international transactions, tax revenues will increase so that this makes a major contribution in driving the domestic economy. The negative impact is the occurrence of problems among countries conducting international transactions due to differences in tax rates, differences in the provision of tax facilities, and differences in tax planning.⁵ It is also undeniable that globally it is not uncommon to find parties with abundant wealth and large companies avoiding national tax obligations.⁶

Transactions between the two countries or several countries can cause its own problems in terms of taxation, namely the clash of jurisdiction of tax regulations between countries.⁷ This needs to be further regulated and agreed upon by both countries concerned or around the world in order to further improve the economy and trade between countries, and not hamper foreign investment due to the imposition of double taxation which will burden taxpayers domiciled in both countries in the transaction. It is important for citizens, consumers and investors to have information about who is behind companies to ensure informed decisions and to challenge decisions made on their behalf.⁸

The existence of cross-border transactions makes each country able to impose taxes on income sourced from these cross-border transactions. On the one hand, the country where the source of income originates can impose tax on the income because the income is considered to be sourced from its country.⁹ On the other hand, the country where the tax subject is established or domiciled (for corporate tax subjects), domiciled or residing (for individual tax subjects), may also impose tax on income sourced outside its country obtained by its domestic tax subjects (world wide income). This has the potential to cause international double taxation where there are two or more countries whose tax laws impose taxes on the same tax subject on the same tax

³ Fajar Malvinas, Mahdi Syahbandir, and Syarifuddin, "Analysis of the *Beneficial Owner* in the Indonesia-Dutch Double Taxation Avoidance Agreement in the Appeal Dispute of PT Indosat, Tbk in the Tax Court," *Syiah Kuala Law Journal*, Vol 2(2) (2018), p. 276.

⁴ Restariana Dwinita Putri, "Analysis of Indonesia-Hong Kong Double Taxation Avoidance Agreement (DTAA)," (Undergraduate Thesis, Faculty of Law, University of Indonesia, Jakarta, 2013), p. 1.

⁵ *Ibid.*

⁶ Sara Dillon, "Tax Avoidance, Revenue Starvation and the Age of the Multinational Corporation", *The International Lawyer*, Vol. 50. No. 2 (2017), pg. 275.

⁷ *Ibid.*

⁸ Adam Foldes, et. al, "Beneficial Ownership: How to Find the Real Owners of Secret Companies: A Guide for journalists and civil society in Ghana, Kenya & Nigeria" *Transparency International* (2017), Pg. 4.

⁹ Charles. R. Irish, "International Double Taxation Agreements and Income Taxation at Source", *The International and Comparative Law Quarterly*", Vol. 23, No. 2 (1974), pg. 292.

object in the identical period.¹⁰ With the rampant condition of double taxation, it will make tax smuggling efforts intensify.

In response to this, one solution to overcome the problem of international double taxation is the international tax policy to regulate the right to impose taxes that apply in a country.¹¹ With the tax policy, each country is ensured to regulate the existence of taxes in the country's sovereign territory. This policy is also called Double Taxation Avoidance Agreement (DTAA) or *tax treaty*.¹² DTAA is a tax agreement between two countries made in order to minimize double taxation and various tax avoidance efforts.¹³ Each DTAA has more or less the same basic principles, where as part of international conventions, each country involved in a DTAA prepares *its own treat* based on *treaty* models.

The link between the beneficial owner issue in correlation with the implementation of DTAA is the tax treatment on passive income, namely interest, dividends and royalties. Determining who is the beneficial owner of one of these types of income becomes very important to determine whether a person or an entity is indeed the party entitled to the income.¹⁴ In the implementation of DTAA, it often happens that the direct beneficiary of income from the source country is not the entity or person who signs the contract and receives the income. In line with this, the term beneficial owner appears, namely the party who actually enjoys directly the benefits of income received from the source country.

The issuance of beneficial owner provisions has caused mixed reactions from foreign and local investors. Some investors who have been using vehicles (vehicle companies), solely utilize and enjoy the tax facilities provided in the tax treaty. Indonesia and its treaty partner countries are "forced" to recalculate and wait and monitor the follow-up of the implementation of beneficial owner provisions.¹⁵ The detection of acts classified as treaty abuse delegates material risks both in terms of financial (in the form of fiscal correction of tax incentives that have been enjoyed), and credibility and business continuity (if the investor is subject to criminal tax sanctions) to the investor.¹⁶

Some literature states that the concept of beneficial owner (BO) originally came from Common Law.¹⁷ The term beneficial owner in Indonesia was introduced in Article 26 paragraph (1a) of Law No. 7 of 1983 concerning Income Tax as amended several times last by Law No. 36 of 2008 (Income Tax Law) which stipulates that the country

¹⁰ Cornellijs J. Gregg, "Double Taxation". *Transactions of the Grotius Society*, Vol. 3 (1947), pg. 77.

¹¹ Ardiansyah, "Implementation of the *Beneficial Owner* Concept on the Utilization of the Indonesia-Dutch *Tax Treaty* (Study of Tax Dispute related to Interest Payment)", *Iblam Law Review*, Vol. 01. No. 03 (2021), p. 156. 156.

¹² *Ibid.*

¹³ John A. Townsend, "Tax Treaty Interpretation", *The Tax Lawyer*, Vol. 55, No. 1, (2001). pg. 232.

¹⁴ Benny Mangating, "Determination of Beneficial Owner Status to Prevent Abuse of Double Taxation Avoidance Agreement" (Master's Thesis, Faculty of Law, University of Indonesia, Jakarta, 2009), p. 4. 4.

¹⁵ *Ibid.*

¹⁶ John Hutagaol, Darussalam, and Danny Septriadi, *Capita Selecta Perpajakan*, (Jakarta: Salemba Empat, 2006), p. 87. 87.

¹⁷ Kusriani Purwijanti and Iman Prihandono, "Regulation of *Beneficiary Owner* Characteristics in Indonesia", *Notaire*, Vol. 1 No. 1 (2018), pp. 65.

of domicile of foreign taxpayers other than those conducting business or conducting business activities through a permanent establishment in Indonesia is the country of residence or domicile of the foreign taxpayer who actually receives the benefit of the income (beneficial owner).

If there are other parties who are not beneficial owners who receive payments of dividends, interest, and/or royalties sourced from Indonesia, then the party paying the dividends, interest, and/or royalties is required to withhold Income Tax Article 26 in accordance with the Income Tax Law at a rate of 20% of the gross amount paid.¹⁸

In this paper, the author would like to analyze the Judgment of Judicial Review Number 736/B/PK/PJK/2013 related to the determination of beneficial ownership status as a requirement for the collection of Income Tax (PPh Article 26).¹⁹ Based on the decision, it is known that PT Indosat Tbk established Indosat Finance BV (IFC BV) in Amsterdam on October 13, 2003 as an SPV with the aim of funding the operational business of PT Indosat Tbk through the issuance of debt securities.²⁰ The bonds issued by IFC BV are guaranteed by PT Indosat and IFC BV provides loans to PT Indosat.²¹ IFC BV's expenses consist of legal, professional, administrative and notary expenses. Meanwhile, interest expense is the biggest expense.²² There is no salary expense and this proves that there is no economic activity carried out by IFC BV. PT Indosat stated that the counterparty was the beneficial owner of the interest income. The IFC BV is a legal entity domiciled in the Netherlands and is entitled to benefit from the DTAA between Indonesia and the Netherlands. Therefore, PT Indosat does not withhold Income Tax Article 26 and has been appropriate in reporting Income Tax Article 26. Based on the background outlined above, this research will formulate two research problems: first, how to analyze the relationship between the beneficial owner concept and the implementation of double taxation avoidance agreements? Then the second research problem, what is the analysis of Judicial Review Decision Number 736/B/PK/PJK/2013?

2. RESEARCH METHODS

The research will utilize a normative juridical approach, which involves conducting legal research through the examination of literature and secondary data. This study will review pertinent regulations, literature, and expert opinions related to the legal issues being investigated.²³ Additionally, the research will be descriptive-analytical in nature, aiming to describe and interpret the issues, opinions, legal consequences, and societal realities, ultimately leading to a conclusion.²⁴

¹⁸ Fajar Malvinas, Mahdi Syahbandir, and Syarifudin, "Analysis of the *Beneficial Owner* in the Indonesia-Dutch Double Taxation Avoidance Agreement in the Appeal Dispute of PT Indosat, Tbk, in the Tax Court," *Syah Kuala Law Journal*, Vol. 2(2), (2018), p. 281. 281.

¹⁹ Judgment of Judicial Review Number 736/B/PK/PJK/2013.

²⁰ *Ibid.*

²¹ *Ibid.*

²² *Ibid.*

²³ Soerjono Soekanto and Sri Mamudji, *Normative Legal Research (A Brief Overview)*, (Rajawali Pers: Jakarta, 2001), pg. 13.

²⁴ Peter Mahmud Marzuki, *Legal Research*, (Jakarta: Prenada Media, 2005), pg. 35.

3. RESULTS AND DISCUSSION

3.1. Implementation of Indonesian Domestic Taxation Regulations in Determining Beneficial Owner Status as an Effort to Prevent Abuse of DTAA Benefits

3.1.1. Beneficial Owner Concept

According to Vogel, beneficial owners are those who have the right to determine whether a capital or wealth should be utilized for others or determine how the proceeds from the capital or wealth are utilized.²⁵ Furthermore, Olivier, Libin, Weeghel, and Toit stated that the concept of beneficial owner is an important provision in determining whether a tax subject meets the requirements to obtain a facility to reduce the tax rate on dividend income, interest, and/or royalties.²⁶ In a journal entitled *Beneficial Ownership Disclosure: The Cure for the Panama Papers Ills*, beneficial owners are defined as all persons and legal entities that ultimately control or share the profits of a company.²⁷

The term beneficial owner in Indonesia was not included at the time of the first formation of Law No. 7 of 1983 on Income Tax. Until finally it was contained in SE-04/PJ.34/2005 and the fourth revision of Income Tax Law No. 36 of 2008.²⁸ As for the explanation of transactions and beneficial owner criteria, it is contained in PER-25/PJ./2010 jo PER-62/PJ/2009 concerning Prevention of Abuse of Double Taxation Avoidance Agreement.²⁹ Then, Article 1 point 2 of Presidential Regulation Number 13 of 2018 concerning the Implementation of the Principle of Recognizing Beneficial Owners of Corporations in the Context of Prevention and Eradication of ML and Criminal Acts of Terrorism, provides an understanding of the beneficial owner, namely an individual who can appoint or dismiss the management, supervisors, directors, board of commissioners, or supervisors of the corporation, who has the ability to control the corporation, is entitled to and/or receives benefits from the Corporation either directly or indirectly, is the actual owner of the funds or shares of the Corporation.³⁰

In the international concept, regulations regarding beneficial owners will be found more in the rules contained in the Organization for Economic Co-operation and Development (OECD) Model Tax Convention. In 1977, the OECD regulated the beneficial owner which includes Article 10 which regulates

²⁵ Klaus Vogel et al, Klaus Vogel on Double Taxation Conventions. *A Commentary to the OECD, UN and US Model Convention for the Avoidance of Double Taxation of Income and Capital with Particular Reference to German Treaty Practice*, Third Edition, (The Hague: Kluwe Law International), 1997, pg. 3.

²⁶ J. David B. Oliver, Jerome B. Libin, Stef van Weeghel and Charl du Toit, *Beneficial Ownership, Bulletin for International Bureau of fiscal Documentation*, IBFD, July 2000.

²⁷ Jenik Radon and Mahima Achutan, "Beneficial Ownership Disclosure: The Cure for The Panama Papers Ills". *Journal of International Affairs*, Vol. 70, No. 2 (2017), pg. 88.

²⁸ Center For Indonesia Taxation Analysis, "Understanding Beneficial Ownership (BO) in Taxation," <https://cita.or.id/beneficial-ownership-bo/>, accessed on December 16, 2023.

²⁹ *Ibid.*

³⁰ Presidential Regulation on the Implementation of the Principle of Recognizing Beneficial Owners of Corporations in the Context of Prevention and Eradication of Money Laundering and Terrorist Crimes, Presidential Regulation 13/2018, LN 2018 No. 23, Art. 1 point 2.

dividends, Article 11 which regulates interest, and Article 12 which regulates royalties.³¹ The OECD also provided a comprehensive definition of beneficial owner in 2003, which is the individual who receives the actual benefit. The OECD divides beneficial owners into three types, namely first, in a corporation, the beneficial owner must act as part of the shareholders.³² Second, if in a partnership, the beneficial owner is an individual or party that has limited or general characteristics.³³ Third, if in a foundation, the beneficial owner acts as the founder.³⁴

3.1.2. Overview of Income Tax

As it is known that one of the largest state revenues is through tax revenue.³⁵ One of the ways the state collects taxes is through income tax. Etymologically, the term Income Tax (PPH) comes from the words "Tax" and "Income", so it can be concluded as a tax imposed on income. Income Tax is a tax imposed on both individuals and entities on any additional economic capacity originating either from Indonesia, or from outside Indonesia that can be used for consumption or to increase wealth by name and in any form. Therefore, income can be sourced from business profits, salaries, honorariums, gifts, and so on.³⁶

Talking about Income Tax, it is necessary to know in advance about the tax subject. The law does not mention the definition of Tax Subject, but limitingly in Article 1 paragraph (2) of the KUP Law states that Taxpayer is an individual or entity, including taxpayers, tax withholders, and tax collectors, who have taxation rights and obligations in accordance with the provisions of tax legislation.³⁷

Meanwhile, the tax object is regulated in the provisions of Article 4 paragraph (1) of the Income Tax Law, which states that:³⁸

"Taxable Object is income, which is defined as any increase in economics capacity received by or accrued by a Taxpayer from Indonesia as well as from offshore, which may be utilized for consumption or increasing the taxpayer's wealth, in whatever name and form."

Every tax law has international aspects, both regarding the subject and object of taxation. The international aspect of tax legislation describes the extent to which the state determines its taxation rights outside its territory. The

³¹ Burhan Jatmiko and Paramita Prananingtyas, "Juridical Study of the provisions Regarding the Beneficial Owner of the Company," *Notarius*, Vol. 16 No. 1 (2023), p. 243. 243.

³² *Ibid.*

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ Hatta, "Contradictory Application of Double Taxation Law in Indonesia," *Election Law Review*, Vol. 20 No. 1 (2018), pp. 50.

³⁶ Ministry of Finance of the Republic of Indonesia Directorate General of Taxes Directorate of Counseling and Services and Public Relations. Rights and Obligations Guidebook, 2008, p. 4.

³⁷ *Law on the Third Amendment to Law Number 6 of 1983 concerning General Provisions and Tax Procedures*, Law No. 28 of 2007, LN of 2007 No. 8, Art. 1 point 2.

³⁸ *Law on the Fourth Amendment to Law No. 7 of 1983 Concerning Income Tax*, Law No. 36 of 2008, LN of 2008 No. 133, Art. 4.

international aspects stipulated in the Income Tax provisions are needed in determining:³⁹

1. The status of foreigners domiciled in Indonesia and foreign incorporated companies conducting business activities in Indonesia so that their tax obligations can be determined;
2. Indonesia can tax both onshore and offshore income;
3. Determination of source of income in relation to foreign tax credits;
4. The amount of tax withheld on compensation received or earned by foreign taxpayers (non resident tax payer); and
5. Income tax treatment such as deem profit and deem dividend can be applied according to tax rules.

Article 26 of the Income Tax Law regarding international jurisdiction stipulates that taxation applies to both types of income, passive income and active income, received by foreign taxpayers.⁴⁰ This includes several types of income paid from Indonesia to foreign taxpayers, and a withholding income tax rate of 20% is applied.⁴¹ Article 26 of the Income Tax Law regulates tax withholding on income sourced from Indonesia that is received or earned by foreign taxpayers and Permanent Establishments (BUT).⁴² Thus, this regulation confirms the obligation to withhold tax on income originating from Indonesia received by foreign tax subjects, including income from permanent establishments.⁴³

3.1.3. Legal Basis for Double Taxation Avoidance Agreement

Double Taxation Avoidance Agreement (DTAA) or tax treaty is an agreement between sovereign states and has legal status as an international treaty and functions as a law-making treaties based on international public law because it is agreed by the government, contracting states in its capacity as a subject of international public law.⁴⁴ DTAA is an effort by two countries to avoid double taxation. On the other hand, the existence of DTAA has a beneficial impact to further strengthen the relationship between the bound countries.⁴⁵ However, what should also not go unnoticed is that the drafter of the DTAA must be able to balance a series of competing interests of the parties.⁴⁶ According to Deutsch, Robert, and Arkwright, Roisin, double taxation occurs where the same tax (usually a tax on income or profits) is levied by more than one country on

³⁹ John Hutagaol, *Taxation of Contemporary Issues*, (Yogyakarta: Graha Ilmu, 2007), pp. 102.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ Dan Throoph Smith, "The Functions of Tax Treaties", *National Tax Journal*, Vol. 12. No. 4 (1959), pg. 317.

⁴⁵ Adrian A. Kragen, "Double Income Taxation Treaties: The OECD Draft" *California Law Review*, Vol. 52 No. 2 (1964), pg. 332.

⁴⁶ Richard L. Reinhold, "What is Tax Treaty Abuse? (Is Treaty Shopping Outdated Concept?)" *The Tax Lawyer*, Vol. 53. No. 3 (2000), pg. 682.

the same taxpayer, in respect of the same subject for the same period.⁴⁷ Given that tax revenue is very important for a country, but in this case the rights of taxpayers must also be prioritized.

The Indonesian state (government) can close DTAA based on the mandate of Article 11 paragraph 1 of the 1945 Constitution which states that if the President with the approval of the DPR declares war, makes peace and treaties with other countries.⁴⁸ In addition, Article 4 paragraph (1) of Law No. 24 of 2000 concerning International Agreements states that the Government of the Republic of Indonesia makes international agreements with one or more countries, or another international legal subject based on an agreement, and the parties are obliged to implement the agreement in good faith.⁴⁹ As for more specifically, related to income tax, Article 32A of the Income Tax Law states that the government is authorized to make agreements with the governments of other countries in the context of avoiding double taxation and preventing tax evasion.⁵⁰

In addition to avoiding double taxation, several other objectives of the preparation of DTAA include:⁵¹

- a. Protecting taxpayers;
- b. Encourage or attract investment;
- c. Facilitate the expansion of developed country companies;
- d. Helping to reduce and combat tax evasion and smuggling, enhancing cooperation in the application of domestic provisions, improving the exchange of tax information and experience, and improving the interpretation of tax provisions;
- e. Harmonization of taxation criteria;
- f. Prevent discrimination;
- g. Strengthen economic relationships; and;
- h. Enhance treaty abuse prevention and cooperation in assessment and collection and other tax administration activities.

3.2. Analysis of Judicial Review Decision Number 736/B/PK/PJK/2013

3.2.1. Case Position⁵²

The dispute related to the beneficial owner that will be discussed is a dispute between PT Indosat Tbk (Respondent for Reconsideration formerly Appellant) and the Director General of Taxes (Petitioner for Reconsideration formerly

⁴⁷ Deutsch, Roberth & Arkwright, Roisin, *Principle and Practice of Double Taxation Agreements* (London: BNA International Inc), 2008, pg. 12.

⁴⁸ 1945 Constitution, 1945 Constitution, LN 1959 No. 75 Ps. 11 paragraph 1.

⁴⁹ *Law on International Agreements*, Law No. 24 of 2000, LN of 2000 No. 185, TLN No. 4012.

⁵⁰ *Income Tax Law*, Art. 32 A.

⁵¹ Amalia Anggunsari "The Position of the Double Taxation Avoidance Agreement (DTAA) - Tax Treaty between Indonesia and the Netherlands in the Indonesian Legislative System (Case Study of Tax Court Decision Number: PUT-17568/PP.M.III/13/2009 on Tax Dispute Number: 13-032417-2004)" (Master Thesis in Kenotariatan, Faculty of Law, University of Indonesia, Jakarta, 2010), p. 66.

⁵² Supreme Court, Judgment of Judicial Review, No. 736/B/PK/PJK/2013, *Director General of Taxes v. PT Indosat Tbk* (2013), pp. 2.

Appellee).⁵³ Initially, the Appellant received a Tax Collection Letter (STP) for Income Tax Article 26 for the May 2009 Tax Period which was issued based on research into the implementation of Income Tax Article 26. According to the Appellee, the basis for the issuance of the STP was based on the Court Decision with No. Put 23288/PP/M.II/12/2010 dated May 18, 2020 and No. Put. 23289/PP/M.II/13/2010 dated May 18, 2010 where Indosat Finance Company BV-Dutch (IFC BV-Dutch) was declared not the beneficial owner of the interest income it received.⁵⁴ The Appellee relied on the legal basis of Circular Letter of the Director General of Taxes No. SE-4/PJ.34/2005 dated July 7, 2005 on Guidelines for Determining the Criteria of beneficial owner as stated in the Agreement on Avoidance of Double Taxation between Indonesia and other countries.⁵⁵ Based on the circular letter, it is known that parties who are not beneficial owners and receive payments of dividends, interest, and/or royalties sourced from Indonesia, the party paying the dividends, interest, and/or royalties are required to withhold Income Tax Article 26 in accordance with the Income Tax Law, at a rate of 20% of the gross amount paid.⁵⁶

Regarding the STP, the Appellant has filed a Request for Cancellation of STP of Income Tax Article 26 received by the State-Owned Enterprises Tax Office (KPP BUMN) on October 13, 2010 with Proof of Receipt of Letter No. PEM:01008320/051/oct/2010. The reason why the Appellant filed for the STP cancellation was due to the Court Decision No. Put 23288/PP/M.II/12/2010 and No. Put. 23289/PP/M.II/13/2010 were for the 2004 and 2005 tax years.⁵⁷ Meanwhile, for the 2008 and 2009 tax years, the Appellant has met the beneficial owner criteria required in the Netherlands. Thus, for the Appellant, the tax treatment in 2008 cannot be equated with the years 2004-2005.⁵⁸

The Appellant disclosed that in 2008, based on article 11 par. (2) Tax Treaty, the Appellant was able to apply the reduced rate of the Indonesia Netherlands Tax Treaty, which was 10%. The Appellant added that in fact the Appellant had performed the obligation to withhold Income Tax Article 26 at 10% based on Circular Letter of the General of Taxes Number SE-17/PJ/2005 concerning Guidelines for Income Tax Treatment of Article 11 on Interest in the Double Taxation Avoidance Agreement (DTAA) between Indonesia and the Netherlands (SE-17/PJ/2005).⁵⁹ Article 11 paragraph 2 of SE-17/PJ/2005 explains that in connection with no problems in its implementation, Indonesian taxpayers who have debts or loans to Dutch residents, both individuals and entities, are required to withhold Income Tax Article 26 at a rate of 10% of the gross amount paid.⁶⁰ Then Article 11 paragraph 4 SE-17/PJ/2005 states that considering the procedure for implementation, has not been discussed between the Indonesian and Dutch "Authorized Officials", then the provisions apply, namely Indonesian taxpayers who have debts or loans to Dutch residents, both

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ *Ibid.* p. 3

⁶⁰ *Ibid.*

individuals and corporations, are required to withhold Income Tax Article 26 at a rate of 10% of the gross amount paid.⁶¹

Based on the *Service Providing Companies Decree* issued by the *Dutch State Secretary of Finance (SSF)* which is the Dutch Tax Authority, namely IFZ 2004/126 dated August 11, 2004 where the Dutch Tax Authority has issued *beneficial owner* criteria that must be met by taxpayers with criteria:⁶²

No.	Requirements	Condition 2004-2005	Condition 2008-2009
1.	At least half of the Company's Management Board are Dutch residents. ⁶³	Not yet fulfilled	Fulfilled
2.	Board members residing in the Netherlands must have professional skills to perform their duties. ⁶⁴	Fulfilled	Fulfilled
3.	Key management policies must be unlocked in the Netherlands. ⁶⁵	Fulfilled	Fulfilled
4.	The Company's Main Bank Account must be opened in the Netherlands. ⁶⁶	Fulfilled	Fulfilled
5.	The books and records of the company must be organized in the Netherlands. ⁶⁷	Fulfilled	Fulfilled
6.	The company has to fulfill its tax obligations in the Netherlands (e.g. filing corporate income tax returns, etc.). ⁶⁸	Fulfilled	Fulfilled
7.	The company address must be in the Netherlands. ⁶⁹	Fulfilled	Fulfilled
8.	For the purpose of extension, the company must not be resident in another country. ⁷⁰	Fulfilled	Fulfilled
9.	<i>Equity Capital</i> of 2 million Euros. ⁷¹	Not yet fulfilled	Fulfilled

⁶¹ *Ibid.*

⁶² *Ibid.* p. 4.

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

The ruling of the Tax Court Number Put.39133/PP/M.II/99/2012, dated July 10, 2012, which is legally binding, is to cancel the Decision of the Director General of Taxes Number KEP-283/WPJ.19/BD.05.2011 dated April 11, 2011 and STP PPh Article 26 for the May 2009 Tax Period Number 00003/104/09/051/10 dated September 17, 2010. However, after the decision became final, the Appellee filed a request for reconsideration on October 29, 2012.⁷² In this case, the Appellee feels that the Tax Court Judges in their decision have exceeded their authority by canceling STP PPh 26 Number 00003/104/09/051/10 dated September 17, 2010 which should be the authority of the Director General of Taxes. In addition, the Appellee maintained its argument that the Appellant was not considered the *beneficial owner of the* interest income from the Appellant's loan so that the withholding rate for Income Tax Article 26 was 20%.⁷³ However, the Appellee's request for reconsideration was rejected and ordered the Appellee to pay court costs in the reconsideration examination in the amount of Rp2,500,000 (two million five hundred thousand Rupiah).⁷⁴

3.2.2. Case Analysis

Based on the Position Case mentioned in the previous sub-chapter, it should be understood that the Appellant has entered into a loan agreement with a counterparty domiciled in the Netherlands, namely Finance Company BV-Dutch (IFC BV-Dutch). It is known that Finance Company BV-Dutch is entitled to benefit from the DTAA or tax treaty between Indonesia and the Netherlands. As is known that conceptually, a tax treaty is a contract between two countries that ratify it.⁷⁵ Therefore, based on the DTAA or tax treaty, it is appropriate for the Appellant not to withhold Income Tax Article 26.

Meanwhile, the Appellee uses the regulation related to the beneficial owner *as* outlined in circular letter Number SE-04/PJ.34/2005 dated July 7, 2005, which contains:⁷⁶

1. Beneficial owner is the actual owner of income in the form of dividend, interest, and or royalty, both from Individual Taxpayers and Corporate Taxpayers who are fully entitled to directly enjoy the benefits of these incomes.
2. Special Purpose Vehicles⁷⁷ or SPVs in the form of conduit companies,⁷⁸ paper box companies,⁷⁹ pass-through companies⁸⁰ are not included in the definition of beneficial owner above.

⁷² *Ibid.*

⁷³ *Ibid.* p. 17.

⁷⁴ *Ibid.* p. 42.

⁷⁵ Philip F. Postlewaite and David S. Makarski, "The A.L.I. Tax Treaty Study - A Critique and a Modest Proposal", *The Tax Lawyer*, Vol. 52, No. 4 (1999), pg. 740.

⁷⁶ Rachmanto Surahmat, *Bunga Rampai Perpajakan*, (Jakarta: Salemba Empat, 2007), pp. 7.

⁷⁷ In the Income Tax Law Article 18 paragraph (3b) is referred to as a *Special Purpose Company*.

⁷⁸ *The Conduit Companies Report* published by the OECD in 1986 states that conduit *companies* are established solely for *tax avoidance (Company set up in connection with a tax avoidance scheme)*.

3. If there are other parties who are not beneficial owners as referred to above who receive payments of dividends, interest, royalties sourced from Indonesia, then the party paying the dividends, interest, or royalties is required to withhold Income Tax Article 26 in accordance with the Indonesian Income Tax Law at a rate of 20% of the gross amount paid.

The Appellee argued that companies such as FC BV-Dutch, which are special purpose vehicles (SPV), cannot enjoy the tax rate as stipulated in the DTAA. In this case, the Appellant states that FC BV-Dutch is not a fund distribution agent representing other parties in providing loans. FC BV-Dutch is a counterparty to the transaction which is a separate legal entity from the Appellant and has active business activities. Therefore, the Appellant was obliged to pay the principal and interest to FC BV-Dutch. Therefore, FC BV-Dutch is entitled to obtain the benefits of DTAA between Indonesia and the Netherlands, namely not being subject to interest tax on interest in Indonesia. Thus, loan interest payments do not need to be subject to Income Tax Article 26.

FC BV-Dutch is a legal entity that is also the beneficial owner of the funds loaned to the Appellant.⁸¹ The interest earned from lending funds to the Appellee was taxable income and was reported to the Dutch authorities. Thus, the Appellee's correction cannot be sustained because it is not in accordance with Article 4 jo. Article 11 paragraph (4) of the Indonesian-Dutch Treaty which states that interest arising in one State shall only be taxable in the other State if the beneficial owner of such interest is a resident of the other State and if such interest is paid on debts created for a period of more than 2 (two) years or which is paid in connection with the credit sale of industrial, mercantile, or scientific equipment. Therefore, it can be concluded that the interest paid by the Appellant to its counterparty, FC BV-Dutch, does not need to be deducted under Income Tax Article 26. Thus, the decision of Judicial Review Number 736/B/PK/PJK/2013 is correct.

4. CONCLUSION

The term beneficial owner in Indonesia was not included at the time of the first formation of Law No. 7 of 1983 on Income Tax. Until finally it was contained in SE-04/PJ.34/2005 and the fourth revision of Income Tax Law No. 36 of 2008. Then, the existence of cross-border transactions makes each country able to impose taxes on income sourced from these cross-border transactions. On the one hand, the country where the source of income comes from can impose tax on the income because the income is considered to be sourced from its country. In response to this, one of the solutions to overcome the problem of international double taxation, namely with international tax policy to regulate the right of tax imposition that applies in a country. The link between the beneficial owner issue in correlation with the implementation of DTAA is regarding the tax treatment of passive income, namely interest, dividends, and royalties as regulated in the OECD. Based on the case that occurred between PT

⁷⁹ A *paper box company* is a company that does not have the substance of a general business. The company is only registered in a country so it only has legal aspects.

⁸⁰ The term *Pass-through Company* is intended for companies whose function is only to intermediate an income so that they do not have authority over the income.

⁸¹ Supreme Court, Judgment of Judicial Review, No. 736/B/PK/PJK/2013, *Director General of Taxes v. PT Indosat Tbk* (2013), pp. 5.

Indosat Tbk (Respondent for Reconsideration formerly Appellant) and the Director General of Taxes (Petitioner for Reconsideration formerly Appellee). The FC BV-Dutch as the counterparty to the Appellee's transaction in this case is a separate legal entity from the Appellant and is engaged in active business activities. Therefore, the Appellant has an obligation to pay principal and interest to FC BV-Dutch. FC BV-Dutch was also the *beneficial owner* of the funds loaned to the Appellant. As a result, FC BV-Dutch is entitled to the benefits of the Double Taxation Avoidance Agreement (DTAA) between Indonesia and the Netherlands, so that it cannot be taxed on interest by the Indonesian Government. Thus, FC BV-Dutch should be exempted from the imposition of Income Tax Article 26.

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