An Implementation of Automatic Exchange of Information (AEOI) In Investigating the Occurrence of Tax Evasion Abroad

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Abstract

The non-achievement of tax revenue targets can be caused by indications of tax evasion committed by taxpayers. Taxpayers often keep their assets in "Tax Heaven" countries. This is because the tax rate is lower and safer because the confidentiality of customer data is guaranteed. In order to overcome the limitations of fiscal space in detecting the occurrence of tax evasion abroad, an automatic information exchange system or so-called AEoI (Automatic Exchange of Information) between countries was born, which is used to identify and track the potential taxes abroad. The aim of writing this article is to find out tax evasion committed by overseas taxpayers, as well as the application of Automatic Exchange of Information (AEoI) in an effort to investigate the occurrence of tax evasion. This type of legal research uses normative legal research (doctrinal) with a law approach and a conceptual approach. The results of this study are tax evasion by taxpayers abroad by transferring profits and saving money to tax havens or Offshore Financial Centers and means to collect evidence. Tax investigators can use the AEoI scheme to obtain information in the form of bank accounts and other assets owned by its citizens abroad. This evidence can be processed into evidence so that it has strength and judgment in the law of evidence.

Keywords: Exchange of Information; Investigating; Tax Evasion.

Introduction

Taxes are the primary source of revenue for country's economic activities, enabling the government to function and providing public services to the community (Farouk, 2018). In Indonesia, it is the major source of the government's development funds. Generally, taxpayers and collectors are bound in a contractual relationship with the assumption that taxes are the price for the benefits provided by the state to its citizens. This obliges tax payment from business owners in order to obtain protection and public facilities from the government (Vosslamber, 2010).

According to Article 23 of the 1945 Constitution, "Taxes and other coercive levies for the state are regulated by law." Law Number 6 of 1983 on General Provisions and Tax Procedures (KUP Law) and its amendments were enacted based on this clause. Article 1 Number 1 of the KUP Law explains that "Taxes are mandatory contributions to the state by individuals or entities that are coercive under the law with no direct compensation, and are used for state needs for the greatest prosperity of the people." Therefore, the formulation of regulations is necessary to achieve this goal of prosperity.

In 2015, the United Nations (UN), International Monetary Fund (IMF), World Bank, and The Organization for Economic Co-operation and Development (OECD) agreed on the need for mobilizing domestic resources is reflected in the State revenue. These organizations noted that at least 15% of the tax ratio indicator is required to fulfill basic needs or facilities for infrastructure, health, and education outlined in the Sustainable Development Goals (SDGs).

Figure 1. Tax ratio in 2016-2020 (Source: Ministry of Finance)

Meanwhile, data from the Ministry of Finance showed that the tax ratio to be gross domestic product (GDP) decreased in the year 2016-2020 period (Intan, 2021). A sharp decrease occurred in 2020, influenced by the widened state deficit caused by the COVID-19 pandemic. The State Budget deficit throughout 2020 was IDR 1,039.2 trillion or 6.34% of the GDP (Kementerian Keuangan Republik Indonesia, 2021), while the tax revenue obtained on November 30, 2020, was IDR 925.34 trillion. This is equivalent to 77.19% of the total State Budget target of IDR 1,198.82 trillion based on Presidential Regulation 72/2020 (Kementerian Keuangan Republik Indonesia, 2020).

A reason for the sub-optimal achievement of this target was tax evasion by persons who consider these charges a burden that will reduce their income, leading to substantial revenue loss caused by non-compliance. Many individuals prefer to save their wealth abroad, particularly in "tax haven" countries, where the tax rate is lower and safety is guaranteed by the confidentiality of customer data.

Economic globalization increases the possibility of tax avoidance and evasion, posing a challenge for authorities to strengthen the tax collection system to enable debt collection in an accurate and accountable manner. The Cases of criminal acts in the field of taxation are considered very detrimental to state finances, resulting in the need for policies to promote fiscal consolidation for medium-long-term sustainability. Therefore, an AEoI (Automatic Exchange of Information) system between countries was created to overcome the limitations of fiscal space in detecting the occurrence of tax avoidance. This system is used to identify and track potential taxes abroad and is a new global standard that facilitates the reduction of tax avoidance. AEoI is expected to assist in the investigation and detection of tax evasion and the perpetrators abroad.

Based on the above background, this research discussed the Application of Automatic Exchange of Information (AEoI) in Investigating the Occurrence of Tax Evasion Abroad. The problems evaluated were, first, the modus operandi of tax evasion by foreign taxpayers, and second, the Application of Automatic Exchange of Information (AEoI) in investigating this crime.

Method

This type of legal research is normative (doctrinal) legal research using a statute approach, standardize and a conceptual approach. The types of this legal research is prescriptive by examining legal materials (library based), which includes both the primary legal materials in the form of laws and regulations relating to criminality and tax crimes and the secondary legal materials in the form of books, journals, and the research reports that relevant to the discussion in application of Automatic Exchange of Information (AEoI) in an effort to investigate the occurrence of tax evasion abroad. The technique of analyzing legal materials with the syllogism method through a deductive mindset that uses 2 (two) premises, namely the major premise is the applicable legal rule. While the minor premise, namely legal facts or empirical conditions in the implementation of the rule of law. Then from the 2 (two) premises, conclusions are drawn.

Discussion

Implementation Of AEoI In Several Countries

Before the AEoI became applicable, the members of the European Union had tax-related cooperation known as the EU Saving Tax Directives. International cooperation in the financial sector has occurred for a long time, as two countries usually engage in treaties to increase trade and investment, as well as avoid double taxation. In America, the exchange of tax information and data was first performed by the Foreign Account Tax Compliance Act (FATCA), a regime for reporting information and withholding taxes on the accounts of US citizens residing abroad. There are several key differences between FATCA and AEoI. First, the minimum amount that should be reported in FATCA is USD 50,000, while AEOI has no minimum. Also, the scope of AEOI is wider because it covers all foreigners with funds in a country, while FATCA is specifically for US citizens.

Since 2017, AEoI in Japan has sought to report every income and property owned and sourced from other countries and can be regarded as successful. This achievement is supported by the high level of taxpayer compliance, where the citizens use the services of a tax consultant to fulfill their obligations (Indriani, 2021). Meanwhile, Malaysia, Indonesia, and Singapore were the first Southeast Asian countries to successfully implement AEoI. Countries in Asia, such as Singapore, Hong Kong, Japan, and Malaysia, have a high level of tax compliance above 4. As part of its commitment to implement the AEoI, Malaysia signed a Multilateral Competent Authority Agreement detailing the rules for the exchange of information between participating jurisdictions as well as the Convention to encourage administrative assistance in the tax matters with the other signatories.

Modus Operandi of Tax Evasion
Tax Evasion in Criminal Law

Taxes are a useful source of finances for the physical and non-physical development of the Indonesian jurisdiction. However, tax crimes often occur due to negligent as well as intentional acts committed by groups who do not deposit tax money to the state treasury, resulting in a loss of financial revenue. These includes follows the taxpayers, authorities (officers/employees/ tax officials), and third parties (banks, notaries, tax consultants, public accountants, and administrative offices) (Nahak, 2014). Although payments should be made correctly and in accordance with applicable laws, many taxpayers remit less than their income necessitates and commit evasion offenses.

According to Mardiasmo, tax evasion is concept of attempt to lighten the financial burden by illegal means or law violations (Mardiasmo, 2009). The perpetrators may ignore the formal mandatory tax provisions, falsify documents, or fill in incomplete and incorrect data (Kurniawati & Toly, 2014). Bawoleh also defined the act as an effort to avoid illegally owed taxes by hiding the actual situation intentionally or by negligence (Bawoleh et al., 2021).

Article 372 of the Criminal Code (KUHP) explains the definition of embezzlement as "a deliberate, unlawfully control of an object in one's possession that should or partly belong to another person." Anyone found guilty of embezzlement is sentenced to a maximum imprisonment of 4 (four) years or a maximum fine of 900 (nine hundred) rupiahs. Furthermore, Law Number 28 of 2007 only mentions tax crimes, which are regulated in Chapter VIII, Articles 38 to 43.

Article 38 of Law Number 28 of 2007 states that:

Everyone who, by negligence:

    a. provides no Notification of Letter;

    b. files a notification letter with material or information that is untrue, misleading, or incomplete.files a notification letter with material or information that is untrue, misleading, or incomplete.

        which might result in a decline in state revenue. A person who commits this act after the first infraction listed in Article 13A may be fined at least once or up to twice the amount of unpaid or underpaid tax, or they may receive a prison term of no less than three months nor more than a year.

According to Article 39 of Law Number 28 of 2007:

    (1) Any person who knowingly:

        a. does not disclose the company to be verified as a Taxable Entrepreneur or does not register to get a Taxpayer Identification Number for the business;

        b. without the proper authorization to possess a Taxpayer Identification Number or Taxable Entrepreneur Confirmation, utilizes or abuses;

        c. ignores the Notification of Letter submission;

        d. submits a notification letter or other document with inaccuracies or omissions;

        e. refuses to conduct the examination required by Article 29;

        f. falsely presents phony books, records, or other materials as being true or does not accurately reflect the circumstances;

        g. not display lending books, records, or other papers; does not retain books or other records in Indonesia;

        h. does not maintain books, records, papers that serve as the basis for bookkeeping, summarizing, recording, and other documents in Indonesia as specified in Article 28 Paragraph (11), including the outcomes of data processing from electronically managed books or online application programs; or

        i. does not deposit withheld or collected taxes, resulting in losses to state revenues, will be penalized with a minimum of six months' imprisonment and a maximum of six years' imprisonment, as well as a fine of at least twice or four times the amount of unpaid or underpaid tax due.

    (2) If a second tax-related offense is committed before 1 (one) year has passed beginning from the end of the sentence, the punishment mentioned in paragraph (1) is increased once to become twice the criminal consequence.

    (3) Anyone else who attempts to commit a crime by misusing or using their taxpayer identification number and/or taxable entrepreneur confirmation without authorization, as described in paragraph (1) letter b, or by providing false or incomplete information in their notification of letter and/or application materials, as described in paragraph (1) letter d, will be sentenced to a minimum of six months and a maximum of two years in prison.

Article 39A states that anyone who knowingly:

        a. issues fictitious tax bills, evidence of data collection, withholding, or tax payment, or both; or

b. files a tax invoice but has not been verified as a Taxable Entrepreneur will get a sentence of 2 years to 6 years in jail. In addition, there will be a fine that is at least twice as much as the tax on the tax invoice, as well as evidence of tax collection, withholding, and/or payment, up to a maximum of six times that amount.

The application of the law against tax crimes must be executed carefully due to their relationship with other offenses. Norms of criminal acts in the taxation field also include provisions contained in the Criminal Code as well as other laws, rules and regulations. Hence, the punishment must be congruent with the principles of criminal law and enforcement.

The reason is that special legal rules will override general laws based on the specificity of the crime committed. As a result, the use of general penalties in the Criminal Code is aimed at crimes that are not included in the regulations against criminal acts of taxation.

The author claims that this study takes a qualitative approach, collecting data from libraries and field research done through related person interviews. The study's findings indicate that Bank XYZ must comply with the requirements of international reporting standards because it is a reporting financial institution. These standards are used to categorize data in accordance with reporting data. Some issues were discovered, necessitating the issuance of additional guidance by the Directorate General of Taxes, a competent body that governs the more specific instructions for filling out the reports.

Causes of Tax Evasion

Nickerson highlighted three dimensions of the perceived ethical scale of the aspects of tax evasion, namely three first is fairness, which is related to the positive use of money, second the tax system, related to tax rates, and third discrimination, linked to evasion under certain conditions (Nickerson et al., 2009).

A tax collection system, as a manifestation of the dedication and participation of taxpayers to the directly and jointly perform tax obligations, is needed to finance the state administration and national development (Silaen, 2015). Therefore, the official assessment system was reformed into a self-assessment system in 1983 (Friskianti & Handayani, 2014). Although one of the objectives of the tax reform in Indonesia was to increase state revenues (Ispriyarso, 2020), the self-assessment system in tax collection raises various legal problems, disputes, and fraud cases that lead to various taxation crimes (Oktaviani, 2016). The limitations of the Directorate-General of Taxes in accessing financial information have encouraged the practice of tax evasion, leading to the non-compliance of taxpayers to accurately or honestly report their income and assets.

According to Nickerson, the tax system is one of the factors that influences its evasion. TPB (Theory of Planned Behavior) explains that the behavior of taxpayers is indicated by the implementation of tax system that will form subjective norms (normative beliefs) and influence individual decisions to commit tax evasion (Nickerson et al., 2009). Kaplan's research specifically discussed tax evasion using the attribution theory and proved its attribution to external or situational factors that trigger a higher intention to commit the crime. Hence, tax avoidance behavior can be caused by internal and external factors arising from the perception of taxpayers and the impact of the environment, respectively (Kaplan et al., 1988).

The Situational Attribution Theory relates to the behavior of a taxpayer to external factors, such as the work environment, social influence (pressure), or the tax system implementation. External conditions have an impact on their perceptions of tax evasion behavior, namely the government's responsibility in using tax money, either for state expenditures or misappropriation by officials (Suminarsasi & Supriyadi, 2011).

Suminarsasi & Supriyadi affirmed that the improvement of the tax system increases the perception of tax evasion as unethical behavior and vice versa (Suminarsasi & Supriyadi, 2011). McGee et al. (2008) argued that the behavior is considered ethical when the tax rate is high, the government is corrupt, and the system is unfair (McGee, R. W., Ho, S. S., & Li, 2008). Therefore, the driving factors for this phenomenon are the wastage of the collected funds, an unfair tax system, and the government's discrimination toward certain groups (Nickerson et al., 2009). Also, the lack of public trust in the government or tax system causes evasion (Wahyuningsih, 2015), due to poor information regarding the allocation of the annually received funds.

One of the modes of tax avoidance is transferring profits and saving money in tax havens or Offshore Financial Centers (Sudjarwadi, 2017). Based on the Tax Justice Network report, Indonesia loses approximately US$ 4.86 billion per year, equivalent to IDR 68.7 trillion, due to tax evasion (Fatimah, 2021). The total loss caused by corporate taxpayers reached US$ 4.78 billion or IDR 67.6 trillion, while individual taxpayers led to losses of US$ 78.83 million or IDR 1.1 trillion.

Meanwhile, multinational companies transfer profits to tax haven nations to circumvent disclosing the actual amount of profits earned from the country where the business is located, allowing such entities to pay less tax than appropriate. The tactic used by upper-class individual taxpayers involves hiding their assets and income abroad to avoid the reach of the law in their country.

In connection with tax avoidance, the government made a policy known as "Tax Amnesty." One of the purposes is to ensure taxpayers bring their wealth stored abroad into the country by paying a predetermined ransom. Although many have declared their assets, the state's income is still below target, particularly from repatriation, which increases new tax subjects and objects but has not fulfilled the element of tax amnesty receipts (Harvelllian, 2017).

Based on the 2018 tax amnesty program, the 5 tax havens used by Indonesians are Singapore, the British Virgin Islands, Hong Kong, Cayman Island, and the Australia (Sub Direktorat Bantuan Hukum Direktorat Peraturan Perpajakan II, 2018). The assets in Singapore were estimated to reach 60% of the total wealth of Indonesian citizens abroad (Akmam, 2017).

The Role of Automatic Exchange of Information (AEoI) Role in Investigating the Occurrence of Tax Evasion

The Indonesian government has committed to improving its taxation system by joining the Automatic Exchange of Information (AEoI) initiative, which began in September 2018. Through the Directorate-General of Taxes (DGT), the government started an automatic information exchange system facility or AEoI between countries to detect and track potential taxes abroad. Before this system, the exchange of information regarding to taxpayer data was first performed by the United States (US) government through the Foreign Account Tax Compliance Act (FATCA) (Akmam, 2017).

Consequently, AEoI is a plan of the G-20 countries, initiated by the Organization for Economic Cooperation and Development (OECD). The G-20 leaders agreed on the cessation of banking secrecy and eliminated tolerance for countries or territories that protected tax evaders and other white-collar crimes. The motivation for this decision was the impact of the great financial crisis, which made developed countries seek the return of funds taken by tax avoiders (Chairil Anwar Pohan, 2017).

AEoI functions through the exchange of the financial data of foreign nationals living in a country between the tax authorities. The member countries send and receive pre-agreed information annually without making special requests. AEoI is necessary because it allows tax authorities to monitor and investigate banking transactions by taxpayers abroad. In Indonesia, the Directorate-General of Taxes has difficulty requesting the financial data of its citizens because it collides with regulations regarding banking secrecy. Due to the confidentiality of data concerning cross-country transactions, the government requires active cooperation with other countries in order to exchange data related to tax evasion and tax avoidance.

At the 2009 London Summit, the G-20 Leaders emphatically declared the era of banking secrecy over and mandated the OECD design an information exchange system to end tax evasion (Mattias Vermeiren & Wouter Lips, 2016). Hence, AEoI has become a new global standard to reduce tax avoidance. In Indonesia, the system is regulated by Law Number 9 of 2017 concerning Stipulation of Government Regulations in Lieu of Law Number 1 of 2017 concerning Access to Financial Information for Tax aims to become Laws. After its implementation, AEoI is expected to enhance tax compliance, thereby increasing the potential to increase state revenues from taxes (Onasis, 2019).

Investigations of Tax Crimes

Investigations in the taxation field are conducted to seek, collect, confiscate, and process evidence, which will enable the detection of suspects.

Based on the Circular of the Directorate-General of Taxes No. SE-06/PJ/2014 concerning Guidelines for the Implementation of Criminal Investigations in the Taxation Sector (SE-06/2014), evidence concerning the tax type and amount will be confiscated by investigators. This will be used in the investigation, prosecution, and trial of tax crimes. Evidence is defined as objects in the form of books, including the results of data processing from electronically managed bookkeeping or online application programs, notes, documents, information, etcetera. This constitutes the basis, means, and/or results of bookkeeping, recording, or documentation directly or indirectly related to the business or work of the taxpayer or person suspected of a tax crime. The evidence is also interpreted as proof that has been processed and has power in judgment and law.

According to attachment SE-06/2014, criminal evidence in the taxation field includes deeds of establishment, articles of association, by-laws and their amendments, such as notification letters (SPT), financial statements, audit reports, and tax payment slips, alongside agreements, contracts, and statements. Other tax dispute evidence comprises planning information, invoices, vouchers/source documents, meeting minutes, inauguration letters of taxable

entrepreneurs, bank statements, bank deposit proofs, receipts, information on the flow of goods and money, as well as export and import documents. Export and import documents include notifications, telegraphic transfer, bill of lading, and letter of credit, along with outward and inward manifest. Other items include organizational structures, Standard Operating Procedures (SOPs), third-party statements, minutes of witness examinations, and expert statements.

Tax investigators are generally required to find evidence to convince judges in deciding criminal cases. Although at least two valid pieces of evidence are needed to strengthen the evidence of tax crime, the investigator should obtain as much proof as possible due to the possibility of loss during the trial process. Article 184 paragraph (1) of Law Number 8 of 1981 concerning the Criminal Procedure Code (KUHAP) stated that valid evidence includes witness, expert, and defendant statements, letters, instructions, and the statements. According to the law, only legal evidence can be used to prove a tax crime.

Therefore, the AEoI scheme can be used to collect evidence of bank accounts and other assets owned by citizens abroad, which have strength in judgment and law. The Directorate-General of Taxes will have access to customer data from national as well as international bank and non-bank financial institutions. Meanwhile, laws governing bank secrecy can be "penetrated" for tax purposes. This is regulated in Article 8 Attachment to Law Number 9 of 2017, which states several laws related to bank secrecy provisions become inapplicable by the establishment of a limit, "...as long as it relates to the access to financial information for tax purposes..." Therefore, the AEoI policy facilitates the investigation process, as it enables access to open data and the tracking of taxpayers who store their assets abroad.

A tax observer at the Center for Indonesian Taxation Analysis (CITA), Fajry Akbar, stated that AEoI has a fairly plays an important role in dealing with the declining the tax revenue performance caused by the pandemic. In 2020, Indonesia received financial information from 78 countries/jurisdictions for its financial account holders/taxpayers and sent related data to 71 partners (DJP Pertukarkan Data Ini Secara Otomatis Dengan Puluhan Negara, 2021). Consequently, the automatic exchange of international financial data through AEoI is starting to reap results. As of January 24, 2022, data from the Directorate-General of Taxes (DGT) of the Ministry of Finance revealed that 7,141 taxpayers have participated in the Voluntary Disclosure program. This led to tax revenue of IDR 591.87 billion of which some were indicated as hidden assets due to a lack of reports to the Directorate General of Taxes.

Conclusion

Taxes are a useful source of finance for the physical and non-physical development of the Unitary State of Indonesia. However, tax crimes often occur due to negligence and intentional acts committed by taxpayers, authorities, and third parties who fail to remit their money to the state treasury, resulting in revenue losses. Therefore, the Indonesian government is working to combat tax evasion abroad by joining countries that implement the Automatic Exchange of Information (AEoI). The government runs an information exchange system facility between countries through the Directorate General of Taxes (DGT) to identify and track potential tax evasion abroad. Tax investigators can use the AEoI scheme to collect evidence of bank accounts and other assets owned by citizens abroad, which can be processed into strong legal evidence. Hence, the AEoI system is important in increasing the probability of catching tax evaders.

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