

DETERMINATION OF THE CONCEPT OF VIRTUAL PERMANENT ESTABLISHMENT IN ELECTRONIC TRANSACTIONS TO CREATE LEGAL CERTAINTY

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Abstract

This article is intended to analyze the following issues, the establishment of the concept of virtual Permanent Establishment (BUT) and the criteria required to create legal certainty in the collection of income tax on transactions via the Internet. Based on the research results, it is known that essentially e-commerce transactions are not visible (intangible). The research aims to analyze the concept of Virtual Permanent Establishment (BUT) in electronic transactions and the required criteria to establish legal certainty in income tax collection for transactions conducted through the internet. The research method employed is a descriptive analytical approach, involving the analysis of secondary data supported by primary data related to the position of BUT in the Income Tax Law. This research utilizes a normative juridical approach, where the secondary data obtained is analyzed based on norms, rules, legal doctrines, and principles known in the field of Tax Law. Through the definition of Article 2 paragraph (5) letter p, the Government attempts to "realize" the transaction into the real thing, so that it meets the criteria of BUT, as mentioned in the OECD in the form of "place of business". In fact, the Government in terms of determining the concept of virtual permanent establishment (BUT) and criteria required to create legal certainty in the collection of income tax on e-commerce transactions, still uses the existing criteria in Article 2 paragraph (5) of Income Tax Law. However, the definition in Article 2 paragraph (5) letter p of Income Tax Law has not explained component "fixed" explicitly as required by the OECD, because it has not confirmed the limits of a certain time period, so that a server be "fixed."

Keywords : permanent establishment; virtual; transaction; e-commerce

INTRODUCTION

Along with the development of science and technology, especially communication and information technology, the number of internet users is increasing. This is evidenced by data from the e-Marketer market research institute which states that the population of internet users in Indonesia has reached 83.7 million people in 2014. The figure shows that everyone in Indonesia accesses the internet at least once every month. This puts Indonesia in 6th place in the world in terms of the number of internet users. (Oik Yusuf, 2022)

The use of the internet as a means of communication and information has a positive impact, including advancing the economy, increasing knowledge and expanding networks. This increase in internet use can be seen in the transformation of various activities. Initially, many activities were done manually, then changed to electronic, and one example is *e-commerce*.

In Indonesia, the online shopping system is divided into three channels, the first: through online stores, such as *lazada.com* and *zalora.co.id*. Second: through a *platform* that is used as a place to bring together sellers and buyers, for example Tokopedia and Shopee. Third : through social networks. With the increasing number of internet users, the popularity of social media and the increasing use of mobile phones as internet access devices, it can be predicted that *e-commerce* transactions will increase in the following years.

Thus, it can be said that with the change of conventional trade towards trade through the internet, resulting in the tendency of local business people who originally only did business in the country, to step outside the boundaries of Indonesia. Vice versa, business people from abroad with various types of business activities, will build a network of multinational companies operating in Indonesia. Based on data from the Investment Coordinating Board (BKPM), it is stated that the amount of foreign investment entering in the period January – May 2010 was recorded at 42.1 trillion rupiah, including investment in the sectors of transportation, warehousing, trade, telecommunications, electricity, water and gas, housing, industrial estates, office buildings and so on.

Referring to the picture above, it can be said that international transactions are increasing, both in number and type. This shows the increasing potential of state revenue from the tax sector, namely the increasing potential for taxation from economic transactions carried out by foreign taxpayers in Indonesia, as well as from economic transactions carried out by domestic taxpayers outside Indonesia. Furthermore, based on the principle of neutrality and fairness in the tax system, *e-commerce transactions should be taxed, just like transactions carried out conventionally, so there is no reason to exempt taxes on e-commerce transactions*. Since before the internet developed, the development of conventional trade has impacted taxation aspects, especially for source countries. This is because trade that occurs across borders has given rise to the existence of Permanent Business Forms (BUT), especially with the type of "*fixed place*" such as workshops, representative offices, branch offices and so on that allow source countries to have main taxation rights.

Unlike trade through the internet (*e-commerce*), companies can expand trade without a physical presence, because a website or server can replace it as an intermediary. This allows for the loss of taxation rights from the source country for the activity (*e-commerce* transactions). Why does this happen? The answer is because the *website* or *server* used in that activity (*e-commerce transactions*) does not meet the criteria of "*fixed place*" to make it a BUT.

Furthermore, with regard to tax collection, Adam Smith proposed the principle of tax collection called "*the four maxims*" as a condition for fair tax collection. The four maxims consist of *Equality, Certainty, Convenience of payment* and *Efficiency*. Scholars say that the principle of tax collection proposed by Adam Smith, can be interpreted as a principle that provides reasons for justifying tax collection by the state, so that tax collection becomes fair.

From "*the four maxims*" mentioned above, this paper will highlight the principle of *certainty, which will be used to answer the problem of determining the concept of virtual BUT and the criteria required to create legal certainty in collecting income tax on transactions via the internet*.

The principle of *certainty*, also called the juridical principle, contains the understanding that tax collection must have a clear legal basis or basis, so as to provide legal certainty. The principle of legal certainty itself is actually one of the principles in understanding the rule of law, namely the principle of legality. The purpose of *the certainty* principle is that in tax collection, the principle of legal certainty regarding tax subjects, tax objects, tax amounts or rates and taxation rights must be prioritized. In order to impose income tax on *e-commerce transactions*, legal certainty regarding the above must also exist. This is considering that in Article 2 paragraph (5) letter p of the Income Tax Law there is still a lack of clarity about the concepts and criteria used to categorize "computers, electronic agents and automatic equipment" (or in this paper referred to as electronic media) as one type of BUT form.

RESEARCH METHODS

The research method employed in this paper is descriptive analytical, encompassing the description and analysis of secondary data supported by primary data concerning issues related to the position of Virtual Permanent Establishment (BUT) in the Income Tax Law. The analysis is underpinned by a theoretical statement that provides a conceptual framework for understanding and interpreting the legal aspects involved.

The theoretical statement integrates relevant legal theories and concepts, offering a theoretical foundation for the normative juridical approach used in this research. This theoretical framework aids in exploring the complexities of the legal doctrines and principles associated with the concept of BUT in Tax Law.

For data collection, literature research is conducted to obtain secondary data, comprising primary legal materials, secondary legal materials, and tertiary legal materials. The theoretical statement guides the analysis by providing a theoretical lens through which the legal norms, rules, and principles are interpreted and evaluated within the context of Tax Law.

RESULTS AND DISCUSSION

Concept and Criteria of Virtual Permanent Business Form (BUT)

The main requirement for carrying out tax collection by a country is the availability of a legal basis that underlies the implementation of tax collection. The emphasis on the principle of legality to fulfill the principle of legal certainty in the field of taxation has been found in many constitutions in various countries. In Indonesia, the constitutional foundation is in Article 23A of the 1945 Constitution. But then the question arises: what is the basis for the state to have the authority to collect taxes?

Based on the Theory of State Sovereignty, it can be said that every sovereign state has the authority to collect taxes. Basically, taxes are a form of collection by the state that is coercive. (Santoso, 2003) The existence of this coercion distinguishes taxes from other levies and the coercion was born as a manifestation of the power possessed by the state. According to Rochmat Soemitro, tax sovereignty (*belastingsouvereiniteit*) is the absolute authority that exists in the state, which is exercised through the state apparatus (DPR together with the President) to make regulations to collect taxes. (Rochmat, 1977)

The issue of tax collection on transactions via the internet requires the Government of Indonesia to determine the concepts and criteria that can be used as a basis for the application of Article 2 paragraph (5) letter p of the Income Tax Law which has included computers, electronic agents, and automatic equipment (electronic media) as one type of BUT. The following description explains why the Government includes computers, electronic agents, and automated equipment (electronic media) as one type of BUT. However, it raises a vague question of whether *servers* or *websites* can be categorized as BUT.

In taxation, the rapid advancement of information technology can be a challenge and an opportunity that the Government of Indonesia must answer through its tax policy. The government through tax law must be able to make information technology the main means of managing tax administration and providing services to the taxpaying community. In addition, the Government must be able to take advantage of opportunities from using information technology as the main means in business and economy or often called *e-commerce*. The government needs to intensify and extensify taxation. If the Government can intensify and extensify taxation, it is expected that state revenue from the tax sector will increase. Given and considering this, the Government of Indonesia includes electronic media as one type of BUT through Article 2 paragraph (5) letter p of the Income Tax Law. In addition, according to the Explanation of Law Number 36 of 2008 concerning the Fourth Amendment to Law Number 7 of 1983 concerning Income Tax, states that the amendment to the law in which it amends Article 2 paragraph (5) by adding the letter p, namely: including electronic media as one type of BUT is in order to improve the fairness of tax imposition. Thus carried out the expansion of the subject and object of tax in certain matters. The changes to the law are carried out by adhering to the principles of taxation that are universally adhered to, namely fairness, ease and efficiency of tax administration, in the hope of increasing and optimizing state revenue.

Furthermore, before describing the policy of the Government of Indonesia (represented by DGT) in determining the concepts and criteria used to classify electronic media as a form of BUT, it will first describe the attitude or response of the OECD in determining the concept and criteria for a *server* or *website* as a BUT. The development of the digital economy has made it clear that it has raised challenges in the field of taxation (especially international taxation). The characterization of the digital economy, which is characterized by intangible assets, the massive use of personal data, and the challenges of determining the jurisdiction in which added value is created, has raised fundamental questions about how companies engaged in the digital economy can generate profits. How are the legal

and legal consequences related between the digital economy and the concept of source country and domicile country, as well as the characterization of income for tax purposes? (OECD, 2013)

In addition to the above, it should also be realized that although electronic trading has become more advanced, it still does not necessarily negate the conventional trading legal system. Therefore, all applicable legal mechanisms remain essentially in force, including in taxation unless otherwise provided by a law that specifically excludes them. (Edmon, 2004)

In other words, if there is indeed no additional new tax conception related to trade through the internet, then it means that trade through the internet must also not reduce the tax conception in the tax law system that has been in force. The same thing but in a different expression was put forward by Nufransa Wira Sakti who said that people think that e-commerce transactions *are not taxed, even though in principle there is no difference between buying and selling transactions* in e-commerce with conventional buying and selling transactions. So both must be taxed in accordance with applicable provisions. (Nufransa. 2014)

Based on the opinion that e-commerce buying and selling transactions and conventional buying and selling transactions must both be taxed, specifically for individual e-commerce actors or entrepreneurs, the imposition of taxes can be equated with "conventional stores." However, the problem arises when income tax will be imposed on e-commerce entrepreneurs whose physical presence does not exist in the country concerned (in this case Indonesia).

So far, the existing terms of reference regarding BUT are that BUT requires a physical presence for its business activities in the source country, except for independent agents. Therefore, doubts arise, whether servers, computers or automated equipment (electronic media) used in e-commerce transactions can cause BUT?

At the OECD forum, e-commerce has long been a hot issue. Paragraphs 42.1 to 42.10 are inserted in Article 5 of the OECD commentary specifically to discuss e-commerce. In principle, the OECD sees the development of rules on conventional transactions can be applied to e-commerce, and that the rules should remain neutral (not favoring or favoring either type of transaction). This is in accordance with the principle of taxation on e-commerce. In OECD Model Tax Convention Article 5 (1), it is stated that for the purposes of this agreement, the term BUT means a particular place of business where all or part of a company's business is conducted)

Based on the OECD statement, it can be said that the notion of the existence of the place of business must be "fixed." But whether a piece of equipment (server, computer or electronic media) must remain within the area, or the location of the equipment is sufficient to be considered in one "fixed" place.

As required that because the place for this business is fixed, it must also be prepared in such a way as to last a long time. However, if this permanent place is later abandoned for certain reasons, such as the taxpayer in question dying or change in the place of equipment, then the place is still considered a BUT.

Thus, it can be said that through its publication summarized in the Model Tax Convention on Income and on Capital – July 2008, the OECD has included e-commerce issues in the commentary section of article 5 (as mentioned above) which in essence is more or less as follows :

1. It makes a distinction between computer equipment (*hardware*) and the data and *software* stored in it. *Software* is for example in the form of a *website*. If referring to the criteria "must be permanent" then *the website* does not meet the criteria of '*place of business*' to be classified as one of the BUT. But the server as a place where the data or software is located is a set of computer equipment that has a physical location, so it meets the criteria of a 'fixed place of business' from the company that operates the server.
2. The distinction between the two things is necessary, the reason is because there is a possibility that the company that operates the server is different from the company that does business through the website contained or located on the server. This is possible when a company cooperates with an Internet Service Provider (ISP) by placing certain spaces on the ISP company's server for its website purposes. When that happens, the tenant company does not meet the criteria of '*place of business*' even though they rent certain space on the ISP company's server, because in essence the *website* is intangible. Unlike the case when the *website* is on a server that belongs to the company itself or can also be through server rentals to other companies, then when this happens, the BUT criteria can be met because of the '*place of business*'. To become a BUT, in addition to having to meet the criteria of '*place of business*' must also meet the criteria of '*fixed*'. This "fixed place of business" criterion is met when the server is located in a certain place for a certain period of time or period, in order to be classified as fixed ('*fixed*').

3. When a company operates computer equipment in a certain place, a BUT can be formed even if there are no employees of the company operating that equipment.
4. If *e-commerce* operations through computer equipment placed in a particular country are limited to *preparatory* and auxiliary activities, it does not give rise to BUT. These *preparatory* and *auxiliary* activities include:
 - a. Only help in the form of communication links, for example between suppliers and consumers,
 - b. Used for *advertising*,
 - c. Collecting data for the company,
 - d. Provide information.
5. However, when these *preparatory and auxiliary functions become a very essential and significant part of the company's business activities or core functions, which are carried out through computer equipment and meet the provisions of the 'fixed place of business' then the server falls into the definition of BUT.*

Article 5 (1) of the OECD Model mentioned above is inseparable from Article 7 (1) which states that corporate profits from an approved State will only be taxed in that State, unless it carries on business in another State Party to the Agreement, through a BUT domiciled there. If the company carries on its business as referred to above, then the profits of the company may be taxed in other countries but only on the share of profits derived from the BUT.

The matter described above regulates the determination of the concept of BUT in relation to the taxation rights of the source country on income attributed by BUT. BUT can be considered to appear if there is a *server* that is located somewhere and is fixed. Some argue that a *server* cannot be defined as a place of business. The reason for this is that as a *server*, its location or existence has nothing to do with the source of income. For those who hold this view, the *server* is only considered as a facilitator for transactions between the seller and the buyer. In other words, *the server plays a passive role, mainly due to the use of server functions in advertising, processing orders and authorization credits that are shared between servers located in different countries.*

On the other hand, if you look closely, *servers*, computers can substantially be said to be places of business. The reason is because the *server* is a real piece of equipment. This view arises because in Paragraph 2 of the *OECD Model Commentary Article 5* refers to machinery and equipment that can be said to be a place of business, and in that article indicates that only substantial machinery and equipment can be considered a place of business. This is a description of the OECD's response to the determination of the *concept* of the *server* as a BUT and it turns out that after careful examination the OECD response was adopted by the DGT in determining the concept and criteria of an electronic media as a BUT.

Furthermore, by slightly expanding the view of virtual BUTs in three neighboring countries (Singapore, Malaysia and New Zealand), the following description contains the views of the governments of Singapore, Malaysia and New Zealand in determining the position of *servers*, computers or electronic media as a BUT.

Looking at the Double Taxation Avoidance Agreement (P3B) between Indonesia and Singapore, Indonesia with Malaysia and Indonesia with New Zealand, the following were obtained:

First, regarding the concept of BUT proposed by the three countries. It turns out that the core concept of BUT in the three countries is the same, namely: "BUT is a permanent place of business used to run part or all of the business of the company."

Second, regarding matters that do not include BUT, it turns out that there are similar opinions from the three countries, namely that those that do not include BUT are:

- a. Use of various facilities solely intended to store or exhibit goods or belongings belonging to the company;
- b. Management of a permanent place of business solely for the purpose of purchasing merchandise or to collect information for company purposes;
- c. Management of a permanent place of business solely for advertising purposes, for activities that are preparatory or supporting for the interests of the company.

Third, regarding the conditions that can be used to state that a company is considered to have a permanent establishment (BUT) in another country is if :

- a. The Company carries out surveillance activities in other countries for more than 6 months in connection with a construction, installation or assembly project being undertaken in that other country; or
- b. Major equipment located in other countries used or installed by, for or under contract with the company.

Furthermore, if you pay attention to the guidelines for the imposition of income tax on *e-commerce* transactions made by Singapore, Malaysia or New Zealand, it can be seen that the definition of *servers*, *websites* according to the three countries is as follows: Singapore and Malaysia can be said to provide the same understanding of servers and websites, namely:

- a. a server is defined as a device (including computer hardware and its operation and basic application software) on which the *e-commerce* application is located or operated;
- b. *Website* is defined as a collection of information, which is linked together and available on an electronic network that allows transactions to be carried out.

Both of the above understandings show that Singapore and Malaysia in determining the concept of BUT on a *server*, still use the criterion of "*fixed place of business*" as used by the OECD.

Furthermore, if you pay attention to the guidelines for imposing income tax on *e-commerce* transactions made by New Zealand, it can be said that New Zealand does not provide an understanding of *servers* or *websites*. The New Zealand government makes corporate residency the basis for determining the company as a New Zealand "resident". Next, test the company's residency using:

- a. management centre or
- b. control of the company (this is in view of advances in information technology that allow easily transferring information).

This shows that the New Zealand Government adopted the '*fixed place of business*' criterion as found in the *commentary section of article 5 of the OECD*.

Based on the description above, it can be said that:

- a. The Government of Singapore and the Government of Malaysia adopted the definition of *servers* and *websites* as stated by the OECD;
- b. The New Zealand government in imposing income tax on *e-commerce* transactions looks more at company residencies that are tested using a central measure of management or company control.

Moving on from this reality, it can be said that: the OECD's response through its publication summarized in the *Model Tax Convention on Income and on Capital – July 2008* adopted by the Governments of Singapore, Malaysia and New Zealand which appears from the imposition of income tax on *e-commerce* transactions made by each of these countries.

For the Government of Indonesia, it is hoped that (while waiting for the revision of the Income Tax Law) it can first issue guidelines for the imposition of income tax on *e-commerce transactions*. In making these guidelines (especially regarding the concept and determining criteria of an electronic media as a BUT) can adopt what Singapore and Malaysia do; namely by adopting the concept of *servers* and *websites* that must meet the criteria of "*fixed place of business*"

By studying *Singapore's Income Tax Guide on E-Commerce*, *Malaysia's Guidelenes on Taxation of Electronic Commerce*, and *New Zealand's Guidelenes on Taxation of Electronic Commerce*, it can be said that the mechanism for collecting income tax on *e-commerce* transactions in these three countries shows:

- a. The approach used by Singapore and Malaysia in imposing income tax on *e-commerce* transactions is a territorial approach, namely: tax is imposed on income earned in or originating from the country concerned, or received in the country concerned, or from outside the country concerned;
- b. New Zealand uses two approaches to imposing income tax on *e-commerce* transactions: the approach based on the residence of the *company on which the company is determined as a "resident" of New Zealand and the source of income approach*.

For the Government of Indonesia, in this case the Directorate General of Taxes (DGT), in the mechanism of collecting income tax on *e-commerce transactions*, may be able to complement it with a territorial approach (as used by Singapore and Malaysia). The reason is because the territorial approach seems to be in line with the company's residence (residency) approach, and the territorial approach provides more convenience in determining income on *e-commerce transactions* that can be subject to income tax. This is also in line with what has been regulated in the Decree of the Director General of Taxes Number KEP-701/PJ/2001 concerning the Determination of Private Persons' Residence and Position of Entities, which points to:

- a. the place of the company's leadership office and administrative and financial center as stated in the Deed of Establishment,
- b. the office of the head of the company, and
- c. place of residence according to the actual state of affairs determined by the Director General of Taxes.

In addition, instructions about the place of residence of an entity can also be obtained from:

- a. place of statuter position in accordance with the Standing Act,

- b. place of central management or management effectively,
- c. real or registered location of the head office,
- d. the place of domicile of the administrator, and
- e. the meeting place of the leadership.

Thus it can be said that the criteria for place of residence imply that "all entities deemed to be domiciled in Indonesia, regardless of their place of incorporation, are Indonesian domestic taxpayers (WPDN)." Furthermore, from these implications it appears that the criteria for place of residence are more effective than the criteria for nationality, and this is made better with the support of territorial approaches such as those taken by the Government of Singapore and the Government of Malaysia.

The Attitude of the Government of Indonesia in Determining the Concept and Criteria for Determining Electronic Media as BUT.

There has been progress in the Income Tax Law, namely with the inclusion of computers, electronic agents, or automated equipment (or electronic media) as a type of BUT. This is contained in Article 2 paragraph (5) letter p of Law Number 36 of 2008 concerning Income Tax. Actually, this is an affirmation of what has been defined in the Income Tax and P3B Law, namely "a fixed place of business through which the business of enterprise is wholly or partly carried on." However, as mentioned above, this actually causes problems.

Clearly, Article 2 paragraph (5) letter p of the Income Tax Law states that computers, electronic agents, or automated equipment that are "owned, rented, or used" by electronic transaction operators 'to carry out business activities' through the internet as one type of BUT. The term in the OECD commentary is 'at the disposal of', but in the Income Tax Law it is only mentioned as a *dedicated server*. Computers, electronic agents or automated equipment that are included as one type of BUT without any other conditions; will make it difficult to identify, because it can give rise to very open interpretations. Gunadi (2007) This is supported by Gunadi's opinion which states that permanent business forms (BUT) consist of 4 types, namely:

- a. BUT facilities or assets,
- b. BUT activity,
- c. BUT keagenan, dan
- d. BUT insurance company.

Of the four types of BUT, *dedicated servers* are included in the BUT facilities or assets. This is also in accordance with the Explanation of Article 2 paragraph (5) of the Income Tax Law which states that *dedicated servers* are included in the BUT which contains the understanding of a *place of business* as well as warehouses, land, buildings and so on. BUT *asset type* has a place of business that is its own, or rented from other parties or also by other means (for example facilitated by other parties) for the use of the place of business.

In relation to the above, the question arises: when will the taxation rights become the property of the source country? The answer that can be given is that the right to taxation of the permanent establishment (BUT) begins not at the time of the existence of the facility, but begins or begins since the entrepreneur concerned runs a business or conducts business activities using the facility. Conversely, the question relates to when does the taxation right of the source country expire? The answer is: the source country's employment rights terminate upon closure or termination of such businesses and activities.

Thus, it can be said that the determination of the concept and criteria of an electronic media (*server*) as a permanent establishment (BUT) that can be subject to income tax by the source country, is not at the time of the existence of the facility, but begins or begins since the entrepreneur concerned runs a business or conducts business activities using the facility. Likewise, the expiration of the taxation rights of the source country is at the time of closure or termination of the business and activity.

In addition to Article 2 paragraph (5) letter p of the Income Tax Law, there are other regulations that need to be considered relating to the determination of the concept and criteria of a permanent establishment (BUT), namely the Regulation of the Director General of Taxes number PER-43/PJ/2011 concerning the Determination of Domestic Tax Subjects and Foreign Tax Subjects, which in Article 5 paragraphs (1) and (2) regulates:

- a. A Permanent Business Form (BUT) as referred to in paragraph (1) is a permanent place of business used by foreign tax subjects, individuals or entities, as referred to in Article 4 paragraph (1) to carry out activities or business in Indonesia.
- b. Fulfillment of tax obligations of permanent establishments (BUT) as referred to in paragraph (1) begins when receiving and/or obtaining income sourced from Indonesia through permanent establishments (BUT) in Indonesia.

After looking at the description above, it is clear that in tax regulations, an entity is considered to meet the criteria for a Permanent Business Form (BUT) if physically, the entity is located in Indonesia.

Basically, *e-commerce transactions* are invisible, so through the definition of Article 2 paragraph (5) letter p it seems that DGT is trying to "manifest" the transaction into tangible things, so that it meets the concept and criteria of permanent establishment (BUT) as mentioned in the OECD in the form of "*place of business*." However, according to the author, the definition in Article 2 paragraph (5) letter p of the Income Tax Law has not clearly explained the criteria of "*fixed*" as required by the OECD, because *there has not been affirmed the limit of a certain period of time, which makes a server "fixed"*.

The determination of the time period limit may be able to use the time limit in P3B which concerns the circumstances that can be used to declare a company is considered to have a BUT in another country is if:

- a. The company carried out surveillance activities in other countries for more than 6 months; or
- b. Major equipment located in other countries used or installed by, for or under contract with the company.

Actually the criteria of this equipment (computers, *servers* and other automated equipment) can be interpreted differently. The OECD does clearly state in article 5 point 4 that equipment that is only used as storage and to exhibit goods cannot be categorized as BUT. However, in the Income Tax Law, it is implied that the place, be it a small room or a larger office, or the place is owned or only rented, where an overseas company has the right to use the place, then the criteria for physical assets have been met. Including if the equipment is in Indonesia even if only as a storage place or to exhibit goods. But according to researchers, it is also necessary to test whether the equipment contributes to the income earned by foreign taxpayers (WPLN), so that if both criteria are met then the equipment can be considered as BUT.

Another situation in question is the situation that presupposes that the *server* contributes to generating income or profits for foreign taxpayers (WPLN) and the income or profit is sourced from Indonesia. If the income or profit obtained comes from Indonesia, but the *server* is only a support or support, then the requirements for a permanent business form (BUT) cannot be met. This is in line with point 4 of the OECD opinion summarized and published in the *Model Tax Convention on Income and on Capital* – July 2008. However, if the "nature as a support or support" turns out to be a very essential and significant part of the company's business activities or the company's core business carried out through computer equipment and meets the provisions of "*fixed place of business*" then the *server* falls into the definition of BUT. This is in line with point 5 of the OECD opinion published in the *Model Tax Convention on Income and on Capital*.

Unlike the case with *servers* controlled by other parties or third parties as Internet Service Providers (ISPs), and the ISP only carries out its business activities based on contracts for *storage or network maintenance and does not have the authority to close or open outside the contract, then the server is not a BUT*.

Regarding the website, it is *generally mentioned that* the website is a set of information pages provided through the internet route, and can be accessed throughout the world as long as it is connected to the internet network. Because the website only contains a collection of data, there are no physical assets, so based on these criteria it cannot make the *website* a BUT.

Thus, the *server can be categorized as a BUT if the server* is really controlled by WPLN and is located in Indonesia. In addition, the *server* is not only a means of supporting or supporting, but contributes income or profits attributable to WPLN.

Internet Service Providers (ISPs) cannot yet be categorized as BUTs. The reason is because a *third party controls the server*, the ISP cannot represent WPLN and has no authority outside the contract with WPLN, so the BUT criteria are not met.

Furthermore, it can be said that because in Indonesia the determination of the concept of a permanent establishment (BUT) is still based on the old concepts and criteria, which are not easily applied to the determination of *servers or websites (or electronic media)* as a permanent business form (BUT), the Government issued regulations that require all service providers to *be over the top (OTT)* that wants to operate in Indonesia must be in the form of a BUT. This rule applies to all OTT operators, as well as *for e-commerce* players from abroad operating in Indonesia are required to open representatives in Indonesia, such as *Facebook, Google and Twitter*.

The distinction between the two things (OTT organizers and *e-commerce* players) is needed because of the possibility that the company that operates the *server is different from the company that does business through the website contained in the server*. This is possible when a company cooperates with an *Internet Service Provider (ISP)* by placing certain *space* on the *server* for the purposes of *its website*. When that happens, the company does not meet the criteria of '*place of business*' even though they rent certain *space* on the *server* because the *website* is invisible. Unlike the case when the *website* is on a *server that belongs to the company itself (it can also be through a server*

rented by the company), then when this happens, the possibility of BUT criteria can be met. The reason is because of the *'place of business'*.

Thus, to become a *server* as a BUT, in addition to having to meet the criteria of *'place of business'* must also meet the criteria of *'fixed'*. This "fixed place of business" *criterion is met when the server is located in a certain place for a certain period of time/period in order to be classified as 'fixed'*.

Based on the description above, it can be said that in fact DGT in determining the concept of virtual BUT and the criteria required to create legal certainty in collecting income tax on transactions via the internet, still uses the old concepts and criteria contained in Article 2 paragraph (5) of the Income Tax Law, namely:

- a. the physical presence of the place of business;
- b. the existence of activities or business activities carried out in Indonesia;
- c. the existence of non-independent agents acting for and on behalf of individuals or entities who are not domiciled or domiciled in Indonesia.

As mentioned above, in the author's opinion, the criteria contained in Article 2 paragraph (5) of the Income Tax Law are still incomplete to be used in determining a *server* or *website* to be *fixed*, so that the provisions of Article 2 paragraph (5) of the Income Tax Law (especially with regard to letter p) need to be included regarding the limitation of a certain period of time that can provide legal certainty about when the time of a computer, *server*, and other automated equipment can be categorized as a BUT and when the corresponding BUT expires.

In the previous description it has been mentioned that the time period limit for a computer, *server*, automated equipment can be categorized as one of the BUTs, it is necessary to use the criteria contained in P3B which concerns the circumstances that can be used to certify that a company is considered to have a BUT in another country.

Furthermore, the problem will be a little complicated when the *server* is not only used to serve trading activities in Indonesia, but also used to serve trade activities outside Indonesia. This raises the question: will income received by BUT *dedicated servers* from outside Indonesia be taxed in Indonesia, or will income be taxed only from Indonesia?

To answer this problem, it is also necessary to pay attention to the provisions regarding what types of BUT income are subject to tax contained in Article 5 of the Income Tax Law, and how to attribute (allocated as taxable income) income to BUT, which includes attribution:

- a. Based on facts (*attribution by fact*) is attribution based on income from businesses or activities that are actually pursued by BUT.
- b. Based on *force of attraction* on income from the sale of goods or delivery of similar services (with those performed by BUT) by its head office.
- c. Based on the *effectively-connected income relationship of income* as referred to in Article 26 of the Income Tax Law (e.g. interest, dividends, royalties) obtained by the head office from Indonesian sources if there is an effective relationship between the income and the activities or activities of the income provider.

By considering the three types of income sources, especially by looking at point one, the question in the paragraph above can be answered that *server income from* other countries included in the definition of BUT income, can be subject to income tax in Indonesia, even though it is not sourced from Indonesia.

In the end, it can be said that it is the duty of DGT to make rules on the determination of concepts and criteria as well as time period limits that can be used as a guide to classify electronic media as one of the BUTs. This is because the three countries (Singapore, Malaysia, and New Zealand) that are used as comparisons in terms of regulating *e-commerce transactions*, and in terms of determining the location or position of *the server*, already have their rules used as guidelines. In Singapore, it is called the *Income Tax Guide on E-Commerce*, in Malaysia it is called the *Guidelenes on Taxation of Electronic Commerce*, and in New Zealand it is called *the Guidelenes on Taxation of Electronic Commerce*.

CONCLUSION

The above presentation has tried to explain the determination of the concept of virtual BUT and the criteria required to create legal certainty in collecting income tax on transactions via the internet. In fact, what DGT does in determining the concept of BUT is still based on:

1. The old concept, which requires a physical presence for its business activities in the *source country*, except *independent agents*; and
2. The criteria used are the old criteria, namely the existence of a *'place of business'* and the *'fixed' criteria*.

The use of old concepts and criteria was not easily applied to determine the concepts and criteria of electronic media as a BUT. This happens because in the old concept has not been affirmed the limit of a certain period of time, to categorize a *server* (electronic media) as "fixed".

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