

ANALYSIS OF CRIMINAL ASPECTS OF BENEFICIAL OWNERSHIP IN TAX TRANSFER PRICING

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Abstract - *Transfer pricing is a pricing method utilized by global companies to oversee transactions amongst subsidiaries. Beneficial Ownership refers to the rightful ownership of an asset or property. In this examination, we will scrutinize the wrongful utilization of Beneficial Ownership in transfer pricing as a corporate crime. We will explore how this scheme can be utilized by multinational corporations to decrease their tax obligations, and how it can be considered as an act of corporate wrongdoing. This investigation will examine how criminal law can be implemented to curb this practice and enforce lawful measures.*

Keywords: *Beneficial Ownership, Transfer Pricing, Taxes, Crime Corporation, Aspect Criminal*

INTRODUCTION

Presently, illegal economic activities frequently utilize legal entities as a means to commit financial crimes, such as disguising the origin of deceitful earnings through cash-based business structures and other lawful methods. The fraudulent operations are often carried out under the guise of a limited liability company, foundation, or other forms of business entities. A type of business entity known as a Limited Liability Company (LLC), which is commonly referred to as a corporation, is frequently utilized by criminals to conceal their identities and illicitly obtained funds. Due to the involvement of individuals who commit white-collar crimes, the process of tracing these illegal activities is intricate and complicated (Wheeler & Rothman, 1981).

Multinational corporations employ transfer pricing as a means of managing the movement of income between their branches located in distinct nations (Purwanto & Tumewu, 2018; Rezky & Fachrizal 2018; Harimurti, 2007). This method is applicable for minimizing the amount of taxes that businesses have to pay (Mangoting, 2000; Saraswati & Sujana, 2017; Khotimah, 2019). Transfer pricing can be employed for the purpose of carrying out unlawful activities by corporations as well.

The term "universally transfer pricing" is used within a company to guarantee that the cost of transferring an object or service between taxpayers who have a unique relationship is fair and consistent (Irfan, 2021). While what is meant by special relationship has been explained in Law No. 36 of 2008 concerning Income Tax described in the provisions of Article 18 paragraph (4), between taxpayers are said to have a special relationship when:

1. Taxpayers who have a minimum of 25% equity in other taxpayers, either directly or indirectly, or have connections with at least 25% equity in two or more taxpayers, as well as relationships between two or more taxpayers, fall under this category;
2. Either directly or indirectly, one taxpayer holds control over other taxpayers, or there exists control over two or more taxpayers;
3. A family connection exists between individuals through either direct consanguinity or matrimony, extending either in a linear fashion or one degree laterally.

Transfer pricing has a criminal component which is linked to the notion of beneficial ownership (BO). The term BO pertains to identifying the legitimate possessor of an asset or financial wealth (Novariza, 2021). BO can be utilized in transfer pricing to conceal real revenue from taxation (Budiarto, 2018). The focus of this article is to elaborate on the criminal element of BO in transfer pricing and its potential for facilitating corporate offenses.

Multinational companies can utilize the concept of Beneficial Ownership to lower their required tax payments (Ferdiawan & Firmansyah, 2017). One way to achieve this is by modifying transfer prices among affiliates, resulting in a lower tax obligation. This conduct can be regarded as a violation by the corporation since it's attempting to evade payment of due taxes.



Following the release of Presidential Regulation Number 13 of 2018, which pertains to the Implementation of the Principle of Identifying the Beneficial Owners of Corporations as it relates to the Prevention and Eradication of Money Laundering and Terrorism Crimes, commonly referred to as Presidential Decree Number 13 of 2018, the definition of beneficial ownership has been established. This definition states that beneficial owners are individuals who have the power to appoint or remove directors, commissioners, administrators, supervisors, or other decision-makers in the corporation. They also possess the ability to oversee the corporation and receive direct or indirect benefits from it. Furthermore, they are the true owners of the corporation's funds or shares.

To put a stop to this practice, criminal law can be applied, with governments enacting regulations on transfer pricing and disallowing companies from taking advantage of beneficial ownership to lower their tax liabilities. Companies found violating the regulations would suffer legal consequences as per the law's enforcement provisions.

RESEARCH METHOD

The study adopted a normative juridical research approach to examine the criminal implications of applying beneficial ownership in transfer pricing for tax purposes, with a focus on corporate offenses. This research will investigate the relevant legislations in Indonesia, which encompasses the Tax Law, Tax Regulations, and other pertinent directives. Furthermore, the research criteria are analytical descriptive in character, with the goal of presenting a thorough and all-encompassing view of enhancing the implementation of transfer pricing practices using beneficial ownership as a type of corporate wrongdoing in the tax sector. Types and sources of data based on secondary data, especially sourced from primary legal materials, namely legal materials whose contents are binding because they were issued by the government in the form of statutory regulations that have links with research objects including:

- a. Code of Civil law
- b. Criminal Code
- c. Law Number 8 of 1995 concerning Capital Markets
- d. Law Number 25 of 2007 Concerning Investment
- e. Law Number 40 of 2007 Concerning Limited Liability Companies
- f. Law of the Republic of Indonesia Number 8 of 2010 Concerning Prevention and Eradication of Money Laundering Crimes
- g. Presidential Regulation Number 13 of 2018 Concerning Application of the Principle of Recognizing Beneficial Owners of Corporations in the Context of Prevention and Eradication of Money Laundering Crimes and Terrorism Funding Actions
- h. Presidential Regulation Number 44 of 2015 concerning the Ministry of Law and Human Rights
- i. Decree of the Board of Directors of PT Bursa Efek Indonesia Number: Kep-/BEI/-2018 Concerning Regulation Number I-V Concerning Special Provisions for Listing of Shares on the Acceleration Board
- j. Regulation of the Head of the Center for Financial Transaction Reports and Analysis Number: PER- 02 / 1.02 / PPATK / 02 / 15 concerning Categories of Service Users Who Have the Potential to Commit the Crime of Money Laundering

The law that supports the primary material law is known as secondary material law while the law that supports the secondary material law is known as tertiary material law. To collect data, library studies are carried out and qualitative data analysis is performed without the use of formulas as per the research guidelines.

RESULTS AND DISCUSSION

1. Factors Causing Transfer Pricing as a Form of Corporate Crime.

The OECD MTC 2014 provides a clear explanation of how the related beneficial owner is closely connected to double taxation avoidance agreements (P3B) relating to taxes. In matter this, BO refers to the recipient income you have discretion For use nor utilise income received in



accordance decision myself, as well without exists constraint will exists bond contract or obligation in a manner law For forward income the to party other.

The corporate business entity contributes significantly to the national economic development through its donations, and it not only absorbs employment sectors but also contributes to the state revenue through taxes (Manek & Badrudin, 2017). Tax refers to the obligation of individuals or organizations to provide financial contributions to the state as mandated by law, which is aimed at supporting national development and other public services, without any quid pro quo or direct benefit to the taxpayers (Moeljono, M. (2020).

Tax can be defined as several different elements, including: (1) payments made to the government; (2) taxes that are mandatory and enforceable; (3) a payment method that must follow relevant laws and regulations; (4) payment of taxes without receiving a direct corresponding benefit; and (5) being utilized for the general funding of the state's internal interests, including responsibilities such as governance and improving overall well-being (Oelangan, 2010).

- 1) Search for Self-Gain: The utilization of transfer pricing by management can result in personal financial gain. By shifting company revenue to other affiliated parties under management, this can be achieved.
- 2) Reducing Taxes: Transfer pricing can be employed in order to lower the amount of taxes that a company is required to pay. To achieve this objective, income can be transferred from the company to another entity that is subject to lower tax rates.
- 3) The finance report can be manipulated through transfer pricing, wherein the income from the company can be transferred to other parties with varying financial reports. Such an act can be employed to mask the loss incurred or boost the profits.
- 4) Conceal Transactions: Transfer pricing can also be employed to conceal transactions by shifting earnings from the business to a third party that is not reflected in the financial statement. This approach may be utilized to hide unwanted transactions.
- 5) Price manipulation through transfer pricing is feasible, wherein the income can be shifted from one company to another by paying lesser prices. This tactic can be employed to lower the production expenses and boost earnings.

2. Application Principles of Beneficial Ownership in the Field Taxation

The English Trust Law initially established the definition of a beneficial owner (BO) as someone who meets the qualifications to be an owner, but does not necessarily claim ownership through legal means (legal title) (bin Nik Abdul et al., 2015). The Organization for Economic Cooperation and Development (OECD) has established an international definition of BO (Woodward, 2009). According to this definition, BO refers to the person who ultimately benefits from the entity. The beneficiaries are placed into three categories: (1) if the entity is a company, the BO is a shareholder or a member; (2) if it's a partnership, the BO is a partner, whether limited or general; and (3) in the case of a trust or foundation, the BO is the founder.

To apply the concept of beneficial ownership to taxation, it is important to ensure that the tax payments made by a shareholder or shareholders are correctly attributed to the rightful shareholder(s). This can be accomplished by ensuring that any tax payments made by shareholders are accurately allocated to the corresponding shareholders (Muthmainnah et al., 2019). Issues around tax evasion, money laundering, and financing of terrorism carried out through corporations are a scourge that is highly avoided by all countries in the world (Mugarura, 2018). Especially developing countries like Indonesia, which need every resource and asset they have to be able to pursue economic growth.

Therefore, as one of Indonesia's commitments in eradicating crime through corporations, the Government of Indonesia made Regulation of the Minister of Law and Human Rights No. 15 of 2019 concerning Procedures for Implementing the Principle of Recognizing Beneficial Owners of Corporations (Regulation 15/2019) as the implementing regulation of Presidential Regulation No. 13 of 2018 concerning the Application of the Principle of Recognizing Beneficial Owners of Corporations in the Context of Prevention and Eradication of Money Laundering Crimes and



Terrorism Financing Crimes (Regulation 13/2018) which has been ratified. These two regulations introduce the principle of recognizing the beneficial owner of a corporation which must be implemented by all corporations in Indonesia.

The concept of Beneficial Owner contained in Presidential Decree no. 13 of 2018 concerning the Application of the Principle of Recognizing Beneficial Owners of Corporations in the Context of Prevention and Eradication of Money Laundering (TPU) and Terrorism Crimes (TPM) (hereinafter referred to as Presidential Decree No. 13/2018) listed in Article 1 point 2 regarding the definition of Beneficiary Owners, where the emphasis is on individuals who actually own corporate funds or shares as a result of having three authorities, namely: (i) to appoint or dismiss directors, commissioners, management, supervisors, or supervisors at the Corporation, (ii) has the ability to control the corporation, and (iii) have the right to and/or receive benefits from the corporation either directly or indirectly.

In accordance with the provisions stated in Presidential Decree No. 13/2018, it can be deduced that an individual qualifies as a Beneficiary if their income or profits stem from their ownership of shares, capital, initial assets, sources of funding, or other rights amounting to more than 25% of the aforementioned, which ultimately have the potential to generate profits for the said corporation. This means that any person possessing a substantial stake in a company, either in terms of shares or financial resources, can be classified as a Beneficiary under the said Presidential Decree. Furthermore, it is important to note that being categorized as a Beneficiary does not necessarily require an individual to possess assets in the corporation. In fact, if an individual is endowed with unrestricted authority pertaining to the appointment of corporate management and corporate control, without requiring the consent or approval of any external authority or entity, they may be considered as a Beneficiary. Additionally, if an individual is the true owner of the funds channeled towards corporate ownership, they may also be classified as a Beneficiary.

In Presidential Decree No.13/2018, the range of the business organization encompasses various legal structures such as limited liability companies, foundations, associations, corporations, limited partnerships, firm partnerships, and other types of corporations which are afforded certain benefits and privileges. It is important to note that the ownership of these benefits and privileges solely belongs to the individual or person and not to the entity as a whole.

Presidential Regulation No. 13/2018 governs the concept of Beneficiary, which is distinct from the Beneficial Owner (BO) concept that is governed by the Financial Action Task Force (FATF) Recommendations. Despite the distinctive nature of these two concepts, they do share certain commonalities, as recognized by the regulation and recommendations. It can be deduced that while the regulation delineates the Beneficiary concept, it draws from the established guidelines stipulated by the FATF Recommendations in certain aspects. Therefore, the two concepts complement each other in their governing principles, and their shared characteristics provide a cohesive framework for regulatory policy. The term Business Owner (BO) has been defined as per the FATF Recommendation to encompass an individual who possesses the ultimate ownership or control of another entity and whose interests are directed by another individual. Furthermore, BO also includes persons who hold overall effective control over legal arrangements or other parties. It is pertinent to note that the terms "ultimate ownership or control" and "ultimate effective control" are significant because they imply the management and authority exercised over entities or arrangements through direct or indirect control mechanisms.

Furthermore, it is worth noting that the introduction of the Beneficiary Owner concept through Presidential Decree No. 13/2018 shares a similar underlying motivation as the previously established definition of BO according to the FATF Recommendations. Both guidelines underscore the significance of disclosing information about BOs, which is primarily incumbent upon corporations. The rationale behind this requirement is to minimize the likelihood of criminal offenders, who happen to be BOs or Beneficiary Owners, utilizing corporations as a conduit for committing criminal activities such as TPU and TPM. It is evident that the principal objective behind the enactment of Presidential Decree No. 13/2018 and the development of FATF Recommendations is to create a reliable mechanism that can thwart TPU and TPM.



Moreover, it should be noted that the method of BO disclosure, which is governed by Presidential Decree No. 13/2018, can be effectively executed through the collaborative efforts between relevant authorities and the active participation of the Beneficiary. The disclosure process serves as a crucial tool in preventing and eliminating the potential risks associated with the funding of TPU and TPM by Corporations. To enhance the effectiveness of the BO disclosure mechanism, competent authorities can share and exchange valuable information through both domestic and international channels, with due regard to the legal frameworks established in each jurisdiction. It is imperative that such exchange of information is carried out in compliance with the relevant statutory provisions set forth in both national and foreign contexts, as well as in accordance with the existing international agreements and protocols governing transnational transactions.

Furthermore, in order to guarantee that tax payments made by shareholders or stakeholders are directly ascribed to their account, the government can establish a mandatory requirement that necessitates the submission of relevant information that clearly identifies the shareholder or stakeholder. By implementing this requirement, the government can effectively ensure that every tax payment made by shareholders or stakeholders is correctly attributed to their respective account holders. This measure is critical because it provides a system of checks and balances that promotes accountability and transparency in the distribution of tax payments. Therefore, it is imperative for regulatory bodies to establish stringent policies that promote fairness and accuracy in the allocation of tax payments to shareholders or stakeholders.

3. Constraints Faced in Implementing BO in the Field of Taxation.

The income received from taxpayers' contributions not only constitutes a vital source of revenue for the Unitary State of the Republic of Indonesia, but also holds significant implications for the country's growth and progress. The contributions made by taxpayers encompass a plethora of aspects, ranging from financing infrastructure development to funding social welfare programs, all of which serve as crucial building blocks for the nation's overall development and prosperity. As such, the importance of taxpayers' contributions cannot be overstated, and their contribution towards the country's sustainable development cannot be understated (Fjeldstad, 2014; Senduk et al., 2021). On one hand, tax authorities prioritize the placement of taxes as a budgetary function which aims to accumulate maximal amounts of money for the state treasury. On the other hand, they deal with corporations as taxpayers with a view to maximizing their profits. This often leads to beneficial ownership transparency policies which are aimed at optimizing revenues from the tax sector. However, business actors perceive these policies negatively, as they are associated with an increase in the overall tax burden that must be borne by them. Consequently, there is often resistance and avoidance tactics in both passive and active forms during the implementation of these policies. These practices are known by various terms such as tax avoidance and tax evasion (Rahmawati, 2022).

Tax avoidance and tax evasion are both strategies employed by taxpayers to either lessen or entirely eliminate tax debts. It is significant to note, however, that tax avoidance is a legal method that adheres to provisions in the field of taxation. This approach is done by exploiting the weak spots or the "gray areas" noted in the tax laws in a given country. On the other hand, tax evasion is an illegal or unlawful action executed by taxpayers, including the use of transfer pricing as a technique to decrease tax payments, which results in negative impacts on the state's potential revenue due to the reduction of its actual value. Therefore, it is essential to promote a transparency model with regards to direct beneficiaries or beneficial owners within companies, as this can help prevent instances of tax evasion and improve the overall integrity of the taxation system.

However, at the level of empirical facts, it still faces several obstacles, viz:

1. Despite regulations that require companies to update beneficial owner information and submit the latest data, there are still many firms that have failed to do so, leaving their existing information outdated and inadequate. In other words, the beneficial ownership information of many companies has not been revised or updated, leading to a lack of transparency and



accountability in their business operations. This highlights the need for continued efforts and increased awareness to prompt companies to comply with regulatory requirements and ensure accurate and up-to-date beneficial owner information (Ariani, 2020);

2. The moment of beneficial ownership of A company is considered highly advantageous. This newfound knowledge can only be disclosed through a strict legal basis. It is the Foundation for pushing towards the accessibility of data related to the beneficial ownership in the company. It is important to note that in legality companies, which have been registered by the Ministry of Law and Human Rights, the disclosure of information is limited only to legal owners. However, this data does not give us a wider scope of information such as who the main controller is, who the primary receiver of benefits related to the economy is, and who has the ultimate control over the business activities, namely the ultimate owner, economic benefit and control.
3. An additional issue that arises in regard to updating data is that various companies frequently tend to make modifications to the composition of their ownership. However, it has been observed that the process of altering official company documents is often not adequately updated and aligned with the authoritative government institutions, such as the Depkumham, or with the general public. As a result, this can lead to significant misunderstandings and complications, which could have otherwise been avoided had the relevant documents and records been timely and efficiently updated.
4. Due to the absence of integration of data with the relevant ministries or institutions, it is currently very challenging for the Director General of Taxes to effortlessly acquire comprehensive information pertaining to the transactions that are related to the controllers of the company.
5. Despite the known information pertaining to beneficial ownership, the Directorate General of Taxes still faces challenges regarding the evaluation of taxpayer returns due to ongoing issues surrounding partially established regulations, particularly in relation to maintaining confidentiality during access to customer data. These obstacles hinder the assessment process and further inhibit officials from collecting necessary financial data.
6. Despite efforts made to regulate financial activities, there continue to be obstacles faced due to partial regulations, an example being the issue of confidentiality regarding access to customer data. As a result, the Directorate General of Taxes is faced with challenges in assessing taxpayer returns, even though they possess knowledge of beneficial ownership. The crux of the problem lies in the limited access to financial data which impedes their ability to make accurate assessments.
7. There is a lack of synchronization among various regulations, which creates discrepancies and inconsistencies between them. This lack of coordination among different regulations could lead to confusion and make it challenging for individuals or organizations to adhere to them. Therefore, it is imperative to develop a streamlined and coherent regulatory framework that aligns with national and international standards and promotes consistency and transparency (Ariani, 2020).
8. Beneficial ownership cannot be considered in isolation, as it necessitates the integration of a variety of data. The present data is inadequate and dispersed among numerous agencies, each with its own authority, like the legality of companies under the Ministry of Law and Human Rights, NPWP under the Ministry of Finance, KTP under the Ministry of Internal Affairs Country, and account details with banks, which poses a significant obstacle to the promotion of beneficial ownership data transparency in Indonesia. The absence of a method for integrating the data is a significant problem that needs to be addressed. Furthermore, the situation becomes more intricate when the institutions that require the data are unable to access it, such as in the case of the confidentiality of client information that cannot be obtained by the Directorate General of Taxes, even though it is critical as a basis for supervising and optimizing taxes.
9. The Directorate General of Tax is finding it challenging to enforce the obligation of taxation as the mandatory data on personal and entity tax has not yet been validated, resulting in its inaccuracy and unreliability.



In response to these constraints, it is necessary to do the following things, among others:


1. In order to enhance the utility and effectiveness of beneficial ownership data that is derived from various sources and systems, it is imperative to focus on ensuring policy harmonization and fostering the implementation of a Single Identity Number (SIN) as a fundamental platform for data integration. This approach relies on amalgamating critical data points such as the NPWP, KTP, customer data, financial transactions, and company ownership data, amongst other relevant data types. Through the integration of this data, businesses and organizations can gain valuable insights and a more comprehensive view of pertinent ownership-related information.
2. For the implementation of a transparency policy in regards to beneficial ownership, a strong backing or political determination from the government is necessary. Such support from the government would ensure that the necessary resources and efforts are allocated towards achieving transparency in identifying beneficial ownership information. Without such support, the realization of a beneficial ownership transparency policy may not be possible or may be hindered by various challenges and obstacles. Therefore, it is crucial for the government to exhibit unwavering support for this endeavor to ensure its eventual success.
3. The establishment of a regulatory framework that pertains to the concept of beneficial ownership is deemed essential to ensure legal certainty for Double Tax Avoidance Agreements (P3B). This entails the development and implementation of simplified processes in administering withholding taxes that are associated with beneficial owner status and tax treaties between countries. This will be achieved by formulating and integrating a General Anti Avoidance Rule (GAAR) policy in the Income Tax Law to streamline administrative procedures.

CONCLUSION

In the present document, an examination has been meticulously conducted on the criminal aspects of the adoption of beneficial ownership concerning transfer pricing in taxation, resulting in concluding that this practice can be deemed as a corporate crime. Elucidated in this study is the utilization of this ownership to decrease the tax liabilities of multinational enterprises, which can be regarded as an unethical and unlawful act perpetuated by companies. Moreover, this comprehensive investigation has effectively established how criminal law can be leveraged to obstruct and deter this fraudulent conduct by imposing the rule of law.

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