

## MEDIATION FOR INDONESIAN TAX DISPUTES: IS IT A POTENTIAL ALTERNATIVE STRATEGY FOR RESOLVING INDONESIAN TAX DISPUTES?

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### Abstract

*Tax dispute resolution in Indonesia is not a quick, simple, and economical process. Taxpayers have to wait more than three years for a lawful resolution. This paper elaborates on how mediation can be a potential strategy to resolving tax disputes in Indonesia through administrative law. The Organisation for Economic Cooperation and Development recommended the establishment of a positive connection between taxpayers and the revenue body by changing their relationship from a confrontational to a collaborative one. Mediation encourages this positive bond and has been successfully implemented in Australia. A similar approach is strongly recommended for the Indonesian government. The auditing process provides an opportunity for mediation to minimize tax disputes. However, this process is not easy to implement because it needs political will and a strong desire by the government to implement changes. Mediation is an attempt to achieve a win-win solution and is in line with the principles of Pancasila, given that it ensures deliberation to reach an agreement. If implemented, then mediation will be a courteous approach to tax dispute resolution and will pave the way to a good post-dispute relationship in Indonesia.*

**Keywords:** mediation, dispute resolution, tax dispute, taxpayer, alternative dispute resolution

### Abstrak

*Indonesia memiliki persoalan dalam penyelesaian sengketa pajak karena belum mampu mewujudkan prinsip cepat, sederhana dan murah. Wajib pajak harus menunggu lebih dari 3 tahun untuk mendapatkan kepastian hukum. Tulisan ini menjelaskan mengenai kemungkinan strategi potensi penyelesaian sengketa pajak di Indonesia melalui proses hukum administrasi. OECD telah menyarankan untuk meningkatkan hubungan yang lebih baik yaitu merubah dari hubungan konfrontasi menjadi hubungan kolaboratif antara wajib pajak dan fiskus. Mediasi adalah sebuah upaya untuk meningkatkan hubungan yang lebih baik antara kedua belah pihak jika terjadi perselisihan. Mediasi telah berhasil diterapkan di Australia. Cara ini tentunya dapat dijadikan sebagai rujukan bagi Indonesia untuk meningkatkan hubungan yang lebih baik antara fiskus dan wajib pajak. Salah satu peluang upaya mediasi yang dapat dilakukan untuk meminimalisir sengketa pajak adalah mediasi dilakukan pada saat proses pemeriksaan. Namun hal tersebut tidak mudah dilakukan karena membutuhkan political will dan keinginan yang kuat dari pemerintah untuk membuat perubahan. Mediasi merupakan bentuk upaya yang memberikan win-win solution dan sesuai dengan nilai dalam Pancasila yaitu musyawarah untuk mufakat. Jika mediasi bisa diwujudkan, maka mediasi akan menjadi cara yang santun dalam penyelesaian sengketa pajak di Indonesia dan dapat meningkatkan hubungan yang lebih baik pasca perselisihan.*

**Kata kunci:** mediasi, penyelesaian sengketa, sengketa pajak, wajib pajak, ADR

## I. INTRODUCTION

With the growing number of taxpayers and the increased understanding of the rights and responsibilities in exercising taxation obligation through a self-assessment system, tax disputes between taxpayers and taxation authorities (Directorate General of Taxes/DGT) cannot be avoided<sup>1</sup>. Such a situation requires a fair settlement through fast, economical, and simple procedures and processes. To resolve tax disputes, the Indonesian government passed Law No. 14 of 2002 concerning the Tax Court<sup>2</sup> (called the Tax Court Law). The Tax Court replaced the Tax Dispute Settlement Agency, which was the former institution that assisted taxpayers in obtaining fair resolutions to tax disputes.

The Tax Court investigates and lays down decisions to tax disputes between taxpayers and competent authorities; such decisions can be appealed to the Tax Court or through a lawsuit based on the taxation law<sup>3</sup>. The decision of the Tax Court is final<sup>4</sup> and is permanently legally binding. Thus, the disputing parties cannot resort to other legal remedies unless a reason exists to conduct a judicial review (Article 91 of the Law on Tax Court). Only one Tax Court exists, which is based in the state capital and has jurisdiction to settle tax disputes throughout Indonesia.

Tax disputes that go through the Tax Court has been increasing each year with the increasing number and awareness of taxpayers. The statistics of the Tax Court Secretariat shows that 8,399 dispute cases were filed in 2013, 10,866 cases in 2014, and 12,486 cases in 2015. A total of 16,011 cases were still in progress in 2015, and 9,032 cases (56.4%)<sup>5</sup> were dismissed. The number of tax cases is disproportionate to the number of Tax Court judges, who number only 55 judges. This proportion means that each judge handles 291 cases every year. If this figure is divided by the number of judges, given that 18 assemblies exist, then each assembly handles 889 cases every year. This situation is alarming.

The annual report of the Supreme Court (2013) detailed many tax cases. A review of the filed motions for reconsideration in the directorate of the state administration of the Supreme Court showed that the number of tax cases was the highest. According to Ning Rahayu, the Tax Court suffers from a disproportionate number of tax disputes

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<sup>1</sup> Indonesia, Undang-Undang tentang Pengadilan Pajak (Law Concerning Tax Court), Undang-Undang No. 14 Tahun 2002, L.N. No. 27 Tahun 2002 (Law No. 14 Year 2002, SG. 27 of 2002), Article 1 Paragraph 5, explains that an agrarian tax dispute between the taxpayer and the authority due to the court decision can be solved through an appeal or objection to the Tax Court based on taxation regulation, including lawsuits on invoice execution based on the Law on Warrant for tax collection. Hereinafter "Tax Court Law".

<sup>2</sup> Ibid.

<sup>3</sup> Indonesia. Undang-Undang Tentang Perubahan Ketiga Atas Undang-Undang Nomor 6 Tahun 1983 Tentang Ketentuan Umum dan Tata Cara Perpajakan (Law concerning the Third Amendment of the Law concerning General Guidelines and Taxation Procedure No. 6 Year 1983). Undang-Undang Republik Indonesia Nomor 28 Tahun 2007, L.N. No. 85 Tahun 2007 (Law No. 28 Year 2007, SG No. 85 Year 2007), Article 25 Paragraph 1, states that the taxpayers shall file objections to the DGT for the following matters: notice of tax underpayment assessment, notice of an additional tax underpayment assessment, notice of tax overpayment assessment; notice of nil tax assessment; withholding by third parties under the provisions of the tax laws. Objections shall be filed within three months as from the date of issuance of assessments or the date of withholding unless the taxpayers can demonstrate that the period cannot be fulfilled due to circumstances beyond their control. Hereinafter Tax Law (Third Amendment).

<sup>4</sup> Tax Court Law, article 77 paragraph 1

<sup>5</sup> Ministry of Finance Republic of Indonesia, "Statistics," <http://www.setpp.depkeu.go.id/Ind/Statistik/StatBerkas.asp>, accessed on 6 August 2016

and available human resources (the judges)<sup>6</sup>. Thus, tax dispute resolution takes a considerable amount of time and can be up to three years.

The government needs to solve this issue to ensure fairness and legal certainty for taxpayers. If the dispute settlement takes a long time, then the actual loss is not only borne by the taxpayers<sup>7</sup>, but also by the government itself, thereby disrupting the state budget. The chairman of the Tax Court, I Gusti Ngurah Mayun Winangun, identified three factors that cause tax disputes in Indonesia: (1) different interpretations of the provisions on the amount of taxes paid to the state, (2) limited/lacking skill in tax labor, and (3) lack of coordination in the implementation of tax collection.<sup>8</sup>

According to Wirawan B. Ilyas and Richard Burton, problems always exist for taxpayers who filed legal appeals to the Tax Court. The main issue is the frequent rejection of appeals. However, when an appeals process is initiated and completed, the taxpayers tend to win their case<sup>9</sup>. This finding is supported by the 2015 decisions made by the Tax Court. In 2015, statistical data from the Tax Court Secretariat show that out of 9,032 cases, judges have granted 1,217 cases, granted 4,049 cases in their entirety, canceled 94 cases, and rejected 2,294 cases<sup>10</sup>. These data indicate that taxpayers often won the appeals process in the Tax Court. Filing legal remedies filed to the DGT also ensures fairness, because the DGT is not an independent institution.

According to Ning Rahayu, the accumulation of tax cases in Tax Court begins from a dispute that occurs at the auditing level<sup>11</sup>. That dispute then leads to tax assessment, which subsequently becomes a tax dispute.

The above facts show that the existing law (in this article, it is called UU KUP<sup>12</sup> and the Tax Court Law<sup>13</sup>) is still unable to ensure fairness and legal certainty for the taxpayers.<sup>14</sup> According to Wirawan B. Ilyas and Richard Burton, the accumulated tax disputes in the Tax Court must be solved immediately, because the taxpayers will end up wasting time and cost in seeking fairness and legal certainty. Supporting economic growth is a better use of taxpayers' time and resources rather than handling the

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<sup>6</sup> Inside Tax. Edition 22. August 2014. Inside Profile. Perjalanan Panjang Penanganan Sengketa Pajak di Indonesia, p. 49.

Inside Tax, "Ning Rahayu: Perjalanan Panjang Penanganan Sengketa Pajak di Indonesia [Ning Rahayu: The Long Journey of the Handling of Tax Disputes in Indonesia]," Inside Tax 22 (August, 2014): 48-52.

<sup>7</sup> Tax Law (Third Amendment), Article 27 (5d) states that when the appeal is denied or half accepted, the taxpayers shall pay an administrative penalty of 100% of paid tax based on the appeal decision minus tax paid before the process of appeal.

<sup>8</sup> Ridho Syukro, "Ini 3 Penyebab Sengketa Pajak [This is the three main cause of tax disputes]," Berita Satu, <http://www.beritasatu.com/makro/170973-ini-3-penyebab-sengketa-pajak.html>, accessed on 20 August 2014.

<sup>9</sup> Wirawan B. Ilyas dan Richard Burton, Manajemen Sengketa dalam Pungutan Pajak. Analisis Yuridis terhadap Teori dan Kasus (Jakarta: Mitra Wacana Media, 2012), p. 79

<sup>10</sup> Ministry of Finance, "Statistics." 6

<sup>11</sup> Inside Tax, "Long Journey of Handling Tax Disputes," p. 50.

<sup>12</sup> Indonesia. Undang-Undang tentang Penetapan Peraturan Pemerintah Pengganti Undang-Undang Nomor 5 Tahun 2008 Tentang Perubahan Keempat Atas Undang-Undang Nomor 6 Tahun 1983 Tentang Ketentuan Umum dan Tata Cara Perpajakan Menjadi Undang-Undang (Law Concerning the Fourth Amendment of the Law concerning General Guidelines and Taxation Procedure No. 6 Year 1983. Undang-Undang No. 16 Tahun 2009, LN. No. 62 Tahun 2009 (Law No. 16 year 2009, SG. 62 year 2009)

<sup>13</sup> Tax Court Law

<sup>14</sup> Tax Law (Third Amendment), Article 27 Paragraph 5d states that when the appeal is denied or half accepted, the taxpayers shall pay the administrative penalty of 100% of paid tax based on the appeal decision minus tax paid before the process of appeal.

complex process of seeking justice.<sup>15</sup>

Mediation is a way to resolve disputes out of court. This approach is widely used in civil disputes in Indonesia. Mediation is used for quick, easy, and simple dispute resolution. It also aims to reduce the number of disputes that go to court. In practice, mediation in Indonesia addresses disputes on the Commercial Court, the Industrial Relations Court, the General Court, and public information disputes.

Some Indonesians are unfamiliar with mediation. Thus, they do not use it in tax dispute resolution. Some previous studies discussed tax dispute resolution. Budi Ispriyarso studied the Tax Court regulated in the Tax Court Law and found that the act has weakness in terms of legal certainty and justice. His research was about the Tax Court based on Pancasila principles and did not discuss mediation.<sup>16</sup> Deddy Sutrisno studied tax dispute as a public law dispute<sup>17</sup> and focused only on solving tax disputes through administrative law. According to his research, the Tax Court is an elite part of the Constitutional Court. He also did not discuss mediation. Heru Ratno Hadi questioned why the dispute resolution system did not ensure a simple, fast, and economical process.<sup>18</sup> He then reviewed the effect of not applying those principles in dispute resolution and suggested the establishment of a dispute settlement and tax mediation agency (*Badan Penyelesaian Sengketa dan Mediasi Pajak/BPSMP*) and to concentrate on the Tax Court Law. The above studies discussed mediation as a legal effort through the court, whereas our paper explores the use of mediation in the administrative process and concerns about Law No. 16 of 2009 with regard to the fourth amendment of Law No. 6 of 1983 about the General Requirements and Procedures of Taxation (UU KUP).

Mediation is unknown in the settlement of tax disputes in Indonesia, because the tax assessment letter as the tax disputed object is final, concrete, and individual (a principle in administrative law). However, mediation in the settlement of tax disputes through alternative dispute resolution (ADR) is practiced in the United States, the United Kingdom, and Australia. ADR is used by the Australian Taxation Office (ATO) and is regulated in the Law Administration Practice Statement 2013/3 (ADR in ATO disputes). This paper will examine if mediation is an effective alternative strategy for resolving Indonesian tax disputes.

## II. CONCEPT OF MEDIATION

According to the Economic Law Dictionary of ELIPS (1997), mediation is a way to settle a dispute out of court through a mediator, who mediates between parties in resolving their disputes. Valerine J.L. Kriekhoff briefly defines mediation as a negotiation between two individuals or groups and involves a third party to help achieve a compromise.<sup>19</sup>

<sup>15</sup> Ilyas & Burton, *Manajemen Sengketa*, p. 81.

<sup>16</sup> Budi Ispriyarso, "Membangun Pengadilan Pajak yang Berkepastian Hukum dan Berkeadilan Berdasarkan Keadilan Pancasila [Building Tax Court that ensures Legal Certainty and Justice based on the Pancasila Justice]" (Dissertation, Diponegoro University, 2013).

<sup>17</sup> Deddy Sutrisno, "Pengadilan Pajak dalam Kaitan Penyelesaian Sengketa Pajak sebagai Sengketa Hukum Publik [Tax Court in relation with the Tax Disputes as the Public Law Disputes]" (Dissertation, Airlangga University, 2013).

<sup>18</sup> Heru Ratno Hadi, "Reformulasi Pengaturan Penyelesaian Sengketa Pajak di Indonesia [Reformulation of Regulation on the Settlement of Tax Disputes in Indonesia]" (Dissertation, Brawijaya University, 2017).

<sup>19</sup> Valerine J. L. Kriekhoff, "Mediasi: Tinjauan dari Segi Antropologi Hukum [Mediation: An Overview from the Legal Anthropology]," in *Antropologi Hukum sebuah Bunga Rampai (Legal Anthropology an An-*

From an etymological aspect, mediation emphasizes the existence of a third party that mediates between disputing parties to solve their problems. This definition is important to differentiate mediation from other dispute resolution alternatives such as arbitration, negotiation, and adjudication. The mediator is in a middle and neutral position between the disputing parties, and attempts to achieve an agreement. The definition is still general and has been not given a concrete essence. The idea is similar to that of Nadja Alexander, who stated that mediation provides an impartial third party to assist the negotiation of disputing parties to reach an agreement that suits their needs and interests<sup>20</sup>. Bolle further defined the essence of mediation activity and the role of the mediator as a third party, emphasizing that mediation is a decision-making process facilitated by a third party as a mediator. This statement shows that the decision-making authority rests with the disputing parties; the mediator only facilitates them. The existence of the mediator is important because it helps them make a better decision to achieve an acceptable outcome<sup>21</sup>.

Christopher Moore added that the mediation process needs a knowledgeable third party to help the disputants organize their activities and encourage them to be active in the bargaining process. This idea means that the person is expected to contribute novel variables and dynamics to the disputants' interaction<sup>22</sup>. Folberg and Taylor emphasized that the third party or mediator must be in a neutral position so that he can objectively develop options to accommodate the disputants<sup>23</sup>.

Furthermore, Michael Noone stated that the common sense of mediation is to invite an experienced, independent, and reliable third party to help the disputants settle their case through collaborative negotiation<sup>24</sup>. According to the National Alternative Dispute Resolution Advisory Committee (NADRAC), as quoted by David Spencer, mediation is a method where the disputants, with the help of a practitioner or mediator, pinpoint the dispute issues, provide options, and consider solutions to reach an agreement. However, the mediator has no right to determine the outcome of the resolution and is only obligated to advise both parties in the process of mediation. Moreover, mediation may be willingly done under a court order or subject to a current contractual agreement. NADRAC adds that an alternative is a process where disputants work with a mediator in an attempt to end the dispute<sup>25</sup>. The latter definition emphasizes the definition of mediation as an ADR.

Mediation as an ADR is firmly regulated in Law No. 30 of 1999 (SG No. 138 of 1999) concerning arbitration and ADR. Article 1 No. 10 states that ADR is an institution for resolving dispute or different-opinion case through a procedure negotiated by several parties and is a settlement done outside the court through consultation, negotiation, mediation, conciliation, or experts' judgment.

The above explanation indicates that mediation is expected to help disputants

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thology), ed. T. O. Ihromi (Jakarta: Yayasan Obor, 2001), p. 226.

<sup>20</sup> Nadja Alexander, "Global Trends in Mediation: Riding the Third Wave," in *Global Trends in Mediation*, ed. Nadja Alexander (Alphen aan den Rijn: Kluwer International, 2006), p. 2.

<sup>21</sup> Laurence Bolle, *Mediation: Principles, Process, and Practice* (New York: 1996), p. 1

<sup>22</sup> Abdurrahman, *Penyelesaian Sengketa Melalui Mediasi Pengadilan dan Mediasi Alternatif Penyelesaian Sengketa: Refleksi Dinamika Hukum [Settlement of Disputes through Court-annexed Mediation and Alternative Dispute Resolution of Mediation: A Reflection of Legal Dynamics]* (Jakarta: Peruri, 2008), pp. 558-559.

<sup>23</sup> J. Folberg dan A. Taylor, *Mediation: A Comprehensive Guide to Resolving Conflict without Litigation* (Cambridge: Cambridge University Press, 1984), p. 7.

<sup>24</sup> Michel Noone, *Mediation* (London: Cavendish Publishing Limited, 1998), p. 35

<sup>25</sup> David Spencer, *Essential Dispute Resolution* (London: Cavendish Publishing Limited, 2004), p. 45

reach an agreement without either one feeling that they have won or lost, that is, to achieve a win-win situation. Mediation has several characteristics.

- a. Mediation is a way through which disputing parties, with the help of a mediator, discuss and negotiate to achieve a result decided by the parties.
- b. It is a decision-making process assisted by a certain party (facilitated decision-making or facilitated negotiation)
- c. It is a system in which the mediator leads the negotiation process and the disputing parties control the final result.

### III. INDONESIAN TAX DISPUTE RESOLUTION PROCESS<sup>26</sup>

A regulation on taxpayers' legal efforts to obtain justice is included in Law No. 6 of 1983 concerning UU KUP and Law No. 2 of 2004 concerning the Tax Court. Three legal efforts are available to help taxpayers obtain justice.

1. Be involved in the administration process. This procedure consists of correction assessment tax, decreasing or obliterating administration sanction, and decreasing or annulling the assessment tax. All these are mentioned in Article 16, 36 (1) UU KUP.
2. File an objection to the DGT. It is an administrative procedure, but the decision on the objection can be appealed to the Tax Court.
3. Undergo the litigation process via the Tax Court and the Supreme Court.

To understand the Indonesian tax dispute resolution in a self-assessment system, the process from taxation form filling and notification letter issuance is described as follows:

### IV. MEDIATION OF AUSTRALIAN TAX DISPUTES

Mediation is used by ATO and is regulated in Practice Statement Law Administration 2013/3 (ADR in ATO disputes). ATO provides structured options for resolving disputes before they reach the litigation stage. Such options include ATO in-house facilitation, ADR, and early assessment and resolution procedures for all cases embedded with the Administrative Appeals Tribunal or Small Taxation Claims Tribunal.

The ATO provides three categories of ADR<sup>27</sup>:

1. In-house facilitation is the ATO's version of mediation and is a free service in which disputants are assisted by a skilled independent ATO officer to discuss their cases.
2. Generally, an external practitioner may be engaged in ADR if the dispute is considered complex by ATO.
3. In a litigation case, tribunal courts can order an ADR. Mediation, conciliation, and early non-sided evaluation are the most commonly used in tax disputes.

The practice statement confirms the ATO's commitment to resolving disputes through simple, cost-effective strategies that provide early resolution. It also sets

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<sup>26</sup> Tax Court Law, Article 1 states that tax dispute is a dispute between taxpayers and an authorized official because of a publishing decision that can be appealed to the Tax Court through a claim filed to the Tax Court based on regulation, include a claim of billing tax based on the law on billing tax and forced letter.

<sup>27</sup> Ibid.

out the ATO commitment to play a proactive role in identifying tax disputes that are suitable candidates for ADR, to initiate discussions with objecting taxpayers about the use of ADR in such cases, and to explain to objecting taxpayers the available processes so that they may make informed decisions.<sup>28</sup>

Mediation is preferred by taxpayers to litigation. ATO and the Australian Centre for Justice Innovation and Monash University conducted a joint research to evaluate ADR in ATO disputes. Their findings indicate that most people thought that the processes were fair, and even if a settlement was not reached during the intensive ADR session, ADR was still able to help finalize disputes within a short time. Early implementation of an intensive ADR process corresponded to positive perceptions; however, this factor needs to be linked to case complexity and cost of dispute factors. Evidence also suggests that the ADR processes were perceived to be cost and time-effective. ADR appears to be more effective for some types of taxpayers than others. Large businesses and microbusiness taxpayers were more likely to resolve disputes via ADR. More preparation and intake processes may be needed to support some taxpayers.<sup>29</sup>

We conduct a comparison with the mediation-based tax dispute resolution system in Australia because the Australian system is widely recognized as one of the leaders in best practices in tax administration.<sup>30</sup> The ADR practice in Australia is better than that of the United Kingdom even though they implemented in-house facilitation in similar time periods.<sup>31</sup>

## V. MEDIATION AS AN ALTERNATIVE TAX DISPUTE RESOLUTION STRATEGY

Given the dispute settlement cases faced by the DGT or the Tax Court, settlement alternatives to solve increasing tax disputes are an interesting subject. However, fast, simple, and economical dispute resolution, as stated in the Tax Court Law, has not been achieved yet. According to Eugen Ehrlich, the focus of law development is not on the law and court decision but on the people itself. The law must fulfill the need of people.<sup>32</sup> In his progressive law theory, Satjipto Rahardjo stated that the law has to defend people and fairness.<sup>33</sup> If it cannot ensure fairness to people, then the law has to be changed. Progressive law is always in continuous development. A law is not a final institution and is determined by its own ability to serve people. It continues to evolve to a better and more perfect level.<sup>34</sup> If the regulation on resolving tax disputes

<sup>28</sup> Australian Taxation Office, "Practice Statement Law Administration: Alternative Dispute Resolution in ATO Disputes," <http://law.ato.gov.au/atolaw/view.htm?locid=%27PSR/PS20133/NAT/ATO%27>, accessed on 7 August 2016.

<sup>29</sup> Tania Sourdin, "Evaluating ADR in ATO Disputes: Executive Summary," <http://www.civiljustice.info/adreval/5>, accessed on 5 August 2016.

<sup>30</sup> Melinda Jone, "What Can the United Kingdom's Tax Dispute Resolution System Learn from Australia? An Evaluation and Recommendations from a Dispute Systems Design Perspective," *Australian Tax Forum* 32, no. 1 (2017): p. 39.

<sup>31</sup> *Ibid.*

<sup>32</sup> Sidharta Darji Darmodihardjo, *Pokok-pokok Filsafat Hukum [Fundamentals of Philosophy of Law]* (Jakarta: Gramedia Pustaka Utama, 1999), p. 127.

<sup>33</sup> Satjipto Rahardjo, "Hukum Progresif (Penjelajahan Suatu Gagasan) [Progressive Law (An Exploration of the Idea)]," Paper Presented at Diponegoro University, Semarang, 4 September 2004.

<sup>34</sup> Sidharta, "Pendekatan Hukum Progresif dalam Mencairkan Kebekuan Produk Legislasi [Progressive Law Approach in Unfreezing the Frozen Legislative Product]," in *Dekonstruksi dan gerakan pemikiran hukum progresif [Deconstruction and the Movement of Progressive Law]*, ed. Moh. Mafud M. D. (Yogyakarta:

in the law on UU KUP and the Tax Court has not given fairness and legal certainty for society, then a new law that can realize fairness through simple, fast, and easy tax dispute resolution is needed.

According to Gustav Rudbruch, a law has to give fairness, warranty, and benefit<sup>35</sup>. It has to be able to provide benefits and satisfaction for people. Time and cost spent for tax dispute settlement does not benefit taxpayers. The wasted time and cost should be used instead to develop the economy so that the government's budget can fund other important things.

When taxpayers undergo a legal process, they tend to win their case after going through the objection, appeals, and reconsideration processes. Hiring lawyers is costly, and the process wastes time. If the taxpayers lose their case in the objection stage (being denied or half granted), then they have to pay an administrative fine, which is 50% of the tax amount based on the court decision minus paid tax<sup>36</sup>. When they lose in the appeal stage, they have to pay 100% of the tax based on the court decision minus paid tax before they filed the objection. This regulation is stated in Article 27 Paragraph (5d) of Law regarding UU KUP. By contrast, when taxpayers win the case, the DGT does not have to pay a fee.

To fulfill the social demand for fairness and legal certainty, which is the right of taxpayers, a new law for tax dispute settlement needs to be created. Mediation is one effort to deal with disputes. It is considered a simple, fast, and economical approach because it involves a third party as agreed by both parties, unlike a court that takes time and money.

Australia has a common law system, whereas Indonesia has a civil law system, which is not a pure one. Mediation is an alternative for dispute settlement used in the state with the common law system. Indonesia adopts mediation to settle disputes or disagreements in the fields of trade, labor, and agrarian. In Indonesia, mediation is used only for private law disputes and not for public law disputes such as those related to tax law. Given that mediation in tax disputes is difficult, an independent third party should serve as a mediator in the process. Some problems related to hierarchical structure may arise when they have to make an administration decision and consider existing regulations.

The Organisation for Economic Cooperation and Development (OECD) found that many countries, including Indonesia, apply the traditional paradigm of taxpayer and tax collector who have a confrontational relationship rather than a collaborative one<sup>37</sup>. Their relationship is based only on their duties as stated by law, thus creating a gap between them. According to OECD, the paradigm needs to be changed to improve the relationship between taxpayers and tax collectors. They need transparency and open communication to reach an agreement characterized by cooperation and trust.<sup>38</sup>

Indonesia has a self-assessment system that trusts the taxpayers. However, in reality, the government still dominates the regulation of dispute settlement and has not opened communication in the form of negotiation involving an independent party. The process of dispute settlement by administrative law still indicates a

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Taafa Media, 2013), p. 25.

<sup>35</sup> Wolfgang Friedman, *Legal Theory* (London: Stevens & Son Limited, 1953), p. 35

<sup>36</sup> *TeTax Law (Third Amendment)*, Article 25 (9).

<sup>37</sup> OECD, "Working Paper 6 – The Enhanced Relationship," *OECD Tax Intermediaries Study*, July 2007.

<sup>38</sup> Karen Dawn Stilwell, "Mediation of Canadian Disputes" (Master Thesis, University of Toronto, 2014), pp. 18-19.

confrontational relationship. Imposing fines when objections and appeals are not granted is considered unfair.

The globalization era attracts many foreign companies to invest in other countries. Foreign and domestic investors have contributed greatly to the economic development of Indonesia. The government also has to maintain a good relationship with these investors, particularly to improve economic stability, labor, and tax collection. Aside from offering tax incentives, the government has to establish an open relationship with taxpayers and ensure open communication, not only in information exchange and taxpayer honesty in filing tax returns (SPT), but also in tax dispute settlement. Continuous dispute and the lack of legal certainty will not benefit either party. Indonesia has a culture of deliberation, which is also a reflection of Pancasila. It can be achieved by two individuals, a group with another group, an individual with a group, and by the government with an individual or a group in society. The establishment of the law concerning tax amnesty actually shows that the government has been starting to initiate a good relationship with the taxpayers. The government particularly considers the efficiency factor to deal with benefits and losses. Inevitably, the government needs the taxpayers to support the state budget.

Tax dispute mediation can support good governance of the DGT. Providing good services to taxpayers is part of the government's duty<sup>39</sup> and will positively affect the government itself. In accordance with the experience of tax dispute resolution in the Tax Court and to enhance relationships post-dispute, Indonesia can apply dispute settlement using ADR to overcome legal issues that the law has not been able to address.<sup>40</sup>

## VI. OPPORTUNITY FOR MEDIATION IN THE AUDITING PROCESS

Tax dispute settlement is already enacted within the Indonesian legal system, yet an alternative means to tax dispute settlement is not established. Within Indonesian law, tax dispute is categorized as an administrative dispute. Hence, the decision of the DGT on an objection could be another tax dispute. To overcome this problem, mediation in the auditing process can be implemented as an alternative solution. This procedure is already practiced in Australia by the ATO. The taxpayer has the right to propose a dispute settlement through mediation in the auditing, objection and litigation processes. However, the Tax Court Law considers that disagreement in the process of auditing is not a tax dispute. In reality, the disagreement occurs at the beginning of the tax dispute, which leads to the issuance of a Notice of Tax Assessment (SKP). The Tax Court Law has no definite concept of tax dispute. In countries such as the United States, the Netherlands and Australia, a disagreement in the process of auditing is considered a tax dispute.<sup>41</sup>

In the auditing regulation (PMK No. 17/PMK. 03/2013 concerning Auditing Procedures), if the taxpayers object to the auditing result, then they may ask for a discussion with the Quality Assurance (QA) team from the DGT. Implicitly, UU KUP and

<sup>39</sup> M. A. Radjagukguk, "Reformasi Sistem Tata Kelola dalam Pelayanan Publik pada Pemerintahan yang Baik (Good Governance)," *Veritas* (2016): p. 68.

<sup>40</sup> Khoirul Hidayah, "Indonesian Tax Dispute Resolution in Cooperative Paradigm Compared to United Kingdom and Australia," *IOP Conference Series: Earth and Environmental Science* 175 (2018): 1-6, doi:10.1088/1755-1315/175/1/012203

<sup>41</sup> Roelof Vos. "Mediating Tax Disputes in the Netherlands." *Dutch-Flemish Magazine for Mediation and Conflict Management* 18, no. 3 (2014): p. 7.

The Act of the Government No. 74 of 2011 on the etiquette of implementing rights and complying obligations of taxation shows that a discussion with taxpayers is related to the compromise of fulfilling their obligation. This joint discussion between the tax assessor and taxpayers is indirectly shown in the auditing process. The process, which is detailed below, is based on the act of the Minister of Finance No. 17/PMK.03/2013 about Auditing Procedures and enhanced in the act of the Minister of Finance No. 184/PMK.03/2015.

1. Audit program composition
2. Audit plan composition
3. Auditing (by the auditing team)
4. Audit documentation in audit working paper (*Kertas Kerja Pemeriksaan/KKP*)
5. Issuing Notification of Tax Audit Finding (*Surat Pemberitahuan Hasil Pemeriksaan/SPHP*) which contains audit result of taxpayers
6. Holding a closing conference (*Pembahasan Akhir Hasil Pemeriksaan*) with taxpayers
7. Making a discussion report with the QA team: if the taxpayers disagree with the audit findings, then they can file an appeal with the QA team, and the summary of the *closing conference* will be composed.
8. Making a report on the *closing conference*
9. Making a report on audit findings
10. Making a calculation note (*Nota Perhitungan*)
11. Issuing Notice of Tax Assessment (*Surat Ketetapan Pajak/SKP*)

The auditing process shows that an opportunity for mediation exists in the process of discussion with the QA team. The discussion is conducted if the taxpayers and the tax auditor have different opinions. The QA team serves as the mediator. However, the team's main role is to draw the conclusion and make a decision related to these different opinions.

In the auditing process, a disagreement may occur between the taxpayers and the tax auditor. The tax auditor is a civil servant (staff of the DGT) appointed by the Tax Service Office (KPP) or the head of the regional office of the DGT (*Kanwil DJP*) to conduct tax auditing. The staff has the authority and is responsible for the whole auditing process. According to authority theory, if mediation occurs in this process, then the appointed staff of the DGT also has a role as mediator. On the basis of the hierarchy of the DGT structure, mediation can be performed by a civil servant who works as an auditor and has a higher position than the tax auditor in charge. A mediator for the auditing process is appointed by the head of KPP of the DGT or the head of the regional office of the DGT.<sup>42</sup>

This step can be done only if the government has improved the relationship between the taxpayers and the revenue body (tax collector). To address these broad challenges, many revenue bodies have heeded the recommendation of the OECD to adapt their tax administration and enforcement strategies to meet the demands of the modern tax administration environment and, more specifically, to implement an efficient, relationship-based approach to resource allocation.<sup>43</sup> Even though Indonesia

<sup>42</sup> Indonesia, Directorate-General of Taxes, Surat Edaran tentang Kebijakan Pemeriksaan (Circular Letter on the Investigation Policy), No. SE-28/PJ/2013.

<sup>43</sup> OECD, Addressing Base Erosion and Profit Shifting (Paris: OECD, 2013); OECD, Study into the Role of

is not a member of the OECD, it can refer to tax administration development to fulfill the need for taxes of the state budget and to improve the efficiency of tax collection. Transparency can improve the relationship between the taxpayers and the revenue body. Mandatory mediation will achieve a quick settlement and is a transformative process guided by a mediator.<sup>44</sup> ADR through mediation will provide the parties with some freedom to engage from an early stage prior to the litigation process.<sup>45</sup> The interests of the taxpayers and the government must be balanced in a new system, and legislative limitations must be overcome<sup>46</sup>. A collaborative relationship between taxpayers and the revenue body may open an opportunity for tax dispute settlement through mediation. Such a relationship can allow settlements to be resolved in a courteous manner. A regulation on mediation can be made by amending UU KUP in the future.

## VII. CONCLUSION

To ensure the taxpayers' rights to a fair and legal resolution in tax dispute settlement, changes in the law are necessary. In reality, the existence of the Tax Court Law has not been able to ensure a quick, easy, and simple process. Mediation is an effort to conduct a negotiation and settle a dispute. An important step is to improve the relationship between the taxpayers and the tax collectors from a confrontational to a collaborative one. Taking into account the importance of taxes to the state and the taxpayers themselves will create a harmonious relationship. A major change is needed to openly settle disputes. Taxpayers have the option to settle disputes through court and mediation. They can use mediation when they discuss the result at the end of the auditing process. Mediation can be a courteous solution to tax disputes and is in line with the value of deliberation to reach an agreement, as implicitly stated in Pancasila.

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Tax Intermediaries (Paris: OECD, 2008).

<sup>44</sup> Vicki Waye, "Mandatory mediation in Australia's civil justice system." *Common Law World Review* 45, no. 2-3 (2016): p. 214, doi: <http://dx.doi.org/10.1177/1473779516645455>

<sup>45</sup> Barbara Billingsley and Masood Ahmed, "Evolution, revolution and culture shift: A critical analysis of compulsory ADR in England and Canada." *Common Law World Review* 45, no. 2-3 (2016), p. 186, doi: <http://dx.doi.org/10.1177/1473779516657745>

<sup>46</sup> Chris Jaglowitz, *Mediation in Federal Income Tax Disputes* (Canada: Faculty of Law University of Windsor, 1999), p. 11.

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