

IBLAM LAW REVIEW

P-ISSN

2775-4146

E-ISSN

2775-3174

Volume 3, Nomor 2, 2023

Authors

¹Dharma Setiawan Negara

²Husban

³Samuel Dharma Putra

Nainggolan

⁴Lufsiana

Affiliation

¹Universitas Sunan Giri Suarabaya

²Mahkamah Agung Republik Indonesia

³Universitas Airlangga

Email

¹dharmajournal1@gmail.com,

³snainggolan43@gmail.com,

⁴lufsiana_abdullah@yahoo.co.id

Date Submission

10 April 2023

Date Accepted

20 April 2023

Date Published

31 May 2023

DOI

10.52249

REORGANIZATION OF THE TAX COURT WITHIN THE STATE ADMINISTRATIVE COURT POST CONSTITUTIONAL COURT DECISION NO 26/PUU-XXI/2023

Abstract

Pursuant to Article 24 paragraph (2) of the 1945 Constitution of the Republic of Indonesia (1945 Constitution of the Republic of Indonesia) it is stated that judicial power is exercised by a Supreme Court and judicial bodies under it within the realm of general courts, religious courts, military courts, state administrative courts and by a Constitutional Court. Based on Article 1 number 8 of Law Number 48 of 2009 Concerning Judicial Power (UU 48/2009) there is a special court that has the authority to examine and hear and decide on certain cases which can only be formed within one of the judicial bodies under the Supreme Court. regulated in laws and regulations. The limitation of judicial institutions as stipulated in Article 24 paragraph (2) of the 1945 Constitution of the Republic of Indonesia does not allow for judicial institutions that are not within the scope of the Supreme Court and/or the Constitutional Court. However, there is a judicial institution, namely the Tax Court as stipulated in Article 2 of Law Number 14 of 2002 concerning the Tax Court (UU 14/2002), which is a judicial body that exercises judicial power for taxpayers seeking justice in tax disputes. Regarding the Tax Court, the guidance is carried out by the Supreme Court and the Ministry of Finance. This makes the tax court not completely independent as a judicial institution in general that carries out a judicial function (there is still interference from the executive branch, namely the ministry of finance), plus that the Supreme Court, in order to be able to fully supervise the tax court both technically and administratively, the tax court should be under the judicial institutions under the Supreme Court. This research is a normative juridical research using statutory and conceptual approaches with the aim of finding an ideal arrangement regarding the institutional structure of the tax court in Indonesia.

Keywords: *E-Government, Public Services, Discretion, Maladministration*

Abstrak

Berdasarkan Pasal 24 ayat (2) Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 (UUD NRI 1945) disebutkan bahwa kekuasaan kehakiman dilaksanakan oleh Mahkamah Agung dan badan peradilan yang berada di bawahnya dalam lingkup peradilan umum. pengadilan agama, pengadilan militer, pengadilan tata usaha negara, dan oleh Mahkamah Konstitusi. Berdasarkan Pasal 1 angka 8 Undang-Undang Nomor 48 Tahun 2009 Tentang Kekuasaan Kehakiman (UU 48/2009) terdapat pengadilan khusus yang berwenang memeriksa, mengadili, dan memutus perkara tertentu yang hanya dapat dibentuk pada

salah satu badan peradilan. di bawah Mahkamah Agung. diatur dalam peraturan perundang-undangan. Pembatasan lembaga peradilan sebagaimana diatur dalam Pasal 24 ayat (2) Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 tidak memperbolehkan adanya lembaga peradilan yang tidak berada dalam lingkup Mahkamah Agung dan/atau Mahkamah Konstitusi. Namun terdapat lembaga peradilan yaitu Pengadilan Pajak sebagaimana diatur dalam Pasal 2 Undang-Undang Nomor 14 Tahun 2002 tentang Pengadilan Pajak (UU 14/2002), yaitu badan peradilan yang menjalankan kekuasaan kehakiman bagi Wajib Pajak yang mencari keadilan dalam sengketa perpajakan. . Terkait Pengadilan Pajak, pembinaannya dilakukan oleh Mahkamah Agung dan Kementerian Keuangan. Hal ini menjadikan pengadilan pajak belum sepenuhnya independen sebagai lembaga peradilan pada umumnya yang menjalankan fungsi yudikatif (masih ada campur tangan lembaga eksekutif yaitu kementerian keuangan), ditambah lagi Mahkamah Agung agar dapat sepenuhnya menjalankan fungsi peradilan. mengawasi pengadilan pajak baik secara teknis maupun administratif, pengadilan pajak seharusnya berada di bawah lembaga peradilan di bawah Mahkamah Agung. Penelitian ini merupakan penelitian yuridis normatif dengan menggunakan pendekatan perundang-undangan dan konseptual dengan tujuan untuk menemukan pengaturan yang ideal mengenai struktur kelembagaan pengadilan pajak di Indonesia.

Kata Kunci: E-Government, Pelayanan Publik, Diskresi, Maladministrasi

INTRODUCTION

Indonesia as a country that declares itself as a rule of law country certainly cannot be separated from the consequences of the rule of law state (Dwiyanto, 2015). The Indonesian legal system which is oriented towards Continental Europe is due to the principle of concordance, so the rule of law concept that is more appropriate to use is the rule of law concept as adopted by Immanuel Kant, Paul Laband, Julius Stahl, and Fichte who use the term in German, namely "*rule of law*". As for *rule of law* includes 4 (four) basic elements, namely:

1. Government is implemented based on the law;
2. Distribution of Power between state institutions;
3. Protection of Human Rights (HAM); and
4. The existence of a State Administrative Court (Hadjon, 1987).

The State Administrative Court (PTUN) in Indonesia was originally regulated in Law Number 5 of 1986 concerning State Administrative Court (UU 5/1986) and then amended by Law Number 9 of 2004 (UU 9/2004), currently as the newest legal basis for PTUN is regulated in Law Number 51 of 2009 concerning the Second Amendment to Law Number 5 of 1986 concerning State Administrative Court (UU 51/2009) hereinafter referred to as the Administrative Court Law. Stipulated in Article 50 of the PTUN Law, the PTUN has the duty and authority to examine, decide and resolve State Administrative Disputes at the first level, believes that there are differences regarding authority and authority. Authority is what is

referred to as a formal power, that is power given under law (attribution), while authority is only about a "*element*" (part) only certain of an authority. Authority consists of powers (*Right Additions*) (Daim, 2014). That authority within the scope of the judiciary is referred to as "Competence" which is then known to be 2 (two) things, namely absolute competence and relative competence (Putu et al., 2014).

State Administrative Court's absolute competence to adjudicate a dispute according to the object or material or subject matter of the dispute. State Administrative Court absolute competence has the following characteristics:

1. Disputing parties (parties) are individuals or civil legal entities with State Administrative Officials;
2. The object of the dispute is a State Administrative Decision (KTUN), namely a written stipulation issued by a State Administrative Agency or Official;
3. The decision which is the object of this dispute contains the legal action of the State Administrative Officer;
4. Decisions that are used as the object of the dispute are concrete, individual, final which give rise to legal consequences for individuals or civil legal entities (Marbun, 2001).

The object of the PTUN dispute in the form of the said KTUN is not limited to a decision issued by a State Administrative Officer *per se*. Based on this, Article 3 of the Administrative Court Law regulates the existence of additional PTUN authorities (competencies) as follows:

1. If a State Administrative Agency or Official does not issue a decision, while this matter is their obligation, then this matter is equated with a State Administrative Decree (KTUN);
2. If a State Administrative Agency or Official does not issue the decision requested, while the period as specified in the said laws and regulations has passed, the said State Administrative Agency or Official is deemed to have refused to issue the intended decision;
3. In the event that the relevant laws and regulations do not specify the time period referred to in paragraph (2), then after the 4 (four) month period has passed since the receipt of the application, the relevant State Administrative Agency or Official is deemed to have issued a decision on rejection (Anastasya Millenia Tuela, Toar N. Palilingan, 2018).

As for Self-Tax Disputes regulated in Article 1 point 5 of Law Number 14 of 2002 concerning Tax Courts (UU 14/2002) that Tax Disputes are disputes that arise in the field of taxation between taxpayers or tax bearers and authorized officials as a result of the issuance of a decision which can be appealed or sued to the Tax Court based on tax laws and regulations, including lawsuits for the implementation of billing based on tax collection laws by force letter. In line with this, Rochmat Soemitro stated that the dispute arose due to a discrepancy between the views of the two parties, and regarding this dispute, "assistance" from a neutral and impartial third party was needed (Putrijanti, 2015). Based on Article 2 because Article 3 Law 14/2002 Tax disputes are tried at the Tax Court domiciled in the state capital with the possibility of being domiciled elsewhere if deemed necessary (Simolang, 2016).

The establishment of a court institution to handle tax disputes was originally a derivative of Law Number 6 of 1983 (UU 6/1983) as amended by Law Number 6 of 2007 concerning General Provisions and Procedures for Taxation (UU 6/2007). Is a tax court that exercises judicial power for taxpayers or tax bearers seeking justice for tax disputes (*Vide*: Article 2 of Law 14/2002). Pursuant to Article 5 of Law 14/2002, the Supreme Court carries out technical development of the judiciary for the Tax Court, but the organizational,

administrative and financial development for the Tax Court is carried out by the Ministry of Finance (Ministry of Finance). This is the main focus of this research, while Article 5 of Law 14/2002 makes the Tax Court stand on 2 (two) feet, namely the Supreme Court (*Judiciary*) and the Ministry of Finance (Executive), this is what can undermine the independence of the judiciary (*Judiciary*) which is free and independent, What is the urgency of entering the Tax Court into the environment of the State Administrative Court?, What is the position of the Tax Court after the Constitutional Court Decision Number 26/PUU-XXI/2023?

RESEARCH METHODS

Research essentially starts with human curiosity expressed in the form of problems or questions. Each problem needs an answer or solution, so that the person concerned will gain new knowledge which he considers correct (Marzuki, 2005). This research is a normative legal research that is intended to examine the provisions of positive law and the positive legal instruments studied will be used as a source of legal materials. This research is also research that aims to reform the law (*Reform Oriented Research*) namely research to evaluate existing legal regulations and provide recommendations for changes to these legal regulations. Type *Reform Oriented Research* In this research, it is possible later that there will be deeper research regarding the Position of the Tax Court in Indonesia (Hadjon, 1987).

This study uses a statutory approach (*Statute Approach*) is carried out by reviewing all laws and regulations related to the legal issues being studied (Marzuki, 2005). This study also uses a conceptual approach (*Conceptual Approach*) is carried out by using the views and concepts of several thinkers as well as the doctrines that have developed in the science of law as a basis for research in order to build a legal argument in solving the legal issues being researched.

RESULT AND DISCUSSION

The Urgency of Entering the Tax Court into the Environment of the State Administrative Court

The rule of law in *rule of law* reject the arbitrary power of the organs of the State. Limitations of arbitrariness can be done through restrictions on power (*separation of power*). Such restrictions give rise to several separate state organs. Opinion of C.F. Strong stated that a country must have government power which can be divided into legislative power, executive power, and power *Judiciary* (Strong, 2004). Against the separation of powers (*separation of power*) this, Montesquieu called something absolutely necessary, he himself stated that: "*when the legislative and executive powers are united in the same person... there can be no more liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in tyrannical manner. Again, there is no more liberty. If the judicial power not separated from the legislative and executive*" (Subechi, 2006).

Based on information about *separation of power* in relation to the *Trias Politics*, then the organizational, administrative and financial development of the Tax Court carried out by the Ministry of Finance as regulated in Article 5 of Law 14/2002 is clearly contrary to *Trias Politics*. The composition of the Tax Court is based on Article 6 because Article 8 Law 14/2002 consists of Leaders, Member Judges, Secretary, and Registrar. The Chairperson, Deputy Chairperson, and Judges at the Tax Court are appointed by the President from a list of

nominees proposed by the Minister of Finance after obtaining approval from the Chief Justice of the Supreme Court for a term of 5 (five) years and can be extended for 1 (one) term of office.

Regarding the procedural law of the Tax Court, for example in Article 34 of Law 14/2002 it is stipulated that the parties to the dispute at the Tax Court can each be accompanied or represented by one or more attorneys with a Special Power of Attorney, which can be attorneys. In the Tax Court, several terms and criteria are required that are different from the Legal Counsel in the scope of other judicial bodies. There are requirements from the Minister of Finance for attorneys who accompany or represent the disputing parties in the Tax Court. Law 14/2002 does not provide a clear explanation of the requirements as intended. These requirements are contained in the Regulation of the Minister of Finance Number 61/PMK.01/2012 Concerning Requirements to Become Legal Counsel at the Tax Court (PMK 61/2012).

Then Article 60 of Law 14/2002 stipulates that in the course of the Tax Court trial, questions posed to witnesses by one of the parties are conveyed through the Chief Judge. If the question referred to by the Presiding Judge has nothing to do with the dispute, the question is rejected. Furthermore, Article 9 paragraph (2) and paragraph (5) of Law 14/2002 stipulates that in examining and deciding certain tax dispute cases that require special expertise, the chairman can appoint ad hoc judges as member judges and the procedure for appointing ad hoc judges is regulated by decision of the Minister of Finance.

In terms of protocol and allowances, it is regulated in Article 22 of Law 14/2002 by stipulating that the protocol positions of the chairman, deputy chairman and judges are regulated by government regulations. While allowances and other provisions for the Chair, Deputy Chair, and Judges, Secretary, Deputy Secretary, and Alternate Secretary are regulated by a Decree of the Minister of Finance. This includes Human Resources (HR) who fill the Tax Court which is still very lacking and even those who are actually said to be experts in tax law are still lacking. Therefore, many Tax Court Judges are filled with retired officials at the Ministry of Finance or the Director General of Taxes.

The tendency to change and emphasize the function and authority of *Trias Politics* namely the executive, legislative and *judicial*, is an effort intended to maintain the stability and suitability of the state in carrying out its duties in accordance with their respective authorities. Philosophically, in Montesquie's understanding, there is a different division of powers in the three institutions, namely as lawmakers (legislators), law executors (executors), and enforcers of laws (*judiciary*). Through a composition like this it is actually possible that a harmonization and stability will be created, because each of them has received their authority as regulated by the constitution. Agreeing with this, Sri Soemantri stated that regarding the essence of the constitution itself, among others (Thaib, 2001):

1. There is a guarantee of human rights and citizens;
2. Established a fundamental constitutional arrangement;
3. There is a division and limitation of fundamental constitutional tasks.

If the separation and/or distribution of powers (*separation of power*) happened *overlapping* authority, it is feared that it will damage harmonization *checks and balances* between the powers of the state. The Tax Court in carrying out its authority as a litigation institution (*judiciary*) examines and decides tax disputes, but on the other hand there are many strategic matters that are still regulated by the executive power (Government) regarding the course of this judicial institution. Things like that do not only bring consequences to policies or to internal

and external mechanisms, but also relate to the joints regarding which Tax Court is under which authority in *Trias Politics*. The arrangements regarding the position and exercise of the authority of the Tax Court as stipulated in Law 14/2002 need to be revised.

As for Article 27 paragraph (2) of Law Number 28 of 2007 concerning the Third Amendment to Law Number 6 of 1963 concerning General Provisions and Tax Procedures (UU 28/2007) states that "The tax court decision is a special court decision within the state administrative court environment". Based on the above rules, it is as if the Tax Court is a court that is included in the scope of the Supreme Court and the court environment under it. However, it is clear that Article 5 of Law 14/2002 does not explain it that way.

The position of the Tax Court, which is partly under the Ministry of Finance, is very vulnerable to injustice for justice seekers (Call Justice) in the occurrence of tax disputes, this is because in the process of implementing the judiciary can carry out a bargaining process regarding tax disputes (Simolang, 2016). The position of the tax court is increasingly unclear because in Article 2 of Law 14/2002 it is stated that the Tax Court is a "judicial body that exercises judicial power", but in Law 48/2009 which incidentally is a law that regulates judicial power, the tax court does not mentioned therein. Likewise in Law Number 8 of 2004 concerning Amendments to Law Number 2 of 1986 concerning General Courts (UU 8/2004) there are also several "special" courts which aim to examine and decide cases and/or disputes in accordance with the scope of each of which consists of the Commercial Court, Children's Court, Corruption Court (Tipikor), Industrial Relations Court (PHI), Human Rights Court, Fisheries Court, and others that fall under the realm of the Supreme Court.

The current condition of the Tax Court is still far from ideal. The Tax Court currently has 18 (eighteen) panels, each assembly consisting of 3 (three) judges and 2 (two) substitute clerks. Each assembly meets 2 (two) times a week. The Tax Court also held hearings outside of its position in Jakarta, namely in Surabaya and Yogyakarta. The large number of tax disputes examined and decided by the Tax Court, coupled with the limited quality and quantity of Human Resources (HR) in it, should follow the spirit of reform, the guidance and organization and administration of this Tax Court should be immediately integrated into the environment of the State Administrative Court under the authority Supreme Court. It also aims to maintain the dignity of the Tax Court itself.

Position of the Tax Court After the Constitutional Court Decision Number 26/PUU-XXI/2023.

On the legal practice side, the large number of laws approved by the Constitutional Court show that the legal products produced by legislators (legislatures) still have ideological defects, in other words, the quality of statutory products is full of content contrary to the constitution. not participatory, aspirational, and accountable. There are still inconsistencies in the drafting of laws both in text and in substance, it is even considered that the laws made are only intended for momentary political interests which override the aspect of justice (Asy'ari, Syukri, Meyrinda Rahmawaty Hilipito, 2013).

In this condition, legislative products cannot be allowed to conflict with the constitution, because if this is allowed to continue, there will be a process of deligitimizing the constitution, violating citizens' constitutional rights, and can even lead to the collapse of democracy. That is why the Constitutional Court is required to play its role through the authority to review laws, because it can function as a balancing force in controlling legislative products that violate the constitution. This is in accordance with the opinion of Hans Kelsen who stated

"recognized the need for an institution with power to control regulate legislation" (Ferejohn, 1803). In this case the control is in the form *judicial review*. This can be a means to purify the laws produced by the legislature so that they do not harm the community.

As for the position of the Tax Court, which has recently been widely discussed in academic forums and legal practitioners, it seems that they will find a bright spot with the issuance of the Constitutional Court Decision Number 26/PUU-XXI/2023. Through application *Judicial Review* against Article 5 paragraph (2) of Law 14/2002 whose verdict is as follows:

1. Declare Applicant II's application inadmissible;
2. Granted Petitioner I and Petitioner III partially;
3. Declare that as long as the phrase "Department of Finance" in Article 5 paragraph (2) of Law 14/2002 contradicts the 1945 Constitution of the Republic of Indonesia it does not have binding legal force as long as it is not interpreted as "the Supreme Court which will be implemented in stages no later than 31 December 2026; So that Article 5 paragraph (2) of Law 14/2002 in full reads "Organizational, administrative and financial development for the Tax Court is carried out by the Supreme Court which will be implemented in stages no later than 31 December 2026";
4. Ordering the publication of this decision in the State Gazette of the Republic of Indonesia as appropriate;
5. Rejecting the application of Applicant I and Applicant III for other and the rest.

The Petitioner is of the opinion that the provisions of Article 5 paragraph (2) of Law 14/2002 are contrary to Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia which states that Indonesia is a country based on law. In addition, Article 24 paragraph (1) of the 1945 Constitution of the Republic of Indonesia also states that the judicial power is an independent power to administer justice in order to apply law and justice. Article 24 paragraph (2) of the 1945 Constitution of the Republic of Indonesia also confirms that judicial power is exercised by the Supreme Court and the judicial bodies under it, including the Constitutional Court.

As for the Constitutional Court Decision Number 26/PUU-XXI/2023. Through application *Judicial Review* against Article 5 paragraph (2) of Law 14/2002 this is classified as a conditional constitutional decision (*Conditionally Constitutional*), it can be seen from the consideration of the judges and the verdict which contains the word "conditional constitutional" either implicitly or explicitly. Model conditional constitutional decisions contain the following characteristics:

1. The conditional constitutional decision aims to maintain constitutionality in accordance with the conditions determined by the Constitutional Court;
2. The conditions determined by the Constitutional Court in constitutional decisions are conditionally binding in the process of forming laws;
3. Opening up opportunities for reviewing the norms that have been tested, in the event that the formation of a law is not in accordance with the requirements determined by the Constitutional Court in its decision;
4. Conditional constitutional decisions serve as a reference or guideline for the Constitutional Court in assessing the constitutionality of the same norm;
5. Conditional constitutional decisions open up opportunities for testing norms that are textually not listed in the law;

6. Conditional constitutional decisions to anticipate the occurrence of a legal vacuum;
7. The position of the Constitutional Court is basically as an interpreter of laws with the conditional constitutional decision model as well as forming laws (*positive legislator*) on a limited basis (Asy'ari, Syukri, Meyrinda Rahmawaty Hilipito, 2013).

As for the phrase "*Organizational, administrative and financial development for the Tax Court is carried out by the Supreme Court which will be implemented in stages no later than 31 December 2026*" Making the Supreme Court since the decision of the Constitutional Court Number 26/PUU-XXI/2023 has been able to carry out organizational, administrative and financial development for the Tax Court. Thus, since the Constitutional Court Decision Number 26/PUU-XXI/2023 was read out and has permanent legal force (*force of change*) The Tax Court has officially entered into the environment of the State Administrative Court because indeed in terms of the object of the dispute, namely the tax dispute is a State Administrative Decision (KTUN).

DAFTAR PUSTAKA

- Anastasya Millenia Tuela, Toar N. Palilingan, F. M. D. (2018). Kewenangan Pengadilan Tata Usaha Negara Dalam Menyelesaikan Sengketa Penyalahgunaan Wewenang Yang Dilakukan Pejabat Tata Usaha Negara. *E-Journal Universitas Sam Ratulangi*, 25(2).
- Asy'ari, Syukri, Meyrinda Rahmawaty Hilipito, M. M. A. (2013). *Model dan Implementasi Putusan Mahkamah Konstitusi Dalam Pengajuan Undang-Undang (Studi Putusan Tahun 2003-2017)*. Pusat Penelitian dan Pengkajian Perkara, Pengelolaan Teknologi Informasi dan Komunikasi Kepaniteraan dan Sekretariat Jenderal Mahkamah Konstitusi Republik Indonesia.
- Daim, N. A. (2014). Hukum Administrasi Perbandingan Penyelesaian Maladministrasi Oleh Ombudsman dan Pengadilan Tata Usaha Negara. *Laksbang Justitia*.
- Dwiyanto, A. (2015). *Reformasi Birokrasi Kontekstual Agus Dwiyanto Gadjah Mada University Press*. Gadjah Mada University Press.
- Ferejohn, J. E. (1803). CONSTITUTIONAL REVIEW IN THE GLOBAL CONTEXT. *Journal Legislation and Public Policy*, 6, 49-59.
- Hadjon, P. M. (1987). *Perlindungan Hukum Bagi Rakyat Sebuah Studi Tentang Prinsip- Prinsipnya, Penanganannya Oleh Pengadilan Dalam Lingkungan Peradilan Umum dan Pembentukan Peradilan Administrasi Negara*,. Bina Ilmu.
- Marbun, S. (2001). *Dimensi-Dimensi Pemikiran Hukum Administrasi Negara*. UII Press.
- Marzuki, P. M. (2005). Penelitian Hukum. In *Penelitian Hukum*. Kencana Prenada Media.
- Putrijanti, A. (2015). KEWENANGAN SERTA OBYEK SENGKETA DI PERADILAN TATA USAHA NEGARA SETELAH ADA UU No. 30 / 2014 TENTANG ADMINISTRASI PEMERINTAHAN. *Masalah-Masalah Hukum*, 44(4), 425-430.
- Putu, L., Ikka, N., Hukum, F., Udayana, U., Tanaya, P. E., Hukum, F., & Udayana, U. (2014). *Analisis kewenangan pejabat tata usaha negara dalam kedudukannya di indonesia*. 11(6).
- Simolang, K. (2016). *Kedudukan Peradilan Pajak di Indonesia*. VII(4), 1-23.
- Strong, C. F. (2004). *Konstitusi - Konstitusi Politik Modern*. Nuansa & Nusa Media.
- Subechi, I. (2006). Mewujudkan Negara Hukum Indonesia. *Jurnal Hukum Dan Peradilan*, 1(3), 339.
- Thaib, D. (2001). *Teori dan Hukum Konstitusi*. Raja Grafindo Persada.