Indonesia's Income Tax Arrangements for Over the Top Services

Amelia Cahyadini[1], Budi Arta Atmaja[2], R. Adi Nurzaman[3]

[1]Assistant Professor in Taxation Law at The Faculty of Law, Universitas Padjadjaran

[2]Assistant Professor in Criminal Law at The Faculty of Law, Universitas Padjadjaran

[3]Assistant Professor in Administrative Law at The Faculty of Law, Universitas Padjadjaran

DOI: https://dx.doi.org/10.47772/IJRISS.2024.8110224

Received: 11 November 2024; Accepted: 18 November 2024; Published: 20 December 2024

ABSTRACT

This article discusses the effect of administration of tax arrangements on Over the Top (OTT) services in Indonesia. As is known, OTT as a giant company has a big influence on national and transnational economic growth. Industries in various countries cannot be separated from the important role of OTT. Until now, OTT is still an interesting issue to be discussed in Indonesia because the regulation is still very limited so that OTT cannot be taxed. The method used in this article is a qualitative approach that refers to legal norms, especially Law Number 2 of 2020. The results of this study indicted that current Indonesian regulations are still unable to reach OTT businesses. Currently, the existing provisions only cover electronic trading providers and electronic trading activities. In the future, the Government of Indonesia needs to prepare a concept of income tax regulation that can reach OTT tax subjects so as to be able to provide a fair business climate.

Keywords: Digital Services Tax, Income Tax, Indonesia, Over the Top (OTT), Tax Arrangements.

INTRODUCTION

Over The Top (OTT) is an application accessed and delivered over the public Internet that may be a direct technical/functional substitute for traditional international telecommunication services.[i] The Organization for Economic Co-operation and Development (OECD) categorizes OTT services into real-time communications services; entertainment video services; telework or telepresence; cloud computing and storage; and financial services.[ii]

OTT expands the ecosystem of technology, information, and communication in human life. In addition, this technological development has given birth to a transnational economic power whose operations have an impact on the global geopolitical map and the political-economic interests of countries in the world.

The media industry in various countries, including Indonesia, cannot be separated from the involvement of technology giants such as Google, Facebook, Microsoft, Amazon, and other OTT companies. OTT is a party that takes advantage of the spread of the evolutionary process of media ecology that is taking place today. When people are increasingly dependent on internet-based communication modes and smartphones, there is also a migration of media audiences from old (conventional) media to new (digital) media. The business penetration of search engine companies, social media, and e-commerce quickly shakes the conventional media business of print, radio, and television.

To date, advertising spending is the largest revenue source for OTT companies, for example, YouTube and Facebook, both of which contribute to Google's revenue. YouTube's global revenue in 2019 was US$ 15.15 billion or around 208.1 trillion rupiah. The revenue increased by 36.5% from 2018 of US$ 11.2 billion or around 153.8 trillion Indonesian Rupiah.[iii] This revenue accounts for 10% of Google's total revenue. Facebook's global revenue was US$ 21 billion or around 288 trillion rupiah in the last three months of 2019. The graph of Facebook's revenue can be said to have continued to increase from the fourth quarter of 2011 to 2019.[iv] Facebook's revenue is mostly derived from advertising from the mobile sector (mobile advertising). –

via smartphones), which accounts for 94% of Facebook's overall revenue.[v]

Google's biggest revenue comes from an advertising application called Google Adwords. Google Adwords depends on Google's ability to create crowds, namely crowds that access Google as a search engine to find information, data, or news. This information, data, and news is almost never produced by Google itself but is aggregated from other sources, including online journalistic media sources.

With the database capacity and algorithms that Google has, the search engine company is able to aggregate and present journalistic content from all media as long as it is connected through the internet network. Google provides big data for everyone, Google does not need to produce data itself, but absorbs, collects, and categorizes it from data sources (websites, sites, and portals), then provides access to everyone.[vi] So basically, Google doesn't need to have an editorial structure, hire journalists and editors, but can indirectly modify news produced by journalists and editors from other media, in this case, journalistic media. Likewise, Facebook does not need to have journalists because Facebook "journalists" are all Facebook account owners who actively share information through their respective accounts every day. This aggregation process initially occurs automatically, without any agreement with the content owner.[vii]

It is in this context that the business practices of OTT companies, such as Google and Facebook, have also changed the fate of the journalism media. The more people get information from Google, the more Google benefits, because access to that information brings traffic which is then monetized as internet user behavior data (behavioral data) which is sold to advertisers and others. How can conventional media compete with Google, Facebook, and other OTT companies if what is created is an unequal business climate or contradictory legal treatment? Conventional media is taxed so it is not free to set advertising rates, while OTT is free from taxes, so it can apply advertising rates that are more affordable for users. In fact, legally, the status of both is the same: media institutions. Thus, one of the strategic issues that need to be considered is the imposition of taxes for OTT.

To encourage a healthy business climate, efforts by national governments to tax Google and other OTTs should be welcomed. This is done to help determine the fate of the mass media in Indonesia in the future. Rejecting the existence of OTT is indeed not a realistic choice, therefore formulating an equal relationship can still be done, one of which is through tax instruments. Based on this, the issue to be discussed is how do tax regulations in Indonesia regulate the imposition of income tax on OTT companies?

METHOD

The author uses a research method with a qualitative research approach, namely research that refers to legal norms contained in legislation and norms that live and develop in society.[viii] The analysis is presented in the form of descriptions, whereas if data is found and presented in the form of numbers, it is not intended to be tested statistically, but only to strengthen or sharpen the analysis. Legal research generally has normative juridical and empirical juridical types.[ix] Considering that the Income Tax instrument has been regulated in the laws and regulations in Indonesia, this research was conducted using a normative juridical approach, because the object under study is the norms or rules formulated in the law without ignoring the empirical facts found in the field. The research specification used is analytical descriptive, namely research that describes and analyses secondary data supported by primary data.

LITERATURE REVIEW

Sovereignty is supreme authority, an authority which is independent of any other earthly authority. Sovereignty in the strict and narrowest sense of the term implies, therefore, independence all round, within and without the borders of country.[x] State sovereignty is the absolute authority of the state to exercise its state power without interference from other states, which extends throughout its territory on land, sea, air, and underground.[xi] George Jellinek's opinion, as quoted and translated by Rochmat Soemitro, states that sovereignty is the nature of the state's absolute power to legally determine its own destiny and which has binding power.[xii]

Sovereignty as a concept that refers to the main and highest power to decide can be analyzed and qualified based on the perspective or point of view of opposing elements (diametric), namely legal sovereignty or political sovereignty; internal or external sovereignty; single sovereignty or sovereignty that can be divided; government or people's sovereignty.[xiii] The internal aspect of sovereignty is in the form of the highest power to regulate everything that exists or occurs within the boundaries of its territory. The external aspect of sovereignty is the highest power to establish relations with members of the international community or regulate everything that exists or occurs outside the territory of the state but as long as it is still related to the interests of the state.[xiv] Rochmat Soemitro stated that based on the sovereignty of the country, the country has the authority to make laws, regulations to regulate the making of laws, their implementation, and their courts. The sovereignty of a country is limited and these limits are contained in the sovereignty of other countries.[xv]

DISCUSSION

Every country has sovereignty, that is, the state has the authority to make laws, implement them, and enforce the law.[xvi] This includes the sovereignty to levy taxes on its citizens or residents of the country concerned or by Rochmat Soemitro referred to as taxation sovereignty (belastingsouvereinitiet).[xvii] Based on the theory of state sovereignty, which gave birth to taxation sovereignty, in many countries, taxes are collected based on the authority granted by the constitution in the form of law.[xviii]

Its manifestation is in the form of absolute authority of the state which is exercised through the highest state apparatus (*Dewan Perwakilan Rakyat*/Parliament together with the President) to make regulations to collect taxes and the power to implement them.[xix] Absolute authority into the country itself is limited by provisions in the constitution or the Constitution, while outward, this authority basically cannot be limited by anyone.[xx] Nevertheless, it must be noted that the power of a state which is exercised outside its territorial boundaries cannot be exercised by force, without violating the sovereignty of other countries. In other words, restrictions on the taxation authority of a country are limited by international principles that have been accepted and agreed upon by countries or have obtained permission to carry out administrative actions in other countries.[xxi]

Tax collection by the state through law is part of the way to control individual behavior for the common interest and is a method or policy of collecting funds for the common interest which is carried out fairly for welfare.[xxii] The transfer of wealth without compensation can only be in the form of robbery, theft, confiscation (by coercion), or voluntary giving (without coercion).[xxiii] Tax collection by the state is one of the aspects regulated in the constitution and it can be said that every country in its constitution regulates tax collection.

In the constitution of the State of Indonesia which was first enacted on August 18, 1945, the legal basis for collecting taxes is contained in Article 23 paragraph (2) of the 1945 Constitution of the Republic of Indonesia which states that all taxes for state purposes are based on law. The formulation was later changed through the third amendment in Article 23A of the 1945 Constitution so that it reads that taxes and other levies that are coercive for the needs of the state are regulated by law. Article 23A of the 1945 Constitution is the legal basis for tax collection, as well as a tax philosophy which contains several meanings.[xxiv]

First, the collection of taxes and other collections that are coercive, such as excise, duties, and levies, must have a legal basis in the form of a law. This means that the collection of taxes and other levies that are coercive must first obtain approval from the people. Taking into account that taxes are a transfer of wealth from the people to the state without getting a counter-achievement that can be directly appointed, the transfer of wealth if it is associated with the law will raise the possibility, namely as robbery, confiscation, pickpocketing (by force) or giving gifts voluntarily and sincerely (without coercion).[xxv] Therefore, so that taxes are not categorized as robbery or grants, it is necessary to have the approval of the people through the House of Representatives (hereinafter referred to as DPR) as a representation of the people.[xxvi]

Second, as stated in the 1945 Constitution (before the amendment and after the amendment) that the existence of the obligation to collect taxes based on the law shows the recognition of democratic institutions as the embodiment of the understanding of people's sovereignty.[xxvii] In a democratic country, the people are involved in determining the goals and implementation of government, especially regarding tax collection which involves and burdens all the people. When examined in the Elucidation of Article 23 of the 1945 Constitution

before the amendment, it appears that there has been a justification for these considerations with the formula "...the people's right to determine their own destiny, then all actions that place a burden on the people such as taxes and others must be determined by Constitution."

Third, tax collection is an absolute right of the state, meaning that only the state has the authority to collect taxes from its people.[xxviii] There is no existing social organization in the country concerned which has the authority to collect taxes, including against members of the social organization concerned. The state's authority to collect taxes is one of the characteristics of the state that other organizations do not have. This authority is inherent in every sovereign state.

Associated with the principle of people's sovereignty[xxix] and the State of Indonesia is a state of law[xxx], as well as the authority of the DPR to form laws,[xxxi] the concept will be generated that these provisions provide a juridical basis in tax collection which must be based on the approval of the people as the owner of sovereignty. Aspects of justice and legal certainty must also be a way of thinking that the state should not collect taxes without a legal basis.[xxxii] With the existence of laws, order or regularity in the context of renewal or development is something that is desired, even considered absolute.[xxxiii]

It should be stated that restrictions on the exercise of the tax collection authority of a country in another country do not prevent that country from imposing taxes on subjects residing in other countries, provided that the subject has a relationship with that country, either because of citizenship or because of economic relations, has a taxable object in that country or impose an object existing in another country from which the taxable object is owned by a subject residing in that country.[xxxiv]

In general, the country where the income is derived (the source country) has the first taxation right on an income. The source of income principle bases taxation on the place where the source of income is located,[xxxv] or because of the relationship between the state and income-generating activities,[xxxvi] so that the country where the source is located has the authority to impose taxes on the results that come out of that source.[xxxvii] According to Ongwamuhana, the source jurisdiction is based on an assumption that the source country contributes to non-taxable-owned companies in the country to earn income from that country.[xxxviii]

In this regard, Indonesia has made several efforts to impose an income tax for digital activities, starting with trying to reach the imposition of an income tax for e-commerce since several years ago, both through regulations and laws and regulations. Several regulations issued by the Directorate General of Taxes include Circular Letter of the Director-General of Taxes Number S-429/PJ.22/1998 dated December 24, 1998, concerning Appeals to Taxpayers Conducting Transactions Through Electronic Commerce; Circular Letter of the Director-General of Taxes Number SE-62/PJ/2013 concerning Affirmation of Tax Provisions on E-Commerce Transactions; and Circular Letter Number SE-06/PJ/2015 concerning Withholding and/or Collection of Income Tax on E-Commerce Transactions. In addition, there is also the Minister of Finance Regulation PMK Number 210/PMK.010/2018 concerning Tax Treatment of Trade Transactions Through Electronic Systems (E-Commerce), which was later withdrawn and revoked not long after it was issued.

E-commerce arrangements are regulated in Government Regulation Number 80 of 2019 using *Perdagangan Melalui Sistem Elektronik* (PMSE) and *Penyelenggara Perdagangan Melalui Sistem Elektronik* (PPMSE) terminology. PMSE is defined as a trade whose transactions are carried out through a series of electronic tools and procedures.[xxxix] Meanwhile, what is meant by PPMSE is business actor provides electronic communication facilities used for trade transactions.[xl] What is meant by trade in this regulation is the order of activities related to transactions of goods and/or services, both within Indonesia and beyond the Indonesian territory with the aim of transferring rights to goods and/or services to obtain compensation or compensation.

Government Regulation Number 80 of 2019 is the implementing regulation of the Trade Act, in particular the mandate of Article 66 of the Trade Act, which states that further provisions regarding trade transactions through electronic systems are regulated with or based on government regulations. Government Regulation Number 80 of 2019 basically does not contain regulations regarding taxes applicable to PMSE and PPMSE, but regulates PMSE in general. Nevertheless, in Article 8 of Government Regulation Number 80 of 2019 it is affirmed for PMSE business activities to apply tax provisions and mechanisms in accordance with the

provisions of the laws and regulations.

The provisions of the legislation related to taxation in question include Law No. 2 of 2020. It can be said that Law Number 2 of 2020 is the first law that regulates digital tax provisions in Indonesia. One type of regulated tax is Income Tax from PMSE activities carried out by overseas taxpayers and/or by PPMSE. Income Tax Liability in PMSE activities arises if the subject of foreign taxes and/or PPMSE meets the provisions of significant economic presence.[xli] Overseas business actors or ppmse abroad who qualify for significant economic presence can be treated as Permanent Establishment, so it can be subject to Income Tax.[xlii] The significant economic presence referred to in this law is (1) the gross circulation of consolidated business groups up to a certain amount; (2) sales in Indonesia up to a certain amount; and/or (3) active users of digital media in Indonesia up to a certain amount.[xliii]

Through Law Number 2 of 2020, the Government of Indonesia formulated a form of tax for PMSE and PPMSE that cannot qualify for the existence of BUT in Indonesia, namely Electronic Transaction Tax. Electronic Transaction Tax is known from the formulation of Article 6 paragraph (9) of Law Number 2 of 2020. Electronic Transaction Tax is a substitute for Income Tax for overseas business actors who do PMSE and/or PPMSE that cannot be designated as BUT because of the P3B between Indonesia and other countries.[xliv] This Electronic Transaction Tax is imposed on transactions in the sale of goods and/or services through PMSE to buyers or users in Indonesia. Electronic Transaction Tax as intended, paid and reported by foreign traders, overseas service providers, and/or PPMSE abroad that has fulfilled a significant economic presence.[xlv] In Law Number 2 of 2020 there is no more complete description of Electronic Transaction Tax. Provisions regarding the amount of tariffs, the basis of imposition, and procedures for calculating Electronic Transaction Taxes will be regulated by Government Regulations.[xlvi]

Based on the terms of tax law making which refers to the certainty principle of Adam Smith's Canon,[xlvii] Normative tax laws must provide legal certainty. In addition, tax laws must also provide justice, as well as the principles of equality and equity. Laws that contain rules that are general to be guidelines for everyone to behave in society, so that the rules and implementation of these rules achieving legal certainty.[xlviii] So the question will arise, what provisions (absolutely) must be poured in the form of legislation to be able to create legal certainty? It is a provision that is material law.[xlix] which must be fully and clearly stated in the tax law. Provisions that are material law is the provision regarding, first, the subject of taxes, namely who is made the subject of tax, the terms of a person's rather subject to taxes, the division of tax subjects, and so on.

Conceptually, the subject of tax is the person that the law is intended to be taxed with.[l] As a subjective tax, the criteria of the subject of tax have an important meaning in the application of the Income Tax system. The determination of the subject of taxes becomes one of the benchmarks in determining whether a party is obliged or not to meet the tax obligation on income received or obtained. The tax subject who receives or earns income which is the object of income tax, will then become a taxpayer and have an obligation to pay Income Tax. The importance of determining the subject of tax is also stated by Peter Harris, i.e. the law must identify the person or entity who is the subject of the tax for two main purposes, first, to allocate income tax obligations, i.e. who is obliged to pay taxes. Second, to identify who are the parties who can have income so that the limits of the entity that is obliged to pay taxes are known.[li]

The second, provisions that are material law are the object of taxes, namely what is the object of tax and what the conditions are, how it is defined, where the boundaries are, what is excluded, what does not include tax objects, and so on. Article 4 of the Income Tax Act which states that the object of the tax is income, i.e. any additional economic capabilities received or obtained by taxpayers, both from Indonesia and from outside Indonesia. Under this system, Indonesia will tax all income received by domestic taxpayers, both from Indonesia and from outside Indonesia.

The third, provisions regarding tax rates, namely how much, in terms of where the rate is applied, when the rate will be applied, and so on. While other provisions that are formal law, such as ordinances and so on, do not have to be outlined in the law, but there is no prohibition to pour formal tax law provisions in the provisions of the law.[lii]

Based on that, when looking at Article 6 paragraph (12) of Law Number 2 of 2020, then the provisions regarding the tariff and basis for the imposition of Electronic Transaction Tax should be regulated in the legal level. While for the procedure of calculating Electronic Transaction Tax can be regulated in laws or regulations under the law. The regulation of implementing the principle provisions is implemented further with lower regulations, so that if it contains provisions that are contrary to the provisions of the law, it will by itself be invalid and should not be enforced.

Until now, government regulations governing electronic transaction taxes do not yet exist. The absence of government regulations is due to the decision of the Government of Indonesia which has not imposed provisions on Income Tax for PMSE and PPMSE businesses. Another consideration is related to a more political issue, namely the issue of retaliation or revenge, as is the case between the United States and the European Union countries. Countries that take unilateral action to set income taxes for digital platforms face a lot of trade retaliation with the United States.[liii]

Given that the Electronic Transaction Tax is an alternative to income tax of PMSE activities, the electronic transaction tax provisions have also not been enforced. This is a form of the Indonesian Government's commitment to wait for the results of the OECD consensus which is expected to provide guidelines for world taxation in facing the challenges of digitalization of the economy. In addition, referring to the previous description, then if you want to impose an Electronic Transaction Tax the Indonesian government needs to prepare a law that better guarantees legal certainty.

Other considerations regarding the provisions regarding of Income Tax and Electronic Transaction Tax are related to more political issues, namely the issue of retaliation or revenge, as occurs between the United States and European union countries.[liv] Countries that take unilateral action to set income taxes for digital platforms face a lot of trade retaliation with the United States.

The enactment of Law Number 2 of 2020 also received attention from the United States. Through the United States Trade Representative (here and after written by USTR), the United States conducted an investigation related to the scheme of cooking on digital transactions prepared by Indonesia even though it has not been fully implemented.[lv] There are three points listed in Section 301 Investigations Status Update on Digital Service Tax Investigations of Brazil, the Czech Republic, the European Union, and Indonesia, namely, first, the United States considers Indonesia's digital taxation scheme discriminatory because it only applies to electronic commerce conducted by non-resident tax subjects.[lvi]

The special tax is considered to target U.S. companies and this method is considered to discriminate against U.S. companies. Second, the United States considers Indonesia’s regulated digital taxes inconsistent with international taxation principles, especially Income Tax and Electronic Transaction Tax.[lvii] The principle of international taxation referred to by USTR is the principle regarding Permanent Establishment and double tax risk. Third, USTR is concerned that Indonesia's digital taxes limit U.S. trade through the creation of additional tax burdens that force U.S. companies to spend more to comply with Indonesia's tax rules and the imposition of double taxation on U.S. corporations.[lviii] USTR also continues to monitor the development of measures that will be implemented by Indonesia. USTR has also sent a letter to the Minister of Finance the Republic of Indonesia regarding the investigation.

Furthermore, based on the definition of PPMSE formulated in Law Number 2 of 2020 and Government Regulation Number 80 of 2019, it can be said that PPMSE does not cover OTT, with the consideration that OTT is formulated as an application service provider and/or content over the internet based on the definition put forward by the International Telecommunication Union posted by the Ministry of Communication and Informatics the Republic of Indonesia in Circular Letter Number 3 of 2016.[lix] Application services are the use of telecommunication services through telecommunications networks based on internet protocols that allow communication services in the form of short messages, voice calls, video calls, online conversations (chat), financial and commercial transactions, data storage and retrieval, games (games), networks and social media, and derivatives.[lx] Meanwhile, content services through internet is the provision of all forms of digital information consisting of writing, images, animation, music, video, movies, games (games), or a combination of some and / or all, including in the form of streaming (streaming) or downloaded (downloaded) by utilizing

telecommunication services through internet protocol-based telecommunication networks.[lxi] So that income tax arrangements for OTT companies are not covered by applicable tax laws and regulations.

CONCLUSION AND RECOMMENDATION

Based on the scope of OTT business, the current legislation still does not reach the OTT business form because the current provisions only cover electronic trade organizers and electronic trading activities. The decision has not implemented the rules of Income Tax and Electronic Transaction Tax stipulated in Law Number 2 of 2020, considered a fairly appropriate step with the consideration that in the context of digitalization, there are several issues that still require discussion globally for the imposition of direct tax, one of which is about the concept of sharing the right of taxation between countries, so that, if the Government of Indonesia wants to enact the provisions of Income Tax. OTT needs to determine the concept of sharing the right of cultivation between countries in Indonesia's international tax law system. This needs to be realized in the form of regulations that can be used as the legal basis for the imposition of Income Tax on OTT which at least fully uses the concept of digital presence, proper nexus determination, and the division of cultivation rights based on the principle of fairness, some of which are still part of the discussion and work of the OECD Inclusive Framework. In the future, the Government of Indonesia needs to prepare the concept of income tax arrangements that can reach the subject of OTT taxes so as to provide a fair business climate.

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