

## **Refund Losses of State Assets of Perpetrators of Criminal Acts Of Tax Through Means Legal Penal And Non Penal Law Systems inIndonesia**

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**Abstract:**The purpose of this study is to analyze and discover the nature of indemnification of the state of criminal tax assets by means of penal and non-penal law in the legal system of Indonesia. Analyze and find means of penal and non-penal law in the indemnification of the state of criminal assets in the tax Indonesia's legal system. Analyze and find the factors that influence the indemnification of the state of criminal tax assets in the Indonesian legal system. The results showed that the country setting of return loss of a criminal tax assets by means of penal and non-penal law in the Indonesian legal system, which is regulated in legislation tax crime and Criminal Procedure Code does not provide for the return of assets effectively and efficiently, but only foreclosure legal action precedes the deprivation of legal action if the decision of the court has obtained permanent legal force, Returns loss to the state of criminal tax assets in the Indonesian legal system can be implemented, by means of penal punishment which is conventional by mistake defendant found to be ineffective, as well as indemnification of the country by means of a non-penal law through civil action and by means of the appropriation of assets of criminals based on money laundering laws, not maximized.

**Keyword:** Criminal tax assets, penal and non-penal

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### **I. INTRODUCTION**

Implementation of development in Indonesia is intended to realize the objectives of the state as stated in the fourth paragraph of the Preamble of the 1945 Constitution of the Republic of Indonesia, namely ...to establish an Indonesian State Government that protects the whole Indonesian nation and all of Indonesia's blood spill and to promote prosperity general, intellectual life of the nation, and participate in the implementation of a world order based on freedom, eternal peace and social justice..."

To achieve the objectives of these countries should be supported with adequate State acceptance and the creation of a national steady stability of additionally required law enforcement agencies which have reliable capabilities. Therefore, the required increase in the role and function of effective law enforcement in prevention efforts and the eradication of criminal acts of tax. Tax is a means of development of the country, without the revenue from the tax, the State sector cannot carry out its functions for the menyejahterakan people. From year to year the potential acceptance of State sector taxes continued to increase, On the fiscal year 2012, the tax sector contributed 78.64 per cent or approximately Rp 1.016 trillion of the total Budget of the year 2012. In 2013, the acceptance of State tax have been targeted in the sector reached Rp .9 1.178 trillion. These data show that the tax sector has a vital role in the meantime perpajakan criminal acts or corruption in the taxation sector to the attention of the public since the mencuatnya corruption cases committed by two persons tax officer i.e. Gaius Halomoan Tambunan and Dhana Widyatmika. Both these cases open practice of corruption in the taxation sector during this secret

Law enforcement agencies such as Police, Prosecutors, and the Corruption Eradication Commissio (KPK) has identified sectors of taxation as the Government sector prone to the occurrence of the crime of corruption. The third such law enforcement institutions agreed indicators and the modus operandi of the occurrence of criminal acts of corruption in the taxation sector. Meanwhile, the law enforcement in Indonesia has always been an object of interest to be examined either during the old order, new order or the order is now under way commonly referred to with the order of the reform. Specialized in law enforcement against criminal acts of corruption are a variety of agencies that have authority to conduct the investigation against such criminal acts. Those institutions are the police, Prosecutor's Office and the Commission for the eradication of criminal acts of Corruption. Law enforcement's role in realizing the eradication of criminal acts of corruption tax doesn't work as expected, it can be affected by several factors, among others, quality, profesinalitas, morals and the morals of the apparatus law enforcement agencies are still low, so that the Community trusts the seeker of

Justice against law enforcement agencies increasingly declining. In addition to weak law enforcement is also caused due to law enforcement officials such as the police, the Prosecutor, the investigator civil servant (1988) as well as professional attitude and has not shown high moral integrity.

Law enforcement against criminal acts of corruption tax is very different from other criminal acts, as the existence of institutions that are authorized to conduct the judicial process against the criminal acts of corruption tax, i.e. the presence of the investigating civil servant (1988) which has the authority to conduct the criminal acts of the field of taxation. On other aspects of the crime korupsi be extra ordinary crime (crime). As a criminal act that is categorized as extra ordinary crime criminal acts of corruption has ruined that incredible power and damage against the joints of the life of a country and nation. The impact of the criminal acts of corruption can be seen from the occurrence of various natural disasters and environmental damage such as floods, and the negative impact of criminal acts of corruption of the very life of the nation, strikes even the corruption is the deprivation of rights Economic and social rights of the community, so that Indonesia needed the extra ordinary law enforcement measure.

Attempts tackling crime corruption tax has not been supported by the necessary facilities and infrastructure so that greatly affect law enforcement officers to serve optimally in pemberantasan corruption and has not yet been created synergy law enforcement apparatus. Weak law enforcement in the framework of the eradication of criminal acts of corruption will affect the growth of the economy and directly became one of the causes of the worsening investment climate in Indonesia. The phenomenon of corruption criminal act concerning the field of taxation is not only contrary to universal moral principles but also contrary to the Constitution and philosophical and budaya locals, because the tax was in fact blood the people to build the country.

Corruption is one of the criminal acts which could not be released from the country's problems, the organizers of the State or the people who have the Honorable position in the society. Nevertheless both ordinary criminal acts or corruption, the second such case is equally a crime against property. The difference, at least can be viewed from two aspects viz. the perpetrator and the victim. The perpetrators of corruption, not the haphazard light because they have access to such corruption, "...with misappropriated authorities, opportunities or means of him due to his position...", while the perpetrators of criminal acts the streets are mostly members of the lower strata of society who do not have access everywhere, also does not have the level of knowledge and education. The victims of corruption are not visible and not individuals, but the State, precisely because this public invisibility most don't feel that corruption is a crime that endanger citizens indirectly, as well as follow-up criminal corruption in the taxation field to the detriment of the country's finances.

## **II. FORMULATION OF THE PROBLEM**

1. What is the essence of the crime law enforcement corruption tax in the national legal system?
2. How does law enforcement criminal acts of corruption can restore the tax losses of the country of the perpetrators of criminal acts of corruption tax?

## **III. THEORETICAL FRAMEWORK**

Man in his nature tends to always live in groups, called it a "Aristotle's Zoon Politicon, which translated as social beings and socialization of human life in an organization, the Organization of the smallest family, adalah the organization is distributed is the country. According to f. Isjwara, formally the State is "Organization of power. material in the State was celebrated by a life of communion (staat-gemenchap) of the many forms of perkelompokan.<sup>1</sup>

Johan Hendict Adolf Logemann, in his book *Over de theorie van een stelling staatsrecht* "among others stated:" voor de moderne staat kan mijn inziens deze definitie opgaan, dat hij is een gezagorganisatie, deordening met haar gezag-en dus de beheersing-van een gegeven samenlevingn als geheel, het cq stishten en oundehouden en er gegeven samenlevingsorde "(for a modern state it can be used as a definition that it is an authoritative authority organization whose objects and activities are ialh with the authority or authority that governs and thereby the preservation of an existing society as a distinct community order).<sup>2</sup> J.H.A. Logemann, viewed the State as an authority organization had a specific object, adjust and hold the interest of the community. In the quality of the State as the highest good organisation seen from conception and purpose of the State is highly associated with taxes that closely connected to each other. In light of this country's conception of law elaborated so as to obtain a clear understanding in a discussion of the linkages with state taxes

The concept of a State of law in Continental European countries based on the concept of State law raised by Immanuel Kant, who was known as the State law or state liberal law in the narrow sense of the word that

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<sup>1</sup> F. Isjwara, *Pengantar Ilmu Politik, Cet. ke . 8*, Binacipta, Bandung, 1982, p., 95

<sup>2</sup> J.H.A. Logeman, *over de theorie van een stellig staatsrecht* Saksama, Jakarta, 1954, p.. 73, M. Solly Lubis, *Asas-asas Hukum Tata Negara*, Alumni , Bandung, 1982, p. 27.

distilakan with *nachtwakerstaat*", because the country's only functioning keep security in the narrow sense. As for the *kosepsi* State law in the broad sense which is known as the welfare State or *Walvarsataat* advanced by F.J. Stahl.

With regard to the concept of the welfare state by p. de Haan, et all, in his book *Bestuurecht in desociale rechtsstaat*, stating "De moderne staat is neit allen rechsteaat in de negentiende eeuwse zin, maar ook verzorgingsstaat – of zo men wil – sociale rechtsstaat."<sup>3</sup> Thus the task of the state in a Welfareate is very broad, namely to prioritize the interests (in the sense of prosperity) of all its people. It is here that Lemaire's main feature of "Bestuurzorg" (holding public welfare)<sup>4</sup> But the people that join the Government in all aspects of life of its people should be limited by law to not commit arbitrary. On the basis of the description according to Rochmat Soemitro, that "according to Rochmat Soemitro, that" according to the conception of the State *nachtwakerstaat* (night watchman State/State police/gendarme e'tat) which flourished in the 19th century, the poll tax could be considered ( to a certain extent) as the evil deeds that cannot be avoided, or acts that are not allowed but were forced to do. ... Not the case with State understand state laws (in the broad sense-welfare State). Such countries will search for justificatory polling tax and taxes on the basis of the regulations that have become the norm (the rule) is generally accepted as agents of the law.<sup>5</sup>

In the modern State of each poll tax brings the obligation to organise the people's welfare. Countries collect taxes bring in *kosekuensi* that the country should try increasing the welfare of its people. The State can only impose its people fairly, if sacrifice of people it tidaklan coupled with an increase in welfare of the people of lot.<sup>6</sup> Because of the poll tax is power possessed by State, precisely because that power without with devotion is savagery, devotion without power is ketidak-berdayaan, obligations without rights is sucking, rights without obligation is gluttony.<sup>7</sup>

In some countries which have already advanced, such as the United States, the tax is something that is absolutely present in a country, how phrase of the philosopher "Benjamin Franklin" that in human society, is certain is death and taxes. Therefore without collecting taxes already certain State acceptance will be reduced and will affect the finances of the State. Other countries with communities that attempt to abolish the levy of the tax, because all the tools there are production and distribution in the hands of the State has led to the conclusion that the tax is no longer needed.<sup>8</sup> many experts in the field of taxation has given understanding or definisi taxes are in fact has the same purpose and core. As is also the case with legal science that until now has not yet obtained a single definition that formulate notions of what the law is. Similarly in the field of tax tax sense. the following will put forth some definis tax advanced taxation experts. P.J. A Adriani in his book *Het Belastingrecht* provide definitions that: *noen ik de heffing Belasting, de overheid zich waardor door middel van verscheft middelen dwang juridische om de publieke uitgaven te berstrijden, zuls enige prastatie without daartegen overte stellen* "<sup>9</sup>

#### IV. DISCUSSION

Setting the return loss of State assets of perpetrators of criminal acts of tax, in fact can be traced to the berberbagai legislation, which dimulai of the determination of the loss of the State itself. The loss of the State as set forth in article 1 point 15 law number 15 Year 2004 stated that "the loss of the country/region is lack of money, securities, and real stuff, and certainly in number as a result of tort either intentional or negligent ". The State's losses may occur due to lawlessness and neglect acting Treasurer of State or civil servants in the course of the administrative authorities and by bendahawaran in the framework of the implementation of the authority of the Treasury. Return loss of the State done soon so need to save the country's wealth is lost or reduced Losses of the State can be found on the basis of the results of pemeriksaan by State institutions and the Government that has the authority to do the examination.

To determine there is no loss of State, based on the Presidential Decree Number 103 Year 2001, concerning the position, duties, functions, authorities, Non Governmental Organization Department, stated that the rate/setting there is not harm the country is the Financial Examiner and the Board of the Financial Supervision and development. However, the determination of the calculation of the loss of the State must be

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<sup>3</sup> P. De Haan, et all, *Bestuurecht In de Sociale Rechstat*, sel, I, *Ontwikkeling, Organisatie Instrumentarium* Kluwer-Deverder, 1986, p.150

<sup>4</sup> E. Utreth, gives firmness that ' Bestuurzorg ' was the task of the Government Wlfare State is a State of modern law which shows the interest of the entire people and has been meningga; the principle of *stataatsonthouding* ", introduction to the law of the State administration, Indonesia, *Pustaka Tinta Mas*, Surabaya, 1986, p. 29.

<sup>5</sup> Rochmat Soemantro, *Asas dan Dasar Perpajakan 1*, PT. Eresco, Bandung, p. 2

<sup>6</sup> Sindian Isa Djayadiningrat, *Hukum Pajak dan Keadilan*, N.V. Eresco, Bandung, 1965, p, 67

<sup>7</sup> *Ibid*, p. 2

<sup>8</sup> HJ. Hofstra, *Socialiticshe Belastingpolitiek*, N.V. De Arbeiderspers, Amsterdam, 1946 p. 80

<sup>9</sup> *Ibid*. p.. 67

analyzed case per year. The disadvantage of the country as a result of the tax crime that can happen if the criminal offence was committed tax ooeh tax payers as well as by the tax apparatus. Taxation of criminal acts committed by the apparatus or employee tax taxation taxation is to 64ba civil servants should obey the laws and regulations, including the provisions of tax legislation. Liability of officers of taxes into the consequences of the oath or promise and as a civil servant. Tax officers are carrying out duties and regulations perpajakan. Therefore the tax officers shall not commit crimes that lead do violate the tax law.

Criminal acts may take the form of taxation, offence or crime. Legally the crime being the indicator of tax law, because the rule violation of tax law. Crime in the field of taxation can be either doing or not doing that comply with the regulations. On hakikatnya the provisions of legislation the legal rule is taxation became a corridor for doing or not doing. Doing or not doing in the field of taxation can be categorized into crimes in the field of taxation, while fulfilling the legal tax rule formulation. For example, conduct contrary to the rules of tax law that can be categorized as a crime in the field of taxation, such as tax payers do the deed conveying the annual notice, that its substance is not true, incomplete and unclear, or the taxpayer pay acts of tax for a tax period, or for each type of tax.

On this connection, the victims of crime in the field of taxation, not just priests, to the State, in the sense that result in losses for the State, but the tax payers may be a victim of crime in the field of taxation. When crime victims fixed on the country means the party that committed a crime is a taxpayer or tax officers. Officials of the tax in question was a tax clerk do in tort law by abusing power, or forcing someone to give something, to pay or receive payments, or to work on something for him with its own actions or deeds caused the loss of State or State revenue. If the victim is a taxpayer, means the party is crime melakaukan employee tax or tax officials. For example, employees of the tax does not provide services correctly and to the taxpayers as a self-help system implementation just my assesment, regulated in the General provisions of the Ordinance of taxation.

The losses the State is short of cash, securities, and real stuff, and certainly in number as a result of tort either deliberately or negligent (article 1 point 22 of law No. 1 year 2004). Elements of the losses the country/region is: (a) lack of money, securities, and real stuff and certainly in number; (b) in tort; (c) Causation in tort law with flaws that occurred; d. the subject responsible for the losses. About the "adverse financial state" law enforcement agencies should cooperate with Financial Examinations or Financial and development Supervisory Agency which helps investigators, calculate the loss of the country. In the development of the financial Inspection Agency audit results and the financial and development Supervisory Agency lately, is seen in the fact that the results of the audit have already led to an audit is "against the law" which is not a "zone of authority". Authority of the agency or Financial Supervisory Examiner Financial and rebuilds in the audit is in the zone of accounting, so far there is no need to look for the existence of the tort law or not, because it is the investigating authority and the public prosecutor.

"The financial loss to the country", the construction of article 2 paragraph (1) of Act No. 31 of the year 1999 is linked with law number 1 Year 2004 should be viewed with kemprehensif, by examining the relationship of the State with loss of return against the law. Thus each of the findings of the existence of the losses by the State Comptroller of audit results he does should be reported to the relevant authorities (POLICE and Prosecutors) to see if the occurrence of a loss the State returned It is an act against the law or not. If you see a Article 64 paragraph (1) of law number 1 Year 2004 stated that the Treasurer, Treasurer instead of civil servants and other officials who had been assigned to indemnify countries/regions may incur administrative sanctions and/or criminal sanctions ". Thus clearly be seen that although the State's loss of return has been made then still possible to be processed through the criminal. Thus the criminal aspect of every Financial Supervisory audit results should be reported to authorized agencies (POLICE and Prosecutors) regardless of whether the losses the State has already returned or not, because to see if the occurrence of a loss the country was brought about the existence of the tort law or not is the authority of investigators, which are "dominis litis" ex Article 139 Criminal Procedure Code which determines Prosecutors whether the matter can be assigned to the Court.

The link between the crime and the tax authority is understood by the people of Indonesia as well as the international community, such as the International Monetary Found (IMF) nor the Transparancy International (TI). The United Nations Convention Against Corruption (UNCAC), associated with the criminal offence of corruption, in the sense that when the crime was committed by tax reform taxation (fiscus), then this is corruption because it is done based on the authority tax reform in his position as a public official. "public officer" (a public official). Public officials referred to as so-called hemaat authors include:

1. The people who held the position of legislative, Executive, administrative or judiciary of a country, whether appointed or elected, permanent or temporary, paid or not, regardless of the seniority of the person;
2. The people who run public functions, including public institutions or public company, or providing public services as specified in the regulations of the participant countries and applied in areas related to law participating countries;
3. People who are defined as "public official a" in the legislation of the country participants. However, for the purpose of the people who run.

Taxation of criminal acts committed by tax officials or apparatus, its essence is criminal act corruption tax, so there are actually two things that most staple that can be reached, namely: as a preventative and repressive measures. These preventative measures associated with the settings of the eradication of criminal acts of tax, and repressive measures include severe criminal sanctions to perpetrators and simultaneously seeking its fullest State losses can back. It could be examined in the Financial Transaction Abuse Act in determining the existence of a keperdataan step to the perpetrator or his heir if not found enough evidence.<sup>10</sup>

## **V. RETURN LOSS OF THE STATE THROUGH LEGAL MEANS OF NON PENAL**

The state loss of the assets of a penal offender, basically has become part of the criminal law system as an effort to prevent the transfer of state assets derived from criminal acts that are detrimental to the state's finances or revenues. In general, the concept of non-penal return of assets known as Non Conviction Baset (NCB) Asset Forfeiture becomes the instrument of asset recovery and simultaneously to reveal unfair wealth. Asset forfeiture is the term used to describe the seizure of assets by the state, whether the proceeds of a crime or an instrument of crime.<sup>11</sup> NCB Assets forfeiture, is the foreclosure and return of assets through a statement in brake, or a lawsuit against an asset. Meanwhile the concept of civil forfeiture is based on a taint doctrine in which a crime is deemed to taint "taint", an asset used or a result of a crime. This is different from a criminal forfeiture that uses a lawsuit against a person (in personam). Non-criminal looting (civil litigation) in some legal systems is seen as an objective action, aimed at the asset itself, not the individual.<sup>12</sup>

Several provisions are stipulated in UNCAC relating to international cooperation between law enforcement authorities, asset recovery, technical assistance and information exchange, as well as mechanisms for their implementation. In addition, one important aspect of UNCAC is the definition of "public officials" including any person holding the legislative, executive, administrative or judicial office of a State Party, even including officials of international organizations, so as to provide for sanctions for persons who bribe public officials . this regard, UNCAC sets out the government's obligation to take action to prevent corruption practices, among others, in the areas of:

1. procedures and ethics in the public sector;
2. Public sector procurement;
3. public sector finance;
4. public reporting, access to information, protection of whistleblowers;
5. community education; and
6. Private sector standards, including accounting and auditing standards.<sup>13</sup>

Each government (State party) is urged to consider certain activities as offenses, including: bribery practices against national public officials, bribery of foreign public officials and international organizations, embezzlement, misuse or misappropriation of property by public officials, the practice of bribery by decision makers the public sector; and embezzlement by people working in the private sector.<sup>14</sup> A brief overview of key aspects deemed relevant in relation to the scope and content of UNCAC, namely prevention, criminalization and law enforcement, international cooperation, technical assistance and information exchange, and asset recovery recognized by many parties as a major breakthrough, and at the same time a "basic principle" of UNCAC in efforts to prevent and eradicate criminal acts that harm state finances and state revenues<sup>15</sup>.

The provisions contained in UNCAC aim for prevention with measures directed at the public and private sectors, and are a preventive model policy, the UNCAC Policy for the prevention of corruption requires that each State Party: First, in accordance with the fundamental principles of its legal system , developing and implementing or maintaining an effective, coordinated anti-corruption policy to increase community participation and reflect the principles of law enforcement, public wealth management and public affairs with good integrity, transparency and accountability. Second, endeavor to build and promote effective practices for the prevention of corruption. Third, it shall endeavor to periodically evaluate the legal instruments and administrative measures associated with the objective of establishing its adequacy to prevent and combat corruption. Fourth, it shall endeavor to periodically evaluate the legal instruments and administrative measures associated with the objective of determining its adequacy to prevent and combat corruption. such as the establishment and empowerment of anti-corruption and transparency agencies to oversee the financing of

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<sup>10</sup> Article 32 paragraph (1) and Article 33 of Law Number 20 Year 2001.

<sup>11</sup> Muhammad Yusuf, *Merampas Aset Koruptor, Solusi Pemberantasan Korupsi Di Indonesia*, Kompas Penerbit Buku, Jakarta, 2013, p.. 104

<sup>12</sup> *ibid*

<sup>13</sup> *Ibid*

<sup>14</sup> "First global convention against corruption to come into force". Berlin, 16 september 2005, <http://transparency.ie/content/first-global-convention-against-corruption-enter-force>, .

<sup>15</sup> Muhammad Yusuf, *Loc Cit*

political parties and election campaigns. To that end, the state must strive to ensure that service to the public is efficient, transparent and accountable. With regard to the use of state finances, states should promote transparency and accountability. States also need to establish special requirements to prevent corrupt practices.<sup>16</sup>

Prevention and eradication of corruption practices of tax crime requires support and effort from all walks of life. In this regard, UNCAC encourages States Parties to actively promote the involvement of non-governmental organizations and community-based organizations, as well as other elements of civil society, to raise public awareness of corruption and what action can be taken to prevent it.<sup>17</sup> corruption and tax crimes committed by the tax apparatus are closely linked to money laundering crimes derived from criminal acts of corruption, UNCAC specifically regulates the steps applicable by each State Party to prevent the occurrence of money laundering of the source of corruption and corruption committed by the tax apparatus. At the international level, UNCAC is the first legally binding global anti corruption agreement, which prioritizes the principle of equality of sovereignty, equality of rights, and territorial integrity, and the principle of non-intervention.<sup>18</sup> UNCAC binds every UN member country that has ratified it and in its implementation will have implications for the laws and regulations related to corruption in the country concerned. In general, UNCAC regulates five key areas: preventive action, criminalization and law enforcement, international cooperation, technical assistance, and information exchange, and asset recovery. UNCAC is a major step forward in the global fight against corruption, which is also the culmination of the international community's efforts by putting normative instruments to fight corruption globally.<sup>19</sup> UNCAC is needed as a comprehensive approach to preventing and combating corruption effectively.<sup>20</sup>

For countries that have ratified UNCAC are required to take steps to eradicate corruption by promoting and implementing international prevention, detection and sanctioning efforts and cooperation. In fighting corruption. UNCAC, together with other international anti-corruption instruments, is a manifestation of an international consensus that emerged in the early 1990s to identify corruption as a crucial problem that needs immediate addressing, and in particular requires a solution agreed upon by the international community. Some of the provisions contained in UNCAC are mandatory, while others are optional or submitted to government policies (States Parties), whether to apply them or not.<sup>21</sup> Subject to these mandatory requirements, States parties are required to take effective action, and at the same time offer various implementation options that are considered more appropriate to combat corruption.

## **VI. RETURN OF STATE LOSS FROM TAX CRIMINAL ACTS THROUGH CIVIL LAWSUIT**

In general, civil suits are divided into lawsuits of wanprestasi and lawsuits against the law. A breach of a default is filed because of a breach of contract (wanprestasi) of either party. Since the basis of a breach of a breach is a breach of the treaty, such a claim could not have been born without prior agreement. Article 1365 of the Civil Code has accommodated that provision, that every person has the right to claim compensation for an unlawful act that harms him. Although the tax debt does not arise on the basis of the agreement, but the tax debt is the debt of an individual or entity born of a law requiring a person to pay a sum to the state treasury, subject to the conditions of taxation (Taatbestand), subject to good juridical coercion penal and non penal.

To be able to claim compensation based on the act against the law, the conditions that need to be met are 1. The existence of deeds; 2. The act is against the law; 3. An error; 4. Loss; 5. The existence of causal relationships (causality) between unlawful acts and loss. The lawsuit of compensation in the effort to repay the state finances, filed after the criminal act of corruption is no longer possible because it is faced with certain legal conditions (insufficient crime of evidence, free judgment or suspect or defendant dies). Such conditions will technically complicate the State Attorney General especially in the case of proof.

State losses arising as a result of tax crimes committed by taxpayers of persons of ribadi or corporate taxpayer as regulated in Law no. Article 39 Paragraph (1) letter I and Article 41C paragraph (4) of the General Taxation Laws Act (UU KUP). Article 28 Paragraph (1) Letter I and Article 41C Paragraph (4) of the General Taxation Law (UU KUP). The three articles state the term "loss to state revenues" (Article 41C paragraph (4) of the KUP Law), although in the KUP Law does not provide an official explanation of the terms "loss to state income and the term" harm to the state ", both in general terms as well as the explanation of the chapters. The

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<sup>16</sup> UNCAC, Ibid., Article 7, 8, 9, 10, 11, 12.

<sup>17</sup> UNCAC, Ibid., Article 13.

<sup>18</sup> United Nations Convention against corruption (UNCAC), Article 4 ayat (1),

<sup>19</sup> [http://www.unafei.or.jp/english/pdf/RS\\_No83/No83\\_19VE\\_Demostenes1.pdf](http://www.unafei.or.jp/english/pdf/RS_No83/No83_19VE_Demostenes1.pdf).{10/11/2013} The United Nations Convention Against Corruption: An Overview with Special Focus on the Provisions Relevant to Criminal Justice Authorities:",

<sup>20</sup> <http://www.uncaccoalition.org/en/home/186-press-release->{10/11/2013}

<sup>21</sup> Muhammad Yusuf, Op Cit, 155

return of state losses as a result of the tax crime is most likely to be handed over by the perpetrators of the corruption offenses committed before the court when the case has entered the investigation stage in court. Since the procedural law does not explicitly set out on this mechanism, the most probable gap should be sought without damaging the procedural law. The state loss of the perpetrators of tax criminal acts through non-penal legal means is possible because of the tax function to fill state coffers, as long as the return of the state losses is done consciously and by the taxpayer. Legal provisions that are *lex specialis*, the reason for law enforcement officials do not use penal legal means in an effort to restore the state losses, but prioritize the use of non-penal legal means. The existence of the element of loss on state income and state losses in the provisions of Article 38, Article 39 paragraph (1) letter I and Article 41C paragraph (4) UU KUP, can be classified in criminal acts in the field of taxation as a crime against the state economy (crimes against economic). The inclusion of elements of loss to the income of the State indicates that the crime as contained in Article 38, Article 39 Paragraph (1) letter I and Article 41C paragraph (4) of the KUP Law constitute material offense (material delict).

Limitatively, the provision of Article 38 of the 2007 Criminal Code determines, Anyone who due to negligence, Do not submit notification letter; or Submit a notification letter, but the contents are incorrect or incomplete, or enclose incorrect information so that it may cause a loss to the state revenue and the action is an act after the first act as referred to in Article 13A, fined at least 1 (one) time the amount of tax payable or underpaid and at most 2 (two) times the amount of tax payable that is not or less paid, or imprisonment for a minimum of 3 (three) months or a maximum of 1 (one) year.<sup>22</sup>

The formulation of Article 38 of the 2007 KUP Law stipulates that not submitting SPT, or submitting SPT whose contents are incorrect and incomplete constitutes a crime. The provision indicates that the formulation of Article 38 of the 2007 KUP Law is very broad, covering any irregularities in the submission of SPT, although it is committed by the perpetrator because of its negligence (*culpa / schuld*). Broadly defined, because the legislator holds that deviations in the delivery of tax returns can have a significant impact on the taxpayer. This is a consequence of the adoption of a self-assessment system, which gives the taxpayer the freedom to report and perform his tax payment obligations.

One interesting point is observed from the provisions of Article 38 of the 2007 KUP Law, regarding the existence of a clause stating "the act is an act after the first act as referred to in Article 13A", this means that a criminal offense related to the new SPT may be processed and subject to criminal sanction if forbidden acts committed by the perpetrator for the second time. The existence of clauses in Article 38 of the 2007 KUP Law is odd, at least from 2 (two) points of view. First, which institution determines that the offender is a second act. Whereas in the practice of handling criminal cases in the field of taxation, never found any information about "second act" which is included in the file of case investigation. Even without the formal information about the "second act", the Public Prosecutor often declares complete (P-21) when the "second act" clause is part of the formulation of Article 38 of the Law on KUP 2007. The second act is essentially one of the reasons for the judge to increase or aggravate punishment. In criminal law, repetition of a crime (recidive) contains 2 (two) terms, namely: (1) a person who commits a crime more than once. And (2) the previous criminal offense has received a judge's verdict which has permanent legal force (*inkracht van bewijsde*). According to the Expert Staff for the Assessment and Supervisory Manpower of the Director General of Taxes, the non-penal facility in the effort to repay the state losses due to tax crime takes precedence over the penal legal means, the attempts have been made to compel the taxpayer to pay taxes.

Against taxpayers who evade themselves from liabilities by tax evasion to the act of not depositing taxes that have been withheld or withholding or not paying import duties by an incorrect statement, or providing false data (false information on documents) then this action constitutes a violation of the law in the form of a crime. The sanctions that can be imposed on the taxpayer can be either administrative or criminal sanctions as stipulated in the Criminal Law Code, Law no. 31 Year 2001 Jo. Undonesia - Undang No.31 of 1999 on the Eradication of Corruption and Law No. 6 Year 1983 Jo. Law No.10 of 1997 Jo. Law No. 28 of 2007 concerning General Provisions and Tax Procedures.

In the practice of law enforcement of taxation the use of non-penal legal means is executed through an instrument of suspension of investigation in the field of taxation for the purpose of state revenue pursuant to Article 44B Number 28 Year 2007 concerning General Provisions and Tax Procedures shall be made based on written application submitted by the Taxpayer to the Minister of Finance referred to in the provision of Article 4 of Regulation of the Minister of Finance No. 130 / PMK.03 / 2009 dated August 18, 2009 concerning Procedures for Termination of Criminal Investigation in the Field of Taxation for the Interest of State Revenue, Article 4 PMK 130 / PMK.03 / 2009. (1) In order to obtain the termination of the investigation as intended by the Taxpayer, firstly submit a written application to the Minister of Finance by giving a copy to the Director General of Taxes. The petition and the copy as intended shall be accompanied by a statement containing a plea

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<sup>22</sup> See, La Ode Husen, 2009, *Hukum Pajak dan Hak Privilege.*, CV. Utomo, Bandung, p.15

of guilty and the ability to pay off using an example of a letter format as stipulated in the Attachment to this Regulation of the Minister of Finance which is an integral part of this Regulation of the Minister of Finance.

Furthermore, based on the consideration of budgetary function of the tax that is to increase state revenue, the Minister of Finance submits a request to the Attorney General to stop the investigation if the Taxpayer has paid the tax payable that is not or less paid plus administrative sanction in the form of fines of 4 (four) paid. If the budgetary requirements are not made, the investigation of criminal offenses in the field of taxation is continued until completion at the trial of the criminal court.

## **VII. STATE TAX RETURNS CRIMINAL ACTS THROUGH MERGER OF CRIMINAL AND CIVIL LAWSUITS**

The tax law divides the criminal acts committed by the taxpayer in two types: criminal offenses and criminal offenses. Criminal offenses are often matched with a mild crime, a criminal offense for the offender is lighter than the offender. Threats that may be imposed on a taxpayer who commits a breach of tax obligations are a one-year imprisonment or a fine of twice the amount of tax due. In the General Provisions and Procedures for Taxation, the principles of this criminal offense of violation are manifestly contained in Article 38 of any person due to negligence; do not submit notification letter; or submit notices, but the contents are untrue or incomplete, or attach information that is not true; so as to cause a loss to the state income, shall be punished with a maximum imprisonment of 1 (one) year and or a fine of no more than 2 (two) times the amount of tax payable that is not or less paid. Criminal acts in the field of taxation combined with the Crime of Serious Crimes because the threat of criminal is much heavier than the violation. The criminal penalty for this crime shall be a maximum imprisonment of three years and or a maximum fine of four times the amount of indebted taxes that is underpaid or unpaid, as well as for perpetrators of criminal reprisal (criminal) crimes are doubled, one year.

Return of state losses from the perpetrators of tax crime can be done through penal legal means ie confiscation of assets of the perpetrators of tax crime can be done concurrently merging between non-penal / criminal law facilities. Non-penal legal facilities in the state loss of assets of offenders are known as Non-Conviction Based Assets Forfeiture (NCB Asset Forfeiture). become an important instrument in asset recovery, especially in uncovering unfair wealth.

Efforts to return state losses under Article 38 of the PTPK Law implicitly adhere to the principle that although judges give free judgment, it does not prevent the state from filing a civil suit against the perpetrator or his heirs, and if any goods or objects have not been seized, the prosecutor as a lawyer the state may prosecute the seizure of such goods or objects. In relation to the state losses incurred by a corruption act, the PTPK Law presents the concept of "state financial loss recovery effort". The concept is expected to restore the state financial losses. civil lawsuit is caused by a free decision but there is a real financial loss of the state, as regulated in Article 32 paragraph (2) of the PTPK Law. Civil litigation in case the suspect dies at the time of the investigation, whereas there is actually a state financial loss, as set forth in Article 33 of the PTPK Law; The civil suit in the case of the defendant dies at the time of court hearing, whereas there has been a real financial loss of the state, as stipulated in Article 34 of the PTPK Law. Civil lawsuits against corruption of taxes that have had permanent legal force, but there are still assets allegedly derived from the criminal acts of tax corruption that have not been subject to confiscation for the state, as set forth in Article 38 C of the PTPK Law. Additional criminal in the form of replacement payments whose amount is equal to the amount of property obtained from corruption, as set forth in Article 18 paragraph (1) letter b of the PTPK Law. In spite of this, civil lawsuits in corruption crime indicate that criminal law norms alone are not sufficient to restore the state financial loss, at least in certain circumstances. If the PTPK Law is categorized as a criminal legislation, the regulation of civil lawsuits in the law also indicates that a legislation can simultaneously contain both criminal and civil law, as well as administrative law.

The process of returning the state financial loss which on the one hand becomes part of its criminal investigation (in the case of additional criminal) and on the other side apart from examination of its criminal case would potentially bring its own problems. The problem is in addition related to procedural issues as well as the substantial issue of the lawsuit, which ultimately leads to the question of whether or not the legal effort is successful. The failure of the lawsuit not only concerns the failure of the state's recovery efforts, but also the inefficiency of the corruption case court process.

Civil litigation in the framework of the state's repatriation due to a criminal act of corruption, becomes very problematic in the framework of law enforcement of corruption. It is ironic if a legal event that allows the realization of a provision fails because the concept building is less precise. Depending on the accuracy of its legal and theoretical philosophy as an attempt to rediscover its legal philosophy of law and its proper theory as the foundation of that concept. Equally important is the principle which is the *legis ratio* of the rule of law. Criminal law has its own purpose which is different from civil law, whether it concerns material or substantive legal aspect as well as formal or event legal aspects. The rules of criminal law including the PTPK Law further



have their own interests to be protected, which are in general different from those that the civil law rules will protect.

The civil law facility or also called NCB Asset forfeiture is the seizure and acquisition of an asset through a suit in brakes or a lawsuit against an asset. The concept of civil forfeiture is based on a "taint doctrine" in which a crime is deemed "taint" an asset used or is the result of a crime. Despite having the same objective, namely to confiscate and take over the assets of the proceeds of crime, NCB Asset Forfeiture is different from Criminal forfeiture which uses a lawsuit in personam (lawsuit against people) to confiscate and take over an asset.<sup>23</sup>

Nonpenal legal means, hereinafter referred to as "civil looting", "seizure in rem," or in some criminal law systems known as "objective appropriations" are actions directed against the asset itself and not the individual. And this act is separate and is not part of the criminal justice process and in its mechanism requires proof that the asset / property is indicative of the proceeds of the crime. Linda M. Samuel says that the purpose of the NCB Asset forfeiture system is to deal with its predicate crime, as well as to seize assets acquired from or used for a criminal offense. Asset deprivation practices in the United States are of two types. First, conviction based or criminal "in personal" forfeiture, where prosecution is committed against the person. Second, non conviction based (NCB) or Civil "in brake" forfeiture, where appropriations are directed against goods obtained illegally or used illegally, so that the defendant is the asset<sup>24</sup>

The difference between a penal law and a non penalty for the return of an offender's assets can be illustrated by the following matrix:

**Differences Means Of Penal And Non Penal In State Debt Returns**

<u>Penal</u>	<u>Non Penal</u>
The goal is in Individuals (In Personam), as part of criminal sanctions	The object is Object (In rem), legal action carried out by State Attorney Attorney directed against property.
Charged as a criminal sanction in a criminal case.	Foreclosures may be made before, during, after criminal proceedings, or even filed when no criminal justice process is being filed against the offender
_There should be a criminal court ruling. that the criminal case has been completed and can be proven.	_A criminal court ruling is not required. Most actions are used based on reverse proof

In essence, the return of state losses in the taxation crime, may be done simultaneously the use of penal / criminal and non penal / civil lawsuit facilities. This is possible because the subject of criminal acts of taxation that cause losses of the state can be taxpayers or tax apparatus. The state loss of corruption is carried out by the term "surrogate money", an important effort in eradicating corruption in the field of taxation. The return is not easy because of the criminal act of tax corruption, the perpetrators are intellectuals and have important positions. In the Law on Combating Corruption of Tax Corruption, the efforts that need to be made in the settlement of arrears of replacement money are: The confiscation and the auction of property of the convicted person and his heirs after the court decision has permanent legal force, through the decision of the criminal prison subsidiary, through the civil suit and administration finance. Restitution of the state through replacement money is very important, because the money can be used to continue the development. The return is not easy because the process of corruption criminal justice generally takes a long time, so the convict has the opportunity to divert or hide his property which is derived from the criminal act of corruption. In connection with that Article 18 paragraph (2) of Law Number 31 Year 1999 concerning the Eradication of Corruption as amended by Law no. 20 of 2001 stipulates that if the convicted person does not pay the replacement money as referred to in paragraph (1) letter b within a period of 1 (one) month after the decision of the court that has obtained permanent legal force, then his property may be seized by the prosecutor and auctioned off to cover the money replacement.

### **VIII. CONCLUSION**

The regulation of the state loss of assets of the perpetrators of tax criminal acts by means of penal and non penal law in the Indonesian legal system, which is stipulated in the laws and regulations of the criminal act of taxation and the Criminal Procedure Code has not regulated the return of assets effectively and efficiently, the seizure law precedes the act of deprivation, if the court's decision has obtained a permanent legal force.

<sup>23</sup> David Scott Romantz, Idem, p.. 389. Dalam Article 2 huruf f

<sup>24</sup> Ibid

Restitution of state losses from the assets of the perpetrators of tax crime in the Indonesian legal system may be carried out, through penal means of conventional punishment based on the defendant's wrongdoing is ineffective, as well as the return of state losses through non-penal legal facilities through civil litigation and by means of confiscation assets of perpetrators of crime under money laundering law, not yet maximal.

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