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Tax Management Analysis in Infrastructure Sector Using Debt-to Equity Ratio

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Abstract: This research analyzed the administration of arm's length test on debts incurred by taxpayers conducting businesses in the infrastructure sector and reviewed the exclusion of taxpayers conducting businesses in the infrastructure sector from debt-to-equity ratio assessment according to the principle of legal certainty. This research was conducted by employing qualitative methods, and the data were obtained by means of in-depth interviews and literature studies. The results show that in practice, the debt-to-equity ratio assessment is not the only approach that can be employed to test the fairness of debts incurred by taxpayers conducting businesses in the infrastructure sector. Moreover, there are numerous definitions of the activities and scope of businesses in the infrastructure sector but no reference has been available to provide explicit explanation that can be used as a basis for taxation purposes. The absence of clear definition and criteria of taxpayers engaged in the infrastructure sector resulted in legal uncertainty.
Keywords: debt-to-equity ratio (DER), infrastructure, tax management

I. INTRODUCTION

Debts and equity are often used by corporate taxpayers to fulfil their financial needs for the sake of smoothness of their business activities. However, investors tend to prefer debts to equity to finance their business activities. This is called loan financing. Loan financing is often favoured because the financing that uses debts is deemed to be more efficient than the financing that uses equity. In light of the difference in the treatment for loan financing and equity financing, taxpayers are driven to use interests as deductions for gross income. This transaction is known as thin capitalization. Thin capitalization per se, according to Kurniawan (2011), is the formation of capital structure of a company with the debt proportion far overweighing the equity proportion.[1] To minimize thin capitalization transactions, Anti-Avoidance Rules were, therefore, established.

One of the forms of Anti Avoidance Rules in Indonesia is one on the application of Debt-to-Equity Ratio (DER). Debt-to-Equity Ratio (DER) was first governed under the Minister of Finance Decree Number 1002/KMK.04/1984, which was deferred by the Minister of Finance Decree Number 254/KMK.01/1985 in the following year. This deference was intended to encourage domestic investments. Thirty years after the deference, when the transfer pricing issue became a concern in multiple countries, the Minister of Finance Regulation Number 169/PMK.010/2015 on the reapplication of DER was issued with some changes. These changes include the following: the change in the ratio from 3:1 to 4:1; the exclusion of particular taxpayers from DER application; chargeable debt-related costs; the provision specifying that in the case that the equity balance of the taxpayer equals 0 (zero) or is less than one, all debt-related costs may be used as deductions; and the requirement that taxpayers must report their offshore debts.

This research focuses on the exclusion of taxpayers who conducted businesses in the infrastructure sector. This exclusion as governed under the Minister of Finance Regulation Number 169/PMK.010/2015 was aimed to encourage infrastructure development at home for the purpose of improving domestic economy. In an article posted by Indonesia Investment entitled How is Infrastructure Hampering Indonesia's Economic Development (2014), it was said that the lack of adequate infrastructure leads to soaring logistic costs of goods in Indonesia, lowering the competitiveness and investment climate in Indonesia.Thus, the government found it necessary to encourage infrastructure development. Darussalam and Kristiaji state that in excluding taxpayers who are engaged in the infrastructure sector from DER application, detailed arrangement should be performed for some matters, for example, the matter of whether the exclusion is only applicable to public-private partnership projects or whether it is applicable to all infrastructure projects. [2]Thus, the lack of specific specification on the exclusion of taxpayers who conduct businesses in the infrastructure sector in the prevailing DER regulation which is still general in nature has raised issues regarding legal certainty for both taxpayers and tax authorities.

Given that, we sought to raise the topic of the implementation of the exclusion of qualified taxpayers from arm's length debt test using the DER approach as contained in the Minister of Finance Number 169, especially taxpayers engaged in the infrastructure sector, and to analyse the lack of detailed definition and criteria of taxpayers that conduct businesses in the infrastructure sector based on the principle of legal certainty.

The efforts to prevent based erosion through thin capitalization amidst pervasive transactions, even across borders, are currently deemed central to securing the state revenue. There are two kinds of anti-avoidance rules that can be applied, namely the General Anti Avoidance Rules (GAAR) and the Special Anti-Avoidance Rules (SAAR), which govern the arm's length debt-to-equity ratio. Indonesia is still in an urgent need of investment boost in the infrastructure sector in order to develop its economy. One of the stumble blocks hindering investment growth in Indonesia is the poor infrastructure provision due to financing difficulty.

According to the background above, the problems to be raised are as follows: 1. how is the arm's length debt test administered to taxpayers who conduct businesses in the infrastructure sector? 2. has the application of the exclusion in the arm's length debt test using the DER approach given legal certainty to taxpayers who conduct businesses in the infrastructure sector? The objective of this research is to answer the aforementioned problems. This research is expected to be able to provide the following benefits: 1. enhanced knowledge on the impact of thin capitalization rules application to taxpayers who conduct businesses in the infrastructure sector, 2. some suggestions for the government, especially the tax authorities, regarding the application of thin capitalization rules to taxpayers who conduct businesses in the infrastructure sector to be used as consideration in the formulation of regulations in the future.

II. THEORETICAL BACKGROUND

Kurniawan said that one mode of transfer pricing is to do thin capitalization.[3] The definition of thin capitalization is "*one method of financing a business is by funding through debt capital, i.e. funds obtained through various types of loan"*[4]Whereas according to Crumbley, Jack P. Friedman, and Susan B. Anders said that thin capitalization is*"capitalization derived primarily by loans from the shareholder of a corporation than by stock investment"*. [5]

Thin capitalization is one of the financing structures of a company where the use of debt (debt financing) is more dominant than through depositing capital. Gunadi states that the method of capital funding can affect the amount of profit due to the calculation of taxable income for providers of funds both the individual taxpayer and the corporate taxpayer are affected by the method of provision. [6]Furthermore, it is also stated that in practice, funding (financing) for a company can come from capital participation or loans. The choice of financing model is influenced by which choices dominate when making decisions, whether decisions are made based on economic or commercial considerations. In addition to influencing lenders, debt financing also influences those who provide loans so that they can carry out tax management regarding loans. OECD states that tax efficiency does not only occur in the country where the debtor is located, but also the country where the creditor receives interest income. [7]Furthermore, one example is mentioned where debt financing can influence taxation in the country where the creditor is located, one of which is the provision of debt flow so that the recipient of interest income is in a country that does not recognize the concept of taxation on interest or charged but with low rate. If the more dominant choice is based on economic decisions, efficiency efforts will be carried out mainly from the tax side. Kurniawan states that in order to reduce the company's tax burden, the parent company prefers to provide loans (and charge interest) rather than increase the stock deposit. This can be known through the applicable domestic law, namely the Law on Income Tax article 6 (1) a number 3 said that the interest costs related to business are deductible expense. So, if the greater the debt held by a company, the greater the deduction that will be obtained. The amount of the deduction will reduce the taxable income of the company concerned so that the tax burden also becomes smaller. This is in contrast to dividends that must be shared with shareholders if they choose equity financing. According to the Income Tax Article 9 (1) a which state that dividends are non-deductible expense. Therefore, many prefer loan financing rather than equity financing. Giving the loan to the opponent of the transaction or who can be called as the investor himself does not cause a loss, this is because investors get interestwhich is mostly determined by the investor caused by the imbalance of bargaining power. [8]

The application of interest fees as a deductible expense and dividend to non-deductible expense is not only applied in Indonesia, but also in many taxation systems in other countries. This then triggers a phenomenon called the debt bias. Serena, Fatica, and Nicodeme state that debt bias is a distortion that arises in making a company's financing decisions due to deductible interest expense but not so with equity financing. Serena, Fatica, and Nicodeme in their paper entitled The Debt Equity Tax Bias: Consequences and Solutions states that there are a number of negative impacts that will arise due to the occurrence of a debt bias, one of which is to cause systemic risks.[9] In addition, financial management planning using debt instruments is not possible only in a country but debt shifting can occur in other countries. Debt shifting is done by shifting the debt to the affiliate which is located at a high tax rate so that the interest payments to the affiliate will also be high. This affects the high deductible burden so that taxable income will be lower.

However, the impact of debt bias not only affects the company's economy but has a systemic impact as mentioned previously. Serena, Fatica, and Nicodeme state that debt financing carried out by companies also creates welfare costs. Weichenrieder and Klautke in Serena, Fatica, and Nicodeme state that the welfare cost arising from debt financing is around 0.08% to 0.23% of GDP. Putting aside the risks that might arise. There are three inter-company loan schemes namely direct loan, parallel loan, and back to back loan.

III. RESEARCH METHOD

This research took a qualitative approach. Cresswell defines qualitative research as research that starts from an assumption, a point of view, potential use of theories and studies on a topic, and is used to investigate the existing social problems in certain individuals or social groups.[10] Given the research objectives, this research is categorized as descriptive research. The aim of this research was to analyze whether the provision of an incentive of the exclusion of taxpayers engaged in the infrastructure sector from DER regulations is appropriate, given that more detailed regulations on such exclusion are not sufficiently available.

According to the research significance, this research is categorized as pure research. Pure research is conducted without any intervention from any party. Simanjuntak and Sosrodiharjo states that in pure research, a researcher must be able to try in such a way that the research conducted is independent of any particular views in order to maintain the objectivity of the research conducted. [11]

To answer the research questions, data collection was carried out through a field study (to obtain primary data) and a literature study (to obtain secondary data). In the field study, the data was collected by holding in-depth interviews with sources or informants, for example, the Directorate General of Taxes and academicians. A scope for this research was set in order to keep the research focused and to prevent the analysis conducted from straying away from the objectives of this research. The scope of the research was narrowed to the thin capitalization rules under the Minister of Finance Regulation Number 169/PMK/010/2015. The subjects of this research consisted of taxpayers who conducted businesses in the non-construction infrastructure sector.

IV. ANALYSIS

4.1 Analysis of Thin Capitalization Rules Application to Taxpayers in Infrastructure Sector

The Minister of Finance Number 169/PMK.010/2015 is one of the regulations that regulate loans. This regulation was preceded in 1984 by the Minister of Finance Decree Number 1002/KMK.04/1984, which was deferred in 1985 for the purpose of encouraging investment figures through Foreign Direct Investment (FDI). The establishment of regulations on loans is actually intended to prevent thin capitalization practices, in which debts are used in a larger proportion than equity to insert dividends that are supposed to be distributed to shareholders.

In reference to Article 6 (1) number 3 of the Income Tax Law, the interest costs directly attributed to a business are considered as deductible expenses, which means that these interest costs will reduce the tax base. For this reason, Anti Avoidance Rules were established as a prevention effort. The effort to prevent tax base reduction through thin capitalization per se falls into Special Anti-Avoidance Rules. To prevent thin capitalization, it is necessary to establish thin capitalization rules. The OECD has proposed a number of recommended approaches that can be adopted in the arm’s length debt test, namely the determination of the maximum limit of loans the interest of which is recognizable and considered fair when regarded as an expense that can be factored in in a test using the arm’s length principle as well as the ratio approach, including the conduct of debt-to-equity ratio assessment. Another approach to fairness testing is determining the maximum limit of interest that can be recognized as an expense by comparing the interest rate with another variable.

The application of the Minister of Finance Regulation Number 169 in 2015 in Indonesia is an effort to prevent thin capitalization practices. This regulation includes thin capitalization rules specifying arm’s length debt test using the ratio approach. Article 2 (1) sets the debt-to-equity ratio at 4:1. Article 3 (1) states that in the case that the debt-to-equity ratio applied by a taxpayer exceeds the ratio referred to in Article 2 (1), the amount of loan cost that can be factored in in the calculation of taxable income corresponds to the debt-to-equity ratio as referred to the Article 2 (1). The definition of debt referred to in this regulation is laid in Article 1 (2), which states that debt as referred to in Paragraph (2) is the average debt balance in a tax year or a segment of a tax year calculated based on: a. the average debt balance at the end of every month of the year concerned; or b. the average debt balance at the end of every month in a segment of the year concerned.

In the DER calculation according to Article 2 (a), the component of the debt that is calculated is the average of all debts from all parties. This shows that the thin capitalization rules established have successfully prevented thin capitalization attempts through various schemes, including direct loan, parallel loan and back-to-back loan. Thus, corrections will be made irrespective of the debt average should exceed the predetermined ratio, namely 4:1. The exclusion of taxpayers who conduct businesses in the infrastructure sector from the DER application eliminates the need for arm’s length debt test using the ratio approach, particularly the debt-to-equity ratio approach. The lack of regulation further regulating the exclusion from the debt-to-ratio testing as specified under the Minister of Finance Regulation Number 169 makes it no longer necessary to assess further the debt fairness employing other methods unless the total debt contains debts from affiliates. In the event of debts from affiliates, fairness test will be conducted on such debts using the arm's length principle.

F. Irawan points out the importance of planning the audit of taxpayers who have been assessed based on their risk level. If intragroup loans are identified, audit will be conducted for transfer pricing indications. Tax audit per se is distinguished into two, namely office audit and field audit. Office audit normally takes four months to complete, but if transfer pricing indications are found, this audit may be extended until six months.

When DER is not applied, an audit concerning transfer pricing will be carried out if transfer pricing indications are present. This is consistent with a paper published by the OECD entitled Thin Capitalization Legislation: A Background Paper for Country Tax Administration, which reveals that one of the weaknesses of the administration of an Arm's Length Principle-based test is that the test takes fairly considerable time. This is due to the complexity of testing using the arm's length principle, which requires specific knowledge and information on special characteristics of independent parties. Thus, comparison should be performed on an apple-to-apple basis to find an appropriate comparable. However, if no transaction with affiliates is made, there should be no problem with the complete documentation by the taxpayers. Therefore, it can be concluded that the exclusion of taxpayers conducting businesses in the infrastructure sector from the arm's length testing has rendered it no longer necessary to test the debts of the said taxpayers.

A different view has been expressed by F. Irawan, in that the taxpayers engaged in the infrastructure sector should refer to taxpayers who render construction services to which a special treatment in the tax calculation is given. The tax calculation for taxpayers who conduct businesses in the construction services sector refers to Article 4 (2) letter d of the Income Tax Law, which includes construction services business as one of the business sectors that are subject to it. The final income tax imposed to the construction services rendered is calculated by multiplying the tax rate by the gross income received by a taxpayer. With the use of gross income as a basis for the calculation of income tax, the arising costs are non-deductible. In other words, taxpayers who conduct businesses in the infrastructure sector in this case are taxpayers who are engaged in the construction business, thus the arising loans and related costs are non-deductible. It can be concluded that there is no problem with the exclusion of taxpayers engaged in the infrastructure sector from the DER assessment as the taxpayers referred to are taxpayers who conduct construction services business whose income is used as a tax basis in the calculation with no expense that can be deducted.

According to R. N. Hebat, the DER application in the practice only serves as a trigger in the arm's length debt test of a company. Thus, there is a probability that the assessment of the debts incurred by the company is conducted using another method. The administration of the DER-based fairness test is stipulated under Article 18 (3) of the Income Tax Law, which states that the Director General of Taxes are authorized to redefine the amount of income and deductions and to define debts as equity for the purpose of calculating the taxable income of a taxpayer who has a special relationship with another taxpayer according to the arm's length principle but is not affected by such relationship using the comparable uncontrolled price method, the cost-plus method or another method.

According to the explanation above, it can be concluded that the existing regulations are sufficient for preventing thin capitalization attempts because the debts calculated in DER are the whole debts rather than the debts incurred from affiliates alone. Thus, being excluded from the assessment should give taxpayers engaged in the infrastructure sector the flexibility to perform debt-financing. In the practice, however, the application of the DER method only serves as a fulfilment of the requirement to implement the arm's length principle on debts and the authority of the Directorate General of Taxes to define the fairness. As a result, although taxpayers who are engaged in the infrastructure sector are excluded from the DER regulations, their debts can still be assessed using another method. The debts of taxpayers who are engaged in the infrastructure sector may be assessed in another manner, for example, by implementing the arm's length principle, although this method may take a greater amount of resources than the DER method does.

4.2 Analysis of the Exclusion DER Provision in Infrastructure Sector Based on Legal Certainty Principle

Article 2 Paragraph (2) of the Minister of Finance Regulation Number 169/PMK.010/2015 states, "Excluded from the provision on debt-to-equity ratio as referred to in Paragraph (1) are: f. taxpayers who conduct businesses in the infrastructure sector." Other taxpayers who are excluded from the provision include taxpayers engaged in the banking, financial institution, insurance and reinsurance and oil and gas mining sectors and taxpayers whose entire income is subject to final income tax. In general, although the aforementioned taxpayers are excluded from the Minister of Finance Regulation Number 169, there are further regulations that regulate the fair DER applicable in their respective industry. Nevertheless, there is no specific definition or provision based on which taxpayers engaged in the infrastructure sector are excluded from the DER application, and there is no further regulation. This subsequently leads to legal uncertainty. With the lack of further regulations, the exclusion of taxpayers conducting businesses in the infrastructure sector from DER application can be done by referring to the taxpayers' business group (KLU). PER 17/PJ/2015 does not clearly state to which business classification taxpayers engaged in the infrastructure sector belong. The business groups contained under PER 17/PJ/2015 are businesses that have been classified in detail, for example, telecommunications installation.

Unlike Rasyid, Irawan states that in fact, the taxpayers engaged in the infrastructure sector referred to are taxpayers who conduct construction services businesses. Meanwhile, Hebat argues that taxpayers who are engaged in the infrastructure sector are not only taxpayers who conduct construction services business but also those who conduct road provision, power network and port businesses. The absence of precise definition of which business types belong to infrastructure sector causes confusion and, in turn, legal uncertainty for any person, either tax authority or taxpayer. This is apparent in the difference in infrastructure definitions provided by different sources.

Lead analyst of the Directorate of International Taxes, M. S. Prasetio, states that the definition of infrastructure is laid in the Minister of National Development Planning Regulation Number 4 of 2015, which refers to any facility, including physical facility, hardware, software and system. This regulation also classifies infrastructure into transport, road, water resources and irrigation, potable water, centralized water plant, local water plant, tourism, education, sports, health, corrections and public housing infrastructure. The Indonesia Stock Exchange further classifies the utility and transport infrastructure into the following subsectors: energy; toll road, port and airport; telecommunications; transportation; and non-building construction.

As a result, the interpretation of who is considered to belong to the taxpayers engaged in the infrastructure sector varies widely between individuals. Although the definition of taxpayers conducting businesses in the infrastructure sector actually refers to the President Regulation Number 38 of 2015 and the Minister of National Development Planning Regulation Number 4 of 2015, the lack of statement stating that the two regulations should be referred to when defining taxpayers conducting businesses in the infrastructure sector leads to multiple interpretations among readers, including taxpayers and tax authorities, and eventually legal uncertainty. Regulation has certainty if it is certain, strict, unambiguous and continuous. According to that definition, a prevailing regulation must be certain, strict and unambiguous. However, Article 2 (2) letter f does not provide any detailed explanation on which taxpayers conducting businesses in the infrastructure sector are excluded and ultimately causes multiple perceptions and interpretations.

F. Irawan states that taxpayers are required to conduct self-assessment to further review other regulations that are possibly related to those regulations. This is because tax laws generally adopt definitions made by other government institutions. For example, the definition applied for financial services is adopted from the definition made by the Financial Services Authority (OJK), and for construction services, the definition regulated under the government regulation is adopted. In that case, taxpayers must review whether a definition has been set under the regulations issued by other institutions. If that is the case, the Directorate General of Taxes has no authority to make its own definition because its authority is limited to only determining tax basis and rate.

M. S. Prasetyo gave a nod to F. Irawan's opinions. He states that the making of the Minister of Finance Regulation Number 169 was proposed by the Directorate General of Taxes, but during the making, it was stated by an expert staff of the Ministry of Finance that the making of the Minister of Finance Regulation Number 169 fell under the Fiscal Policy Board's authority, thus it is deemed appropriate if the precise definition of taxpayers conducting businesses in the infrastructure sector is made by the Fiscal Policy Board. However, detailed regulations on the exclusion of taxpayers engaged in the infrastructure sector have been absent to the present day. Legal uncertainty can cause moral hazard, which in this case is information asymmetry on one party, in this case taxpayers. The lack of regulation setting out the definition and criteria of taxpayers who conduct activities in the infrastructure sector is taken advantage by taxpayers who intend to be excluded from the provision as a defensive tool.

Regarding the lack of definition of taxpayers who conduct businesses in the infrastructure sector, Hebatargues that in practice, infrastructure should be interpreted based on KBBI (*KamusBesar Bahasa Indonesia*). Burton and Wirawan states that there are a number of interpretation methods employed in the civil law domain that can be used in the implementation of tax laws to interpret these regulations, namely historical, sociological, authentic, linguistic and analogical interpretations. [12]If historical interpretation is to be used, the background of the regulations making should be identified. Taxpayers conducting businesses in the infrastructure sector are excluded for aligning tax regulations with Indonesia's most recent principal goal, namely Nawacita. As previously mentioned, one of Nawacita goals is to encourage infrastructure development in five key issues: basic infrastructure; water, food and energy security; national connectivity; mass transportation; and infrastructure provision financing effectiveness and efficiency.

The last point of the five strategic issues, the infrastructure provision financing effectiveness and efficiency, is of much importance. This means that whatever the infrastructure project is, as long as it is aligned with the government's current priority, namely Nawacita, it can be considered as an infrastructure business activity. This is because at that time, what matter were how to encourage infrastructure development rapidly, in a short possible time and with the most efficient financing and how to achieve the development goals mandated under Nawacita, such as to develop basic infrastructure, water, food and energy security and national connectivity.

Another interpretation method that can be used is linguistic interpretation. Linguistic interpretation refers to the interpretation conducted by analyzing meaning and rules according to standard language use. In this case, meaning can be analyzed using KBBI. According to KBBI, infrastructure means any main support for the realization of a process (business, development, project, to name but few). This is in line with Hebat's suggestion regarding the definition, in that infrastructure is related to public interest. Thus, by infrastructure it does not mean construction service. Construction service is only a type of infrastructure business. In the end, it is still important to draw up a regulation setting out the definition of taxpayers conducting businesses in the infrastructure sector along with their criteria. Despite the many ways to interpret the term, interpretation may vary according to the sources and the interpreter's thoughts.

V. CONCLUSION

The existing regulations are adequate to prevent thin capitalization practices as the debts calculated in DER are the whole debts rather than the debts incurred from affiliates alone. To boost investment in the infrastructure sector, these regulations give taxpayers who conduct businesses in the infrastructure sector flexibility to conduct debt-financing. A regulation that specifically sets the definition of taxpayers conducting businesses in the infrastructure sector will give clarity to tax authorities and taxpayers, although in the practice, the arm's length debt test using the DER method only serves as a trigger for tax authorities in the arm's length testing, leaving a room for testing using another method.The lack of a precise definition of taxpayers conducting businesses in the infrastructure sector leads to multiple interpretations, and eventually, legal uncertainty. A regulation that sets a definition and criteria for businesses belonging to the infrastructure sector will create legal certainty for taxpayers and tax authorities. This further regulation should be drawn up in a plain language and in detail so as to avoid multiple interpretations.

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