International Journal of Latest Engineering and Management Research (IJLEMR)
ISSN: 2455-4847
www.ijlemr.com || Volume 04 - Issue 06 || June 2019 || PP. 01-10

Determination of Residency Status of Dual Residence Citizen: Based on Tax Treaty Indonesia - Malaysia

Nastiti Tri Sandy[1] and Milla Sepliana Setyowati[2]
[12] *Department of Fiscal Administrative Science, Faculty of Administrative Science, Universitas Indonesia, Indonesia*

Abstract: This research focused on the determination of residency status of dual residence citizen based on Tax Treaty between Indonesia and Malaysia. This research refers to the stock sale transaction conducted by Mr. X for tax year 2010 in Indonesia. The purpose of this research is to analyze the determination of Mr. X's residency status at the condition of dual residence based on the Tax Treaty between Indonesia and Malaysia and explains the imposition of income tax on Mr. X's capital gain for fiscal year 2010 in Indonesia. This research used a qualitative approach with field research and literature data collection methods. The results showed that Mr. X is proven as a Foreign Tax Payer based on the test of the provision of tie breaker rule in Tax Treaty between Indonesia and Malaysia. Then, the profit of the sale of non-stock exchange shares received by Mr. X from Indonesia is only subject to income tax in Malaysia in accordance with Malaysian domestic tax law.
Keywords: Dual Residence, Capital Gain, Tax Treaty Indonesia - Malaysia

I. INTRODUCTION

The double population problem that occurs in the tax subject where he becomes Domestic Taxpayer in two countries, becomes a problem that is quite complicated in the scope of international tax disputes. This is because the person has received or obtained income originating from Indonesia so that it raises disputes between two countries where each country has the right to tax the income. In this case, the income referred to arises from the sale of shares conducted by a foreigner in Indonesia.

Mr. X, an individual who is the object in this study, is a citizen with Malaysian citizenship who works in one of the companies in Indonesia, namely A Company. A Company is a corporate whose shares are traded on a non-listed company and is engaged in providing insurance services. Mr. X himself is a legal holder and owner of 15,200 shares with a nominal value of Rp100,000 per share of A Company, which represents 19% of shares issued by A Company. Then he has sold 11,400 of his shares representing 14.25% of the shares issued by A Company to B Company with an acquisition value of Rp24,367,500,000. On the acquisition value of the shares, Mr. X get profit from the sale of shares (capital gain) amounting to Rp23,227,500,000. Mr. X's Share Ownership in A Company makes it a legitimate shareholder as well as the owner of the company so that there are provisions that must be fulfilled regarding the income received from the sale of shares.

At that time, there was a provision in the form of the Director General of Taxes Regulation Number PER-16 / PJ / 2007 concerning Giving Tax ID Number of Individuals who were status as management, commissioners, shareholders / employees and employees through government employers / treasurers, stating that every Mandatory Taxes of Individuals who have status as administrators, commissioners, shareholders / owners and employees with income above non-taxable income must register Indonesian Tax ID. In addition, based on Article 21 Paragraph 5a of Income Tax Law Number 36 of the year 2008 concerning Income Tax, also regulates the tax rate imposed on taxpayers who do not have a Tax ID so that they are subject to a higher tariff of 20%. [1]This means, income from the sale of shares made by Mr. X in Indonesia has the potential to be taxed at a higher rate of 20% if he does not have a Tax ID. Therefore, the company where Mr. X works register Mr. X as a Domestic Taxpayer so Mr. X currently has an Indonesian Tax ID.

The rules that have been fulfilled above certainly create conditions in which Mr. X has dual residency status. Even though Mr. X is a Foreign Taxpayer that has been proven to have an income tax reference number in the country where it originates (Malaysian Tax ID), but it is also considered as a Domestic Taxpayer in Indonesia due to the making of Tax ID based on the Director General of Taxes Regulation Number PER-16/PJ/2007 which has now been revoked. The implementation of the Indonesian Tax ID is what then becomes a reference for tax auditors in calculating income tax. Mr. X owed for the income received from the sale of shares in Indonesia. As a result, the tax inspector considers Mr. X as a Domestic Taxpayer whose tax calculation is based on profits arising from the sale of shares.

The tax dispute in this dual population case is the profit derived from the sale of A Company shares amounting to Rp23,227,500,000 combined by a tax examiner with income in connection with the work of Rp2,224,936,800 on the Annual Individual Income Tax Return. After combining income, Mr. X's net income stated on the Annual Individual Income Tax Return for the tax year 2010 is amounting to Rp25,452,436,800. In

this case, the tax inspector has combined or summed up the two tax objects and then imposed a tax at the usual (not final) tax rate, which is the rate in accordance with Article 17 of the Income Tax Law that applies progressively resulting in underpayment of income tax for Mr. X, which is Rp. 10,313,010,000. This was stated in the Tax Assessment Letter for Underpayment of Income Tax for the tax year 2010.

For the Underpayment of Tax Assessment Letter, Mr. X submits a tax objection request to the Director General of Taxes (hereinafter referred to as DGT). Upon the request for objection that has been submitted by Mr. X, issued by the Director General of Taxes Decree Number KEP-00019 / KEB / WPJ.04 / 2017 concerning Taxpayers' Objection to Tax Underpayment Assessment Letter. In the objection letter, Mr. X is considered as a Domestic Taxpayer so that the imposition of income tax on the sale of shares conducted in Indonesia is subject to the tariff of Article 17 of the Income Tax Law so as to incur a tax of underpayment. On the other hand, Mr. X still considers himself as Foreign Taxpayer (Malaysian resident) because the status of the Domestic Taxpayer should not be valid due to the revocation of the regulation regarding the obligation to make the Tax ID in force, namely PER-16 / PJ / 2007. But in this case, Mr. X has not deleted the Indonesian Tax ID due to the Tax ID removal process cannot be carried out if he is being examined by a tax inspector.

The double population problem that happened to Mr. X is a form of international tax dispute that requires an instrument that applies on an international scale. In this case, the Double Tax Avoidance Agreement (hereinafter referred to as Tax Treaty) can be applied to solve the dual population problems that occur with Mr. X. The Tax Treaty used is between Indonesia and Malaysia, precisely in Article 4 (four) concerning Residents. For this reason, further analysis is conducted regarding the testing of tie breaker rule in the Tax Treaty between Indonesia and Malaysia so that Mr. X is only a resident of 1 (one) country. This is done so that the imposition of income tax on the sale of shares conducted in Indonesia is payable in accordance with the applicable law.

Based on the matters described above, the purpose of this research is to analyze the determination of residency status Mr. X is in dual residency condition if it is based on the Tax Treaty between Indonesia and Malaysia. Then, explain the imposition of income tax on the profits from the sale of shares made by Mr. X in the tax year 2010 in Indonesia is in accordance with the actual residency status.

II. THEORETICAL BACKGROUND

The Determination of Residency Status through Quantitative and Qualitative Tests. Based on the Organization for Economic Co-operation and Development (OECD) official website, rules governing population for taxation purposes are regulated in accordance with the jurisdiction of the country concerned. According to the OECD, Residents of the Malaysian Individual are defined as individual residents in Malaysia for the year of assessment based on Section 7 and paragraph 7 (1B) of the Malaysian Domestic Law. Meanwhile, non-individual residents mean individuals other than individual residents. Residence status of an individual will determine whether the person can be subject to Malaysian income tax.

Furthermore, an individual to be considered as a resident for tax purposes, he must meet at least one of the conditions stated by the OECD. The conditions in question are as follows:

1) Quantitative Test
    a. Physically present in a country in accordance with the number of days specified in the domestic law of the country concerned in the calendar year before the year of assessment; or
    b. Performing work in a country in accordance with the number of days specified in the domestic law of the country concerned in the calendar year before the year of assessment (excluding company directors)
2) Qualitative Test (Qualitative Test)
    a. Individuals must live in a country and their absence from the country must be temporary and reasonable.

If the above provisions are applied in accordance with Malaysian domestic law, then the residence status for tax purposes through quantitative test can be determined based on the total number of 182 days or more of physical attendance in Malaysia within a period of one year of assessment and not based on citizenship. Please also note that an individual who lives in Malaysia permanently does not automatically become a resident for tax purposes. The individual must still refer to the prevailing Malaysian domestic rules regarding the determination of population status.

Whereas, the status of residence for tax purposes through qualitative tests (qualitative tests) is not easily determined like a quantitative test. The term "stay" is not specified in detail in domestic law so there are several factors that need to be understood when determining the status of one's residency. The factors referred to according to CST Tax Advisors publication regarding tax resident rules include: whether the individual has accommodation available to him in the country in question; whether the person is in the country in question or abroad for a temporary purpose; whether the individual has established a permanent residence in the country in

question; and the frequency, regularity and duration of visits to the country in question and the purpose of the visit.[2]

The factors mentioned above are then regulated in a test contained in the Tax Treaty. This is regulated because someone who is a resident in one country for a tax year is possible to become a resident of another country for the double tax agreement. When an individual is a resident in two different countries, there is a tie breaker test in the Tax Treaty which aims to establish a place of residence so that it is only located in one country. The tie breaker test states that dual residence is treated only as a resident of the partner country agreement for the agreement.

Conditions of Tie Breaker Rule. In the event of a conflict between the definition of 'residents' of the two treaty partner countries, the determination of domicile status is seen through a tie breaker rule which includes four tie breaker tests (Rohatgi 2005).[3]

In an international journal entitled Introduction to Tax Treaties &TreatyResidence[4]published by ITC Leiden International Tax Center, Article 4 Paragraph 2 on Tax Treaty provides an individual tie breaker rule and is only valid if the individual is included in domestic law of the two contractingcountries. The tie breaker rule can be determined in a row on a set of factors listed below:

a. Permanent Home
   It is a place where an individual has a permanent residence he owns. This permanent requirement means that the residence must be suitable and available for permanent use.
b. Center of Vital Interests
   It is a place where the individual's personal and economic interests are (including family and social relations, work, political and cultural activities, etc.). These interests must be considered as a whole (cumulative), but personal interests must receive special attention.
c. Habitual Abode
   It is a country where the individual concerned is more often. All the existence of the individual will be taken into account.
d. National
   Citizenship of an individual in a country that entered into an agreement.
e. Mutual Agreement Procedure
   If the above factors do not find an answer (solution), then the country that entered into the agreement has the right to reach a mutual agreement procedure (MAP) in accordance with the provisions in article 25 of the relevant Tax Treaty.

III. RESEARCH METHOD

Data collection technique. Data collection techniques are a way to obtain primary and secondary data information related to the research conducted. In this study, sources of primary data and secondary data were obtained through field studies and literature studies. Field studies in the form of in-depth interviews were conducted with informants related to this research. In-depth interviews were conducted to further explore the topic of research as a whole. Then, the study of literature or literature used in the form of books, journals, legislation, scientific works such as theses and theses and other similar data obtained from the internet relating to research.

Data analysis technique. This study uses qualitative data analysis techniques, where according to BasrowiandSuwandi, qualitative data analysis is carried out since before entering the field. [5]Data analysis in qualitative research has begun since formulating and explaining the problem, before plunging into the field, and this continues as the writing of research results and analysis of the data becomes a hold for further research if possible.

Informant. The selection of informants in this study is certainly focused on informants who are in a field that is in accordance with the topics discussed in this study. The informants involved included the Executive Staff of the International Tax Directorate of the Directorate General of Taxation, the Head of the Tax Treaty Sub-Division of Australia, Asia Pacific, and the African Fiscal Policy Agency, Tax Consultant Mr. X, and tax experts from tax practitioners and academics.

IV. ANALYSIS

4.1 Provisions for Testing Tie Breaker Rule in Tax Treaty Indonesia – Malaysia

To solve the dual population problems experienced by Mr. X, then the concept of the tie breaker rule in the Tax Treaty can be applied. In this case, the subject with dual residence status, based on the Tax Treaty will become a resident only in one country from the two countries concerned. Tax Treaty is stated as the key to solving problems related to population that take place on an international scale. Based on the ITC Leiden journal, Article 4 Paragraph 2 Tax Treaty provides an individual tie breaker rule and is only valid if the individual is included in the domestic law of the two countries that have contracted. To provide a further picture, the tie breaker rule stage can be seen in the following figure:

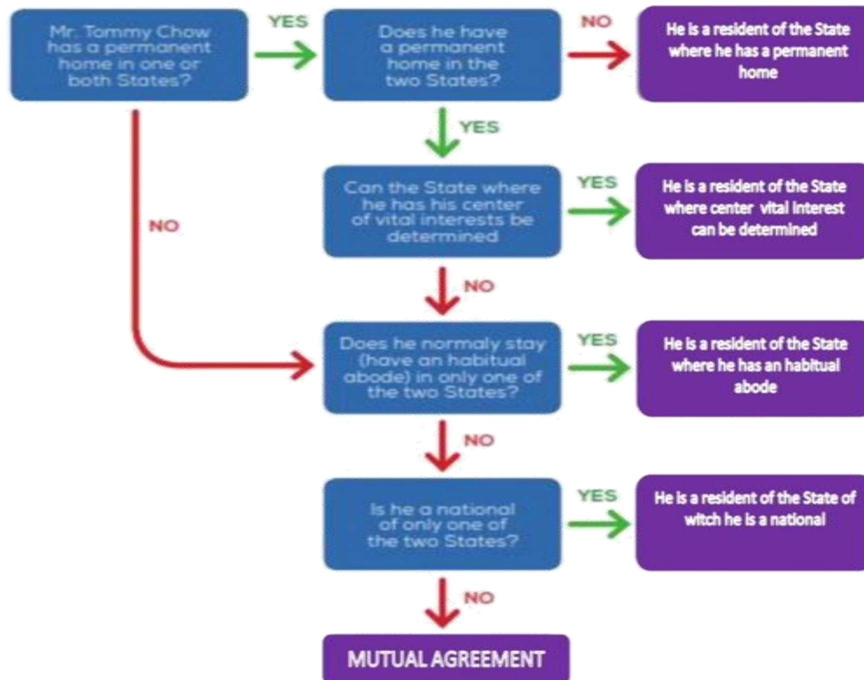

Figure 1 Tie Breaker Rule for Individual
Source: Oetomo, et.all, Tax Treaty is Easy![6]

Based on the picture above, the determination of residency for individuals can be done in several stages in the tie breaker rule. The first is seen as a permanent home where a tax subject is. In the case of permanent home cannot solve the dual residence case, then what is next seen is the closest vital interest. That is, seen from the proximity of personal and economic relations in which country. However, in terms of vital interest cannot solve the dual residence case, then the next thing that can be used as a determinant is through the approach where the usual Tax Subject is known as habitual abode. If habitual abode cannot split dual residence cases, the next determinant is seen from where the Tax Subject's nationality is. However, in the event that citizenship of tax subjects also cannot break the dual residence case, then the following is through procedures regulated in the Mutual Agreement Procedure or MAP.

A. Testing of Permanent Home

Referring to Figure 1 above, the first step that can be done to determine the status of a person's domicile is to test the permanent residence or in this case referred to as permanent home. This is also explained in Indonesian domestic rules, precisely in Article 7 PER-43 / PJ /2011 concerning the Determination of Domestic Tax Subjects and Foreign Tax Subjects. According to this rule, permanent dwelling or also called permanent dwelling place is said to be a place used for residence, which is not temporary and not as a stopover. The residence refers to a place located in Indonesia, with valid evidence (clear ownership documents).[7]

In addition, the OECD Commentary of Article 4 of the OECD Model Tax Convention on Income and Capital paragraph 13 also regulates the concept of a house in a permanent home, that each form of house can be taken into account, either a house or apartment owned or rented or rent a room that is made in such a way as to be a place of residence for him and which will be available to him at any time and not only aims to stay for

certain reasons in a short time or period such as for vacation, business trips, education, etc. place of residence still has the understanding of planning to stay in a sustainable time.

In relation to the case of Mr. X, this is supported by Mr. X's Tax Consultant. Based on interviews conducted with Mr. X's Tax Consultant, then it is known that Mr. X does not reside in Indonesia but resides in Malaysia. Mr. X only has a house / residence and apartment on his behalf in Malaysia and does not intend to have a home / place to live in Indonesia. When in Indonesia, Mr. X occupies the apartment that is provided and paid for by the company in Indonesia, namely A Company. Whereas in Malaysia, Mr. X has his own house and apartment which has been proven by a certificate of house and apartment.

In accordance with the tie breaker rule concept, that if the residency status of a Tax Subject has been resolved in the first stage of the tie breaker rule, the status is clear so that no further testing of the tie breaker rule is necessary. But in this case, the tests carried out in the following points are intended to prove in more detail the status of residency Mr. X. The results of the following tests become an argument that can support the real residency status of Mr. X.

B. Testing of the Center of Vital Interest

Furthermore, in the event that a permanent place of residence cannot solve the dual residence case, then the next step that can be done is testing the center of basic interests or center of vital interest. That is, testing is carried out by considering the closeness of the relationship personally and the economy will be in which country. This refers to the provisions of Article 4 paragraph 2 (a) of the Tax Treaty between Indonesia and Malaysia, which explains that if a person has a permanent place of residence available to him in both parties to the agreement, he will be considered a resident in the party to the agreement where he have a closer personal relationship and economic relationship (center of vital interests). The same thing was stated by the Fiscal Policy Agency, the Head of the Sub-sectors Tax Treaty on Australia, Asia Pacific and Africa, that if a permanent place of residence cannot be determined, then there are other important provisions to consider, namely consideration of personal and economic relations, which is more important.

The center of the center of vital interests which is the place where the individual's personal and economic interests are located (including family and relationships social, work, political and cultural activities, etc.) These interests must be considered as a whole (cumulative), but personal interests must receive special attention. Then, based on Paragraph 15 of the OECD Commentaries on Article 4 Paragraph (2) of the Tax Treaty, it is known that if the person has a place to live in a country, and has a place to live in another country when he is not in the previous country and based on facts, it is known that the first country is the environment in which he lives, where he works, and where his family is, so this factor shows that the main interest of the person is in the first mentioned country.

However, in this case, as previously explained that based on testing of a permanent place of residence carried out based on the provisions of the tie breaker rule, it is known to Mr. X only has a permanent home in Malaysia. Therefore, it can be stated that the main interests (center of vital interest) Mr. X closer to Malaysia (in Malaysia). This was then stated by the Mr. X's Tax Consultant that there are 2 (two) criteria in determining the center of vital interest. The first criterion is personal relationship. This criteria is carried out to test where the family and relatives of Mr. X's lives. In accordance with data obtained from Mr. X's Tax Consultant, then Mr. X has a family who lives in Malaysia. He never brought his family to settle in Indonesia. Mr. X is also known to bear all the costs of his family's life in Malaysia. Then, it was also known that Mr. X's wife is a Philippine citizen who is a permanent resident in Malaysia and can be proven with a Malaysian marriage certificate and also his wife's passport. Whereas the son of Mr. X is a Malaysian citizen who can also be proven by official documents issued by Malaysia.

Furthermore, the second criterion is the relationship or economic interests. This criterion is carried out to test where he works, conduct business activities, and other things that support the sustainability of his business. This can be believed by having 2 (two) cars in the name of Mr. X in Malaysia and insurance that Mr. X follow in Malaysia. Mr. X is also a shareholder in a company in Malaysia. Besides that, Mr. X also did not join any organization or club in Indonesia, he only attended a sports club in Malaysia. Then, if it is based on Article 4 paragraph 2 Tax Treaty between Indonesia - Malaysia, it can be concluded that Mr. X is a Foreign Taxpayer, not as Indonesian Taxpayer. This is because Mr. X only has permanent residences in Malaysia and also the largest personal and economic interests of its own are in Malaysia.

C. Testing of the Habits of Abiding (Habitual Abode)

Then, if a permanent home exists in two countries and the existence of personal and economics relations cannot be determined, then the next step that can be done to determine one's resident status is to use the habitual abode. This refers to the provisions of Article 4 paragraph 2 (b) of the Tax Treaty between Indonesia and Malaysia, which explains that if the center of its principal interests cannot be determined, or if it does not

have a permanent place of residence available to them in both parties to the agreement, then he will be considered as a resident of a state party to an agreement where he according to his habit of habitual abode.

Tie breaker rule is a stage that if one of the stages has been fulfilled, it is not necessary to do the testing in the next stage. This is reflected in the facts of the tests that have been done previously against Mr. X, namely he was proven to have permanent home in Malaysia and the existence of personal and economic relations closest in Malaysia. But in this case, the researcher wants to prove from the stages in the provisions of the tie breaker rule to get a clear analysis of the determination of the residency status of Mr. X.

The test of habitual abode is then interpreted by testing based on location or where a person is staying for the longest, referring to a particular country. Habitual abode is a country where the individual is more often located. All the existence of the individual will be taken into account. Then, based on Paragraph 19 of the OECD Commentaries on Article 4 Paragraph (2) of the Tax Treaty, habitual abode can be interpreted as having a habit of living by seeing which of the two countries have more habitual living, then determining the time period in each country. It should also be noted that the habitual abode test cannot be accumulated from when a person becomes the subject of a country's domestic tax. In other words, it cannot be determined in a lifetime, but it can be determined when it is in a country.

Based on data obtained by researchers from Mr X's tax consultant, it is known that the presence of Mr. X in Indonesia during 2010 is 139 days, so it does not exceed the time test of 183 days. This can be proven based on the immigration entry and exit stamp contained in Mr. X’s Passport. In addition, there are also a number of data obtained by researchers from Mr. X’s tax consultant regarding the details of the trip. It is listed in the passport for the period 2010 - 2011 so it can strengthen the proof.

Based on the travel details of Mr. X if it is adjusted to a passport, in 2010 to 2011, Mr. X is not only in Indonesia, but he also travels to several countries, including Thailand, Singapore, the Philippines, Paris, Australia, and others. This indicates the presence of Mr. X in Indonesia did not take place in a row, but he moved places abroad. In addition, in Mr. X’s passport very clearly reads the stamp and date of arrival and departure from and into Indonesia. This can be evidenced by hardcopy scans of passports in 2009 and 2010 which show that they are in Indonesia. Details based on the immigration stamp data for entry and exit during 2010 are as follows:

Table 1. The Details of Mr. X’s existence in Indonesia

No.	Mr. X’s existence in Indonesia	Total Days
1.	10 January – 15 January	6 Days
2.	24 January – 12 February	17 Days
3.	21 February – 25 February	6 Days
4.	07 March – 12 March	6 Days
5.	21 March – 26 March	6 Days
6.	04 April – 09 April	6 Days
7.	18 April – 23 April	6 Days
8.	27 April – 30 April	4 Days
9.	09 May – 14 May	6 Days
10.	23 May – 31 May	9 Days
11.	06 June – 11 June	6 Days
12.	26 July – 31 July	6 Days
13.	08 August – 13 August	6 Days
14.	22 August – 03 September	12 Days
15.	19 September – 24 September	6 Days
16.	03 October – 12 October	10 Days
17.	19 October – 22 October	4 Days
18.	31 October – 04 November	5 Days
19.	14 November – 19 November	6 Days
20.	29 November – 29 November	1 Days
21.	05 December – 09 December	5 Days
	Total	**139 Days**

Based on the table above, Mr. X is not always in Indonesia for the year 2010 – 2011 with proof of Immigration Entry and Exit Stamp is 139 days. Therefore, it can be said that Mr. X is a Foreign Taxpayer

(Malaysia) because he is in Indonesia not more than 183 days. This has also been proven in the inspection process with Mr. X's passport so that he can be said to have no intention to reside in Indonesia.

The facts described above then show that Mr. X has fulfilled the provisions of Article 2 paragraph (4) of the Income Tax Law, as a Foreign Tax Subject. Pursuant to Article 2 Paragraph (4) of Income Tax Law Number 36 of 2008 concerning Income Tax, it is explained that Foreign Taxpayers are individuals who do not reside in Indonesia, individuals who are in Indonesia no more than 183 days within 12 (twelve) months. These conditions apply to individuals who receive or earn income from Indonesia not from running a business or conducting activities through a permanent establishment in Indonesia.

D. Nationality

To be able to know one's nationality, of course it can be proven with an Identity Card (hereinafter referred to as KTP) that applies in the country concerned. In this case, Mr. X has a Malaysian Introductory Self Accreditation Card (KAD Introduction to Malaysia) which functions as an official identification in Malaysia. In addition, for tax purposes, Mr. X is also known to have a 2010 Certificate of Residence for The Year of Assessment from Inland Revenue Malaysia (Malaysian Taxpayer). These things have been confirmed by Mr. Rusmadi as Mr. X's Tax Consultant in an in-depth interview on November 12, 2017. He stated that all personal interests were Mr. X is in Malaysia, including his identification card showing Malaysian citizenship.

In addition to self-identification, nationality can be supported by Malaysian domestic regulations, namely in the 1967 Income Tax Act, Part II - Imposition and General Characteristics of the Tax, Section 7. Residence: individuals, precisely in paragraph 1 point a. In that point, a person can be declared as a resident of Malaysia (for tax purposes) if he is in Malaysia for 182 days or more in a tax year. In relation to the existence of Mr. X in Malaysia, has been proven beforehand by testing habitual abode that he is longer in Malaysia compared to his existence abroad (including Indonesia). These things can strengthen the argument that Mr. X is a citizen with official Malaysian citizenship.[8]

4.2 Submission of Tax Objections, Tax Appeals and Mutual Agreement Procedures

Dual residence problems that occur in Mr. X has not yet found a bright spot. His party has filed an objection to the Underpayment Tax Assessment Letter then he received as tax calculation based on domestic provisions regarding Domestic Taxpayers. Upon filing the objection, the Director General of Taxes then issued a Director General of Taxes Decree Number KEP-00019 / KEB / WPJ.04 / 2017 concerning Taxpayers' Objection to the Underpayment Tax Assessment Letter. The Objection Decree stated that the Director General of Taxes rejected the objections submitted by Mr. X in his letter without number dated December 31, 2015. In addition, Director General of Taxes also maintains the amount of accrued tax in Underpayment Tax Assessment Letter on Income Tax dated December 17, 2015 Tax Year 2010, which is Rp10,313,010,000.00.

If the Director General of Taxes rejects the objection that has been submitted by the Taxpayer, then the Taxpayer can still take the next legal route, namely the appeal process in the Tax Court. In this case, Mr. X filed an appeal with the Tax Court by adhering to the provisions applicable in the Indonesia-Malaysia Tax Treaty, especially regarding the testing of the tie breaker rule to determine the residency status of Mr. X. He believes that the provisions of the Tax Treaty in question act as a special legal instrument (*lexspecialis*) which regulates taxation rights of each country so that the imposition of double taxation can be avoided.

The appeal filed in this appeal process is the correction of the amount of other domestic net income in the form of other income because Mr. X (as an Appellant) is considered as a Domestic Taxpayer. In addition, an appeal is also filed on a tax audit statement regarding a time test that cannot be proven by a passport because there is only a date of arrival and no date of departure. This is because the tax inspector still insists on the statement regarding the intention of Mr. X to live in Indonesia as indicated by the ownership of the Tax ID. Related to this, Mr. X submitted an appeal argument that he was a Foreign Taxpayer (Malaysian resident) because he was in Indonesia not more than 183 (one hundred and eighty three) days, namely only 139 (one hundred thirty nine) days during 2010 which had been proven in the Examination or Objection process with passport and 2010 Certificate of Residence for The Year of Assessment from Inland Revenue Malaysia (Malaysian Taxpayer). The document is also equipped with income tax reference number and KAD Introduction to Malaysia (Malaysian Tax ID). Thus, Mr. X also stated that he had no intention of living in Indonesia.

To resolve the dual residence problem and this multiple taxation, there is another alternative which a continuation of the tie breaker rule stage in the Tax Treaty provision. The foreign taxpayer can ask the authorized official in his country to make a settlement through the Mutual Agreement Procedure (MAP) in accordance with the provisions stipulated in the Tax Treaty. In relation to the case of Mr. X this, of course MAP is useful as a solution to determine the residency status of Mr. X. Based on previous information, Mr. X is known to have taken domestic law, namely an appeal in the Tax Court. The appeal process is still ongoing and there is no court decision that can solve this case. Therefore, MAP can still be carried out simultaneously with

the process of appeal. This is stated in Article 5 Paragraph 1 of the Regulation of the Minister of Finance of the Republic of Indonesia Number 240 / PMK.03 / 2014 concerning Procedures for Implementing Mutual Agreement Procedures. The article states that the taxpayer's request for MAP can be submitted together with the Taxpayer's request to appeal.[9]

However, there are things that need to be considered in the submission of MAP that is carried out simultaneously with the appeal process at the Tax Court. This is the MAP process can be stopped if the collective agreement in the MAP process has not been achieved, while the appeal decision has been pronounced. This is done with the aim of avoiding an ineffective double decision. According to the Regulation of the Minister of Finance of the Republic of Indonesia Number 240 / PMK.03 / 2014 concerning Procedures for Implementing Procedures for Mutual Agreement Procedures, precisely in Article 5 Paragraph 3, it is stated that the request for the implementation of MAP cannot be submitted in the event that the trial has been fulfilled by the Tax Court on the tax assessment letter submitted by the request for the implementation of MAP. This means that if the MAP process is successful in reaching a meeting point after the issuance of an appeal decision, the result of the joint agreement cannot be implemented.

MAP will function well if this problem has not yet reached the appeal stage in the Tax Court. If it is already in the appeal stage then the appeal decision has been issued, then MAP must be stopped immediately. The statement gives the meaning that if the Taxpayer in question has been in the appeal process, the Taxpayer can still submit MAP as long as the appeal decision has not been issued. In this case, the Taxpayer must choose the path of resolution of the dispute that was taken, whether through MAP or an appeal but not both simultaneously except that the MAP can produce a joint agreement before the first trial begins.

Imposition of Income Tax on The Profit of Shares Sale (Capital Gain) in The Tax Year 2010 in Indonesia.

In 2009, Mr. X is known to have 15,200 shares with a nominal value of Rp100,000 per share of A Company. Please note that A Company is a company whose shares are traded on a non-listed company and engaged in providing insurance services. Then in 2010, the shares he owned amounted to 3,800 shares with a nominal value of Rp100,000 per share of A Company. In the span of one year, it can be seen that there was a decrease in share ownership of Mr. X to A Company. This happened because in 2010, Mr. X has sold 11,400 shares so that it gets a number of profits on the sale of A Company’s shares. Here are the details of the sale of shares made by Mr. X in Indonesia:

Shares Owned:

- Total Shares	=	15.200	
- Nominal Value	=	100.000	x
- Acquisition Cost	=	1.520.000.000	

Shares Sold:

- Total Shares	=	11.400	
- Nominal Value	=	100.000	x
- Acquisition Cost	=	1.140.000.000	

Cost of Shares Sold	=	**24.367.500.000**
Profit Gained (Capital Gain)	=	**23.227.500.000**

Based on the details of the sale of shares of Mr. X above, it can be seen that Mr. X receives profits from the sale of A Company shares in Indonesia, or also called capital gains. When viewed in terms of Indonesian domestic law, the capital gain is a final tax object. This is stated in Article 4 paragraph (1) letter d number 2 of Income Tax Law No. 36 of 2008 which regulates the benefits of selling shares. The article states that profits due to sales or because of the transfer of property including profits due to the transfer of property to shareholders, allies, or members obtained by the company, partnership, and other bodies is one of the objects of income tax. This means that if a Taxpayer sells property at a price higher than the remaining book value or higher than the price or acquisition value, then the price difference is a taxable profit. The selling price used as the basis for calculating the profit from the sale of the shares is the market price.

If the sale of shares is carried out by a Foreign Taxpayer, the profits received will be taxed based on the rules in the Tax Treaty that applies to the two countries concerned. Article in the Tax Treaty governing this matter is Article 13 in the Tax Treaty between Indonesia and Malaysia. Based on Article 13 precisely in paragraph 3, it is known that profits derived from the alienation of shares of a company, whose assets consist primarily of immovable property located in the Contracting State, will be imposed in that country. Pursuant to Article 13 paragraph 3, it can be seen that if a tax subject from a country of domicile gains profits from the

transfer or sale of shares (capital gains) where more than 50% of the value of the shares comes from immovable property located in the source country, the source country the right to impose taxes on these gains.

According to the Head of Sub-sectors Tax Treaty on Australia, Asia Pacific and Africa from Fiscal Policy Agency, Indonesia as the country in which the shares in question are entitled to tax income on the sale of these shares. However, it should be noted that the shares referred to in the statement of the Fiscal Policy Agency above are shares that are more than 50% of the value of the shares derived from immovable property. In this case, Tax Treaty Indonesia - Malaysia does not regulate the tariff charged for profits on the sale of shares. This is because the Tax Treaty only manages the distribution of taxation rights, especially for related countries. The rules that explain in more detail about the imposition of income tax on profits on the sale of shares conducted in Indonesia are then regulated in Article 26 Paragraphs (2) and (3) of Income Tax Law Number 36 of 2008 concerning Income Taxes. Based on the article in question, income from the sale or transfer of assets in Indonesia received or obtained by a foreign taxpayer other than a permanent establishment in Indonesia, and insurance premiums paid to foreign insurance companies are taxed 20% (twenty percent) of the estimated income net.

Referring to the share sale transaction made by Mr. X, then the sale of shares made by Mr. X in Indonesia is not included in the category of shares in the form of immovable property. This is because the shares are shares of A Company which is a company engaged in insurance services. In general, shares owned by insurance service companies are included in intangible assets, not as immovable property. This is because most of A Company's shares are movable property.

Related to the explanation above, the provisions that can be used as a reference for imposing income tax on the profit of selling shares (capital gain) are the provisions in Tax Treaty on Article 13 paragraph 4. Pursuant to Article 13 paragraph 4 of the Tax Treaty, it is stated that profits derived from the alienation of any property other than those mentioned in paragraphs 1, 2 and 3 of Article 13 shall be taxable only in the Contracting State in which the transfer is domiciled. This means, if there is a profit from the transfer of assets (in this case the sale of shares) not regulated in the paragraphs of Article 13 of the previous Tax Treaty, then the taxation rights are only in the country of residence from the party that sold the shares. This taxation right is granted exclusively only to the country of domicile of the party conducting the related transaction only.

If it is directly related to the case of Mr. X, then the party entitled to taxation on capital gains received by Mr. X is Malaysia. In this case, only the Malaysian tax authority has the right to impose a tax on capital gains due to its exclusive rights under the Indonesian-Malaysian Tax Treaty. This right has been clearly stated in Article 13 precisely in Paragraph 4 of Tax Treaty Indonesia - Malaysia. Then it will be further regulated in the Malaysian Domestic Law regarding income tax. That way, there is no double taxation imposed by Mr. X due to profits from the sale of shares received by Mr. X in Indonesia.

In accordance with the above provisions, Indonesia is not entitled to impose income tax on profits from the sale of non-stock exchanges. So that it should not occur Income Tax on underpayment as stated in the Tax Assessment Letter for Underpayment of Income Tax for the Tax Year 2010. Related to the legal process being undertaken by Mr. X for the tax burden inconsistency that is borne by him, then it is fitting for Mr. X takes legal action through a tax court to clarify taxes owed according to the right rules. For this reason, an appeal was made by Mr. X on Decree of the Director General of Taxes Number KEP-00019 / KEB / WPJ.04 / 2017 concerning Taxpayers' Objection of Tax Underpayment Assessment Letter is considered as the right step so that the tax owed to him is in accordance with the law in force.

V. CONCLUSION

Based on the results of the research conducted, it can be concluded that the determination of the residency status of Mr. X in dual residence conditions if based on P3B between Indonesia and Malaysia can be settled by testing the tie breaker rule in accordance with Article 4 concerning the resident. Testing the tie breaker rule that is carried out on permanent home, center of vital interest, habitual abode, nationality and mutual agreement procedure, proves that Mr. X only has a permanent residence in Malaysia, the largest personal (family) and economic (asset or property) property of his is also in Malaysia, he was in Indonesia for only 139 days in 2010 (not exceeding the 183 day test time), and citizenship Malaysia which can be proven by KAD Introduction to Malaysia. Then, the profits from the sale of non-stock shares received by Mr. X in Indonesia in 2010 is not subject to income tax in Indonesia. This capital gain is only imposed in Malaysia in accordance with Malaysian domestic regulations. This is based on Article 13 Paragraph 4 P3B Indonesia - Malaysia. That way, there should be no underpayment tax owed to Mr. X in the 2010 tax year.

Suggestions can be given, among others, to prevent the occurrence of duplicate population cases repeated, it is necessary to understand P3B or tax treaty for tax auditors, especially regarding tax obligations for the WPLN. This is very necessary considering the lack of tax inspectors or other tax authorities who understand the provisions of the Tax Treaty. Next, Mr. X can file revocation of the Taxpayer Identification Number

(NPWP) in accordance with the Director General of Taxes Regulation Number: Per - 20 / PJ / 2013 concerning Procedures for Registration and Giving Taxpayer Identification Numbers, Business Reporting and Inauguration of Taxable Entrepreneurs, Elimination of Taxpayer Identification Numbers and Revocation of Inauguration of Taxable Entrepreneurs, as well as Changes in Data and Transfer of Taxpayers. This was done so Mr. X is only a resident in 1 (one) country. In addition, this is done to prevent the existence of dual residency status and the imposition of double taxation for someone who is a taxpayer who earns income from Indonesia.

REFERENCES

[1] Republic of Indonesia. Constitution Number 36 For the year 2008 on Income Tax. (2008).
[2] CST Tax Advisors. Moving to Singapore: Overview of Tax Residence Rules. https://csttax.com/wp-content/uploads/2015/11/CST_MovingtoSingapore.pdf(2018).
[3] Rohatgi, Roy. *Basic International Taxation*, London: BNA International Inc. (2005).
[4] Raad, Kees van. 'Introduction to Tax Treaties & Treaty Residence', *Int. J. International Tax Center ITC Leiden.* (2017).
[5] Basrowi andSuwandi. *Understanding Qualitative Research*, Jakarta: RinekaCipta. (2008).
[6] Oetomo, Hendhartodkk. *Tax Treaty is Easy!:MudahMemahamiPerjanjianPenghindaranPajakBerganda (P3B).* Jakarta: PPM Manajemen, (2011).
[7] Directorate of General Taxes. Decree of the Director General of Taxes Number: PER-43/PJ/2011 on Domestic Tax Subjects and Foreign Tax Subjects. (2011).
[8] The Commissioner of Law Revision Malaysia. Act 53. Income Tax Act 1967. (1967).
[9] Republic of Indonesia. Minister of Finance Regulation Number 240/PMK.03/2014 on The Implementation of Mutual Agreement Procedure. (2014).