



RELATED PARTY CONCEPT, TRANSFER PRICING CORRECTION DISPUTES, MUTUAL AGREEMENT PROCEDURE (MAP) SUBMISSION: INDONESIA CASE

Muhammad Ilham¹⁾, Budiasih Widiastuti²⁾, Amrie Firmansyah³⁾

^{1, 2), 3)} Polytechnic of State Finance STAN

E-mail: muhammadilham@gmail.com¹⁾, budiasihw@pknstan.ac.id²⁾, amrie@pknstan.ac.id³⁾

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ABSTRACT

This research aimed to determine the concept of related parties between countries as the entry point for resolving the dispute over Transfer Pricing (TP) through Mutual Agreement Procedure (MAP). This research was conducted with qualitative methods to observe the phenomena in the practices of related parties and their relation to the submission of MAP. The data employed are primary in structured interviews and content analysis sourced from research results and regulations issued by the government. The results of this study indicate that to be resolved through MAP, a Transfer Pricing correction dispute must occur between two countries that have the same interpretation of the determination of the related parties. So, not all TP correction disputes across countries can be resolved through MAP because each country has autonomous rights to define related parties differently.



Keywords: mutual agreement procedures, related parties, transfer pricing.

INTRODUCTION

Rapid advances in technology, transportation, and communication make it easy for multinational companies to locate their business in any country in the world (Kurniawan, 2015). Tax issues will become quite complicated when the individual has started doing business or economic activities in a different country. In its development, international trade transactions involving multinational companies in one group have grown more complex, involving not only goods but also capital, services, and immovable property (e.g., intellectual property). In the end, it results in complexity in analyzing and understanding these transactions, including for tax purposes (Irawan, 2020). Tax problems arising from the progress of the world of international trade mainly

occur in the imposition of income tax, which is related to transfer pricing. Transfer Pricing (TP) is closely related to the transaction price of goods, services, or intangible assets between companies in a multinational company (Irawan et al., 2020; Utami & Irawan, 2022). Based on Article 32A of the Income Tax Law, the government is authorized to enter into agreements with the governments of other countries in the context of avoiding double taxation and preventing tax avoidance (laws of the republic Indonesia, 2008).

Transfer pricing is not an illegal or abusive behavior (Borkowski, 1997). Transfer pricing behavior becomes illegal if transfer mispricing results in manipulation or deviation of transfer prices (Beer & Loeprick, 2015). Transfer mispricing behavior is one of the techniques in tax avoidance by diverting profits from the country where it operates to tax havens. In principle, pricing between related companies is required to apply the arm's length principle when companies transact with independent companies (Holtzman & Nagel, 2014). Then in the Minister of Finance Regulation Number 49/PMK.09/2019 (2019) concerning Procedures for Implementing the Mutual Agreement Procedure, it states that the definition of Transfer Pricing is the determination of prices in transactions between parties that have a related party (Minister of Finance Regulation Number 49/PMK.09/2019, 2019). The issue of fairness in setting transfer prices is often a dispute between taxpayers and tax authorities (Firmansyah et al., 2021).

Even though there is international tax law to solve cross-border taxation problems, different tax systems between countries can lead to double taxation (Pratama & Irawan, 2021). It is the reason why over the last few decades, developed countries have formed large networks to draft a Double Taxation Avoidance Agreement (P3B) or a tax treaty. The discussion on the importance of Tax Treaty for developing countries is examined from four main functions, namely: (i) eliminating or avoiding the occurrence of double taxation; (ii) allocating taxation rights appropriately and clearly; (iii) preventing tax evasion and evasion; and (iv) supporting a country's Foreign Direct Investment (FDI) (DDTC, 2019).

Most countries currently accept the Organization for Economic Co-operation and Development (OECD) model agreement, which states that transfer prices should be adjusted using an arm's length standard, determining a price by independent parties (OECD, 2003). Although the model agreement is widely accepted, there are differences in how each country implements it. Nonetheless, there is solid worldwide support for an approach to limit efforts by MNCs to reduce tax liability by setting transfer prices that differ from the arm's length standard (Firmansyah, 2020). The concept of a related party in the settlement of transfer pricing correction disputes is interesting to discuss in more depth.

This study is aimed to discuss the concept of a related party, and its relation to the submission of the Mutual Agreement Procedure (MAP) is still rarely discussed. Arham et al. (2020) has mapped out research on transfer pricing from an accounting and tax point of view that there are differences in the methodology used, the factors tested and the theory used. Among these studies were conducted by Anggraeni & Lutfillah (2019), Depari et al. (2020), Firmansyah & Yunidar (2020), Rahayu et al. (2020), Sulistyawati et al. (2020), and Susanti & Firmansyah (2018). Other studies reviewed the disclosure of related party transactions that are possible for transfer pricing (Helena & Firmansyah, 2018; Sitanggang & Firmansyah, 2021; Utama, 2015).

From a legal point of view, Tarigan et al. (2017) reviewed that transfer pricing is a criminal act committed by companies. Hardiyanto (2019) discussed legal certainty over the implementation of transfer pricing in Indonesia from the perspective of companies and tax authorities in Indonesia. Transfer pricing actions carried out by multinational companies are not a violation of the law (Firmansyah, 2020). Some disputes occur between international companies and tax authorities in Indonesia due to differences in perceptions of the technical implementation of transfer pricing. Thus, the related to the Mutual Agreement Procedure (MAP) submission should be investigated further.

In the explanation of Article 18 paragraph (4) of the Income Tax Law, related parties between taxpayers can occur due to dependence or attachment to one another caused by ownership or equity participation or control through management or use of technology (laws of the republic Indonesia, 2008). A related party is deemed to exist if: (a.) the Taxpayer has direct or indirect equity participation of at least 25% (twenty-five percent) in other Taxpayers; the relationship between the Taxpayer and the minimum participation of 25% (twenty-five percent) in two or more Taxpayers; or the relationship between two or more Taxpayers mentioned last; (b.) a Taxpayer controls another Taxpayer or two or more Taxpayers are under the same control either directly or indirectly, or (c.) there is a family relationship either by blood or by marriage in a straight line and/or one degree to the side (laws of the republic Indonesia, 2008).

Based on Article 9 of the OECD Model and the UN model (Article 9 tax treaty), associated enterprises (related party) occurs when a) an enterprise of a Contracting State participates directly or indirectly in the management, control, or capital of an enterprise of the other Contracting State, or b) the same persons participate directly or indirectly in the management, control or capital of an enterprise of a Contracting State and an enterprise of the other Contracting State (OECD, 2003).

Article 9 of the OECD model implies a two-step analysis. The tax authority must first determine the existence of "associated enterprises." If there are, it must be checked whether the conditions created or enforced between the two companies are in the arm's length principle. Definitions of what is meant by management, control, or capital are not provided. Likewise, there is no definition of associated enterprises in the comments and the OECD TP Guidelines. The 1979 OECD report stated that it was not deemed necessary to define "associated enterprises" and "under common control" as the basis for a common understanding that they were considered to exist. It shows that each country must have an autonomous interpretation of "associated enterprises" (Dwarkasing, 2011).

Furthermore, to compare the arrangements regarding the related party in other countries, this study employs the concept of related party in India because some of the concepts of special relationships in India are different from the concepts of related party regulated in Indonesia. Some of these differences can be seen, among others, in Section 92A of the Indian Income Tax Act, 1961, that two companies are considered as related party if, at any time during the previous year, (a) one company owns, directly or indirectly, shares who owns not less than 26% of the voting power in another company; (b.) any person or company holding, directly or indirectly, a share of not less than 26% of the voting power in each such company; or (c.); a loan submitted by one company to another company is not less than 51% of the total book value of the other company's assets; (d.) one company guarantees not less than 10% of the total loan of another company; (e.) more than half of the board of directors or members of the board of

directors, or one or more executive directors or members of the executive board of one company, are appointed by another company; (f.) more than half of the directors or members of the board of directors, or one or more executive directors or members of the board of directors, of each of the two companies are appointed by the same person or persons; (g.) the manufacture or processing of goods or goods or the business carried out by one company is wholly dependent on the use of knowledge, patents, copyrights, trademarks, licenses, franchises or other business or similar commercial rights, or data, documentation, drawings or specifications anything relating to a patent, invention, model, design, formula or secret process, in which another company is the owner or in connection with which another company has exclusive rights; (h.) 90% or more of the raw materials and consumables required for the manufacture or processing of goods or goods carried out by one company, supplied by another company, or by a person determined by another company, and prices and other conditions relating to inventories affected by such other companies; (i.) goods or goods manufactured or processed by one company, sold to another company or to persons determined by another company, and prices and other terms relating thereto are affected by that other company; (j.) where one company is controlled by an individual, the other company is also controlled by that individual or his or her relatives or jointly by that individual and the individual's relatives; (k.) where one company is controlled by an undivided Hindu family, another company is controlled by a member of an undivided Hindu family or by a relative of a member of that undivided Hindu family or jointly by that member and his or her relatives; or (l.) if one company is a company, association of persons or natural entities, the other company has not less than ten percent ownership in the company, association of persons or individual entities; or exists between the two companies, a mutually beneficial relationship, as specified.

METHODS

This type of research is qualitative research. There are two types of data used in this study: primary data in structured interviews (in-depth interviews) and secondary data in the form of data and information from books, PSAK, Articles of the model convention concerning taxes on income and capital from OECD, and regulations issued by the government (Harmonization of Tax Regulations Law). The following steps carried out data analysis: (1) Data condensation, which is conducted by selecting, simplifying, and changing the data that has been obtained by voice recorder in the form of interview transcripts; (2) Data display, which is conducted by organizing and summarizing data collection of information so that appropriate conclusions can be drawn; (3) Conclusion drawing/verification, which is conducted by drawing the appropriate conclusions from the data that has been presented. Determination of data sources on interviewees is conducted purposively, namely selected with specific considerations and goals. Interviews were conducted with three informants consisting of representatives from policymaker (ministry of finance party), academics (Tax Education and Training Center), and practitioners (Senior Manager of International Tax/Transfer Pricing Services DDTTC). The data collection techniques were triangulation from content analysis results and in-depth interviews (Budiman & Firmansyah, 2021). The triangulation employed in this research is source triangulation, which is conducted by looking for data from various informants that are still related to each other. Also, technical triangulation is done using multiple techniques such as interviews, content analysis, and observation of data sources. It is expected that from the information

obtained, the saturation theory will be more easily formed and achieved. Interviews were conducted within 30-45 minutes for each informant. The main instrument of this research is the researcher himself. To complete this research, the facilities in the Microsoft software (Microsoft Word 2016 and Microsoft Excel 2016) are used for data analysis. This method was employed to answer how the differences in transfer pricing concepts, especially related party concepts, can affect the settlement of transfer pricing disputes through MAP.

RESULT

The Head of the American and European-Double Taxation Avoidance Agreement sub-division of BKF stated that the essential capital of transfer pricing is a related party. The TP correction can never be conducted if there is no related party. He said that the current definition of a related party in Indonesia is too easy to avoid, as excerpted from the following interview.

"Our definition of a related party is very loose, loose in the sense that it is easy to avoid, while in accounting it is wider than in P3B, in P3B it is wider, which is managed, controlled. For us, the remaining 25% are in control of technology and management, but it's challenging to prove it."

According to PSAK 7 paragraph 9 regarding related parties disclosure, a related party is a person or entity related to the entity that prepares its financial statements (referred to in this Standard as the "reporting entity"). According to several sources, this definition has a broader application than the definition contained in the Income Tax Law.

The following is the definition of a related party according to what is regulated in Article 18 paragraph (4) of the Income Tax Law. And the opinions of several sources regarding this matter.

Table 1. Opinions of Several Sources on the Concept of Related Party in the Income Tax Law

Related Party in the Harmonization of Tax Regulations Law	The informants comment
<p>A related party between taxpayers can occur due to dependence or attachment to one another caused by ownership or equity participation or control through management or use of technology.</p> <p>A related party is considered to exist if:</p> <p>a. Taxpayers have direct or indirect equity participation of at least 25% (twenty-five percent) in other Taxpayers; the relationship between the Taxpayer and the minimum participation of 25% (twenty-five percent) in two or more Taxpayers; or the relationship between two or more Taxpayers mentioned last;</p>	<p>Head of BKF's American and European P3B Sub Division:</p> <p>The definition of a related party in the Income Tax Law is easy to avoid, while the description in accounting and P3B is broader. Proof of technology control and management is tough to do.</p> <p>Senior Manager of International Tax/Transfer Pricing Services DDTC:</p> <p>The definition of affiliation differs between the Income Tax Law and PSAK and between countries. It has the potential for double taxation to occur.</p>

Table 1.1. Opinions of Several Sources on the Concept of Related Party in the Income Tax Law (continuation)

Related Party in the Harmonization of Tax Regulations Law	The informants comment
b. a Taxpayer controls another Taxpayer or two or more Taxpayers are under the same control either directly or indirectly; c. there is a family relationship either by blood or marriage in a straight line and/or one-degree side.	Chairman of the Tax Supervisory Committee: As a developing country, the definition of a related party should be simple because the simpler one is usually, the more obedient. Tax Lecturer at the Tax Education and Training Center (PUSPA): A related party can arise for many reasons, not only because of the relationship between equity participation but also because of control. Therefore, some matters related to control concepts should also be seen more.

Source: author processing

In the implementing regulations of the income tax law regarding related transactions, namely the Regulation of the Director-General of Taxes Number PER-32/PJ/2011 concerning Amendments to the Regulation of the Director-General of Taxes Number PER-43/PJ/2010 concerning the Application of the Principles of Fairness and Business Practice in Transactions between Compulsory Taxes with Related Parties, Regulation of the Director-General of Taxes Number PER-22/PJ/2013 concerning Guidelines for Auditing Taxpayers who have a Related Party, and Circular Letter Number SE-50/PJ/2013 concerning Technical Guidelines for Auditing Taxpayers who are Related Having a Related Party, no further explanation was found regarding the definition of a related party. All definitions of a related party in the three additional regulations refer to the definition of a related party according to Article 18 paragraph (4) of the Income Tax Law.

DDTC's Senior Manager of International Tax/Transfer Pricing Services said that the definition of affiliated parties might differ between the Income Tax Law and PSAK. Moreover, even related parties or parties with the related party may vary between countries. One of the root causes of the imposition of double taxation, which is still possible, is a correction to a TP dispute in a country that considers an affiliated party transaction. In contrast, a corresponding adjustment has never been made in the counterparty country because the counterparty country does not view the transaction as a related party transaction. In the following interview excerpt, DDTC's Senior Manager of International Tax/Transfer Pricing Services said:

"If indeed each country has the right to define its related parties, then this will be contrary to the tax treaty that these countries make. The tax treaty is for them to avoid double taxation, while people have their rights."

This opinion is in line with what Dwarkasing (2011) as follows:

"Various countries have different and broad concepts and interpretations of "associated enterprises" in their domestic legislation. Double taxation may arise because of different interpretations of the concept of associated enterprises under domestic transfer pricing rules. For instance, a 26% shareholding is covered in-country A, adjusting. In contrast, country B's transfer pricing legislation requires at least a 50% shareholding for associated enterprises. Country B may therefore not be prepared to apply a corresponding adjustment."

Determining whether a relationship is categorized as an affiliated party is very important as a basis for making transfer pricing corrections. Based on the statement above, every country has the right to define a related party. The different interpretations in various countries to determine the existence of an element of the related party can ultimately result in double taxation.

For example, country A determines that a relationship is classified as a related party if the share ownership of a company to another company is at least 25%. While for country B, an adjustment to the tax on transfer pricing transactions of the Company is made if the share ownership is between companies is a minimum of 35%. A company in country A has a 30% share ownership of a company in country B. When the two companies make transactions above the fair price, country A will adjust it to the reasonable price without any related party that causes the taxes to be corrected and increased. In contrast, country B did not make a corresponding adjustment to the transaction because country B considered that the transaction was not a related transaction.

Thus, there is a condition where MAP cannot resolve disputes related to transfer pricing corrections that occur in cross-border transactions. Although in the tax treaty of each country, it is stated that if there is a dispute overcorrection of TP between countries, it can be resolved through MAP, but in reality, this is not necessarily the case.

One of the cases that can happen in real life is the difference in interpreting the related party between India and Indonesia. Several things are different regarding arranging associated parties according to India's tax laws and regulations with what is regulated in the Indonesian Income Tax Law.

Under section 92A, India Income-tax Act, 1961 (Taxation Laws and Regulations in India), a relationship is considered to be an affiliated party relationship, one of which is if 90% or more of the raw materials and consumables are required. It is used to manufacture or process goods made by one Company, supplied by another company, or by persons designated by another company. Prices and other conditions relating to supply are affected by that other Company.

Meanwhile, in Indonesia, provisions regarding affiliated parties through the percentage of supply for raw materials and consumables needed to manufacture or process goods or goods carried out between parties are not regulated. Thus, if there is a correction, let's say to company A in India that transacts with Company B in Indonesia. According to the provisions in India, the transaction is an affiliated transaction. Therefore a tax correction is made in India, which results in a tax burden that the Company must pay. An increase, while in Indonesia the transaction is not an affiliated party transaction, therefore in Indonesia, a corresponding adjustment is not made.

Every country in the world should have equalized interpretation of the related party so that if there is a TP dispute, it can still be resolved through MAP. However, obtaining the same understanding of the concept of associated enterprises requires a long and 'tough' negotiation.

According to the Head of the American and European P3B Sub-Division of BKF, it can be started from Indonesia. Indonesia is expected to change what has been regulated regarding the definition of a related party in the Income Tax Law since the description of a related party is considered too narrow. In line with what was said by the Head of the American and European P3B Sub-Division of BKF, the PUSPA Tax Lecturer also thought that the related party regulated in the current income tax Law still contains weaknesses quoted from the following interview.

"I still think that the related party rule in Article 18 paragraph (4) contains weaknesses because it has not been emphasized on the substance over form, it is still on the de jure related party, but de facto has not been emphasized. Even though the related party is the entrance to transfer pricing."

He emphasized that Indonesia should review the rules regarding the related party in the Income Tax Law because the interpretation is still too narrow and what needs to be identified more deeply. Suppose the related party can arise due to many things. In that case, it can be because of the relationship between capital participation and control, in principle, the criteria for a related party. Of course, it must first be formulated in the Indonesian tax regulations.

CONCLUSION

The related party is the lifeblood of the TP, so to be resolved through the MAP, a dispute over the correction of the TP must occur between two countries. It has the same interpretation of the determination of the related party. Then, it turns out that not all TP correction disputes that arise across countries can be resolved through MAP because the basis of MAP is a related party. Each country has the autonomous right to define a related party differently in the current condition. The difference in interpretation may result in the definition of a related party according to a country. It differs from the description of a related party in the counterparty country. As a result, TP correction disputes whose taxes have been corrected by a country will not be followed by a corresponding adjustment by the partner country for the counterparty company. The tax subject will be subject to double taxation. In addition, the definition of a related party in Indonesia is considered too loose and easy to avoid because the purpose has not emphasized substance over form or has emphasized de jure relationship rather than de facto. Meanwhile, until now, there is no mutually recognized and clear rule regarding the concept of a related party contained in the provisions of Article 9 of the tax treaty. Because changes in the tax treaty to produce the same interpretation of the related party require lengthy and 'tough' negotiations to harmonize mutually recognized regulations.

This research still has limitations because all the interviewees had been planned from the start. It could be interviewed considering the busyness of the informants. However, the resource persons who could not be interviewed were eventually replaced by other resource persons who also had reliable competence and experience related to the matter being studied. In addition, the number of informants who can be asked about this matter is also not too many but still fulfills the research triangulation.

This study indicates that the regulator should review and re-evaluate the rules related to the current definition of a related party. It is appropriate to evaluate it because it is effortless to avoid. TP dispute cases between countries that should be settled through the MAP can be resolved following the existing tax treaty to eliminate the potential for double taxation. In addition, negotiations between countries are needed to harmonize interpretations related to the related party. If there is a TP dispute, a settlement can be submitted through MAP.

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