

ABSTRACT

Riqqa Soviana, NIM 11220068, 2015. **Tax Haven In Tax Haven Country Under Perspective Islamic Law**. Skripsi. Sharia Business Law Department, Sharia Faculty, State Islamic University of Maulana Malik Ibrahim, Malang. Supervisor: Burhanuddin Susanto, S.HI., M.Hum.

Keywords : Taxpayer, Tax Haven, Islamic Law.

Every taxpayer has the obligation to pay taxes to the state in accordance with the assets owned. So honesty in informing the actual amount of wealth to the state is important. Not justified in manipulating the amount of wealth only to reduce the amount of tax payable. It is an unjust act because taxes paid to the state for the purpose of general benefit. But, there are some taxpayers who use tax haven policy to minimize the amount of tax payable increasingly widespread. This is a challenge for Indonesia that is a Muslim citizen majority. So it is necessary to the Islamic law perspective about this phenomenon.

The purpose of this research is to analyze the concept of tax haven in tax haven countries, and to reveal the perspective of Islamic law on tax haven. This research is a normative legal research using statute and conceptual approach. The source of the material law is using secondary material law consisting of books, and studies in the form of thesis, or dissertation, as well as several journals, and so on.

The results of this study indicate that the concept of tax havens conflict with the sharia principles, so that in Islamic law perspective, that tax haven as it is not permissible to be used. Because of utilizing tax haven to minimize the amount of tax payable to the state is *zalim*. In addition, the transaction is often encountered manipulation and the element of *riba* in the bank system in tax haven countries. And also, tax haven also not transparent in their activities. Thus, it is often used by criminals to save money from corruption, drug trafficking, money laundering and so on.

Introduction

Paying tax to the state is a duty for every citizen. State revenue from tax sector is the source of funds for state citizen prosperity. That sources of funds used to finance the needs of the country consists of the public sector and the private sector. In Indonesia, the tax arrangements regulated in Article 23A of Constitution 1945 which reads, "All tax for utility of country cash are according to the law." So then come the arrangements related to tax collection was regulated in a variety of tax laws.

The rise of the phenomenon of tax havens in the business community is one of the causes of the taxpayer actually keep confidential the information to his own country. This is intended to be a low tax rate payable. In other words, business community who utilize tax haven policy in tax haven countries namely to secure their wealth and minimize the obligation to pay the tax to the own country. These actions include the *zalim* act according to Islamic law. Because the total amount of wealth that should be paid for taxes, the tariff deliberately used to manipulate the amount of wealth decreases. In other words, if the amount of wealth that reported to the state is little, so the tax that must be paid is little too. Islam strictly prohibits any dishonesty, especially to the state referred to as *ulil amri*.

Therefore against this background that this study was conducted, namely to discuss more deeply related to the tax haven concepts in the tax haven countries, along with how the perspective of Islamic law about this phenomenon which linked the concept of tax haven by the five sharia principles, which do not contain *riba*, *maysir*, *gharar*, *haram*, and *zalim*.

This research is a normative legal research. In this research, the author conducted the identification of what are the concepts of tax haven appropriate or not in accordance with *sharia* principles are five, which does not contain *riba*, *maysir*, *gharar*, *haram*, and *zalim*. And the approach used is the statute approach and conceptual approach, and use secondary material law. The collecting of material law was collected by studying literature. The material law that had been obtained from the literature study will be described and linked in such a manner and presented in a systematic discussion.

Theoretical of Perspective of Islamic Law on Tax

Yusuf Qaradawi argues in his book *Fiqh az-Zakah*, taxes are the obligations imposed on taxpayers that must be paid to the state in accordance with the provisions without the feed back from the state, and the results are to finance public spending on the one hand and to realize the most economic objectives, social, political, and other goals to be achieved by state.¹

¹ Gusfahmi, *Pajak Menurut Syariah...* p. 30-31.

Currently, the tax is the duty of a citizen in a country to finance state expenditures. If the government funds are insufficient, then the expenditure for the purpose of economic, social, political, and other goals to be achieved by the state to be blocked, and will arise *al-mudharat* (bad condition). Meanwhile, to prevent *al-mudharat* is an obligation. In the rules of fiqh say:²

مالا يتم الواجب إلا به فهو واجب

According to Maliki, because taxes keep benefit for people through various means such as security, education, and health are mandatory, while the state treasury is not sufficient (the proof, state is still owed), then tax is becomes obligatory.³ The obligation to pay taxes to the state is to avoid the country from unsafe conditions, and also from the condition of a lack of education for the society, as well as reduced levels of public health. To avoid those bad conditions, then that tax be required to be accomplished. And therefore, tax evasion is prohibited by the state. According to Ibn Taymiyyah in *Majmu'atul Fatawa*, said that, "ban on tax avoidance even though it is not fair on the argument that it did not pay their taxes by the obligation will result in a greater burden for the other groups."⁴

Theoretical of General Perspective of Tax Haven

According to Christopher in Fuady's book, the definition of tax haven been given as a country that treats the personal income tax and corporate tax at the lowest level, so it tends to attract the millionaires, multi-national companies, and financial institutions who seek to minimize their tax liability. Due to the easiness, especially in the field of taxation and ease also in the field of strict bank secrecy, then eventually tax haven countries into the world financial centers.⁵

Tax havens are small countries, commonly below one million in population, and are generally more affluent than other countries. There are roughly 45 major tax havens in the world today. Examples Andorra, Ireland, Luxembourg and Monaco in Europe, Hong Kong and Singapore in Asia, and the Cayman Islands, the Netherlands Antilles, and Panama in the America. These tax havens are generally small and affluent, and tax havens are widely used by international investors. In 1999, 59 percent of U.S. multinational firms with significant foreign operations had affiliates in one or more tax havens.⁶

² Gusfahmi, *Pajak Menurut Syariah ...* p. 160.

³ Gusfahmi, *Pajak Menurut Syariah ...* p. 159.

⁴ Gusfahmi, *Pajak Menurut Syariah ...* p. 157.

⁵ Munir Fuady, *Hukum Perbankan Modern...* p. 229.

⁶ James R. Hines, "Tax havens," NBER Working Paper, (May 2007). p. 1.

In the literature mentioned that some examples of the type of tax haven countries are:⁷

- 1) State without income tax levies
- 2) Countries with low tax rates
- 3) State taxing only domestic income (domestic)
- 4) Countries that give special treatment

Tax laws in tax haven countries, in principle, there are several legal ease in tax haven countries, are: ease in the field of tax law, ease in law on bank secrecy, ease in the field of establishment of the company or the establishment of a bank.⁸ One of the features of the tax haven countries is that the law in tax haven countries is very strict to protect the principle of bank secrecy. This causes people in safer to save money in the tax haven countries than saving money in the countries of non-tax haven. Even if the principle of bank secrecy in tax haven countries can be opened, the bank secrecy only be opened with special reasons and can only be opened with the difficult procedures, for example, must submit to the court to open a secret bank.⁹

Countries popularly known as tax havens implement a tax protection policy to attract investors in order to conducting economic activity in tax haven countries. Type of economic activity which we have known since the first is trading. In the era of globalization, the existence of trade impact on increasing international transactions, in which each state has different rules and policies. The businessman was trying to maximize the revenue and to minimize capital owned. One of the way is using policies that implemented in tax haven countries. Tax protection policy will greatly businesses benefit because it can reduce the amount of tax liability which have to pay to his own country.

Discussion

1. Tax Haven Concept In Tax Haven Country

First, implementation low tariff of tax or not at all. The presence of the implementation of tax that only levy a lower tax rate or no levy at all, can attract investors or foreign businessmen to put his wealth in tax haven countries.

Second, giving protection with strict bank secrecy. One of the feature of tax haven country that is the very strict laws to protect the Confidentiality bank principle. This cause many conglomerates to save money in tax haven countries than in countries that are not tax havens. Although the principle of bank secrecy can be opened, but only can be opened with special reasons and can only be opened with a complicated

⁷ Mohammad Zain. *Manajemen Perpajakan*. (Jakarta: Salemba Empat, 2003). p. 364-365.

⁸ Munir Fuady, *Hukum Perbankan Modern* (Jakarta: PT. Citra Aditya Bakti, 2004). p. 234.

⁹ Munir Fuady, *Hukum Perbankan Modern...* p. 238.

procedure, for example, must get permission from the court of tax haven country to open bank secrecy.¹⁰

Third, lack of transparency in operating economic activities. The lack of transparency in tax haven countries is often used as a tool by conglomerates to avoid taxes in their own country. Whether it a company, or criminals such as money laundering the proceeds of corruption, drug trafficking, and so on. Lack of transparency is that hides the real customer data from the customer country. So it cannot be known that a person or entity has the wealth in the country of residence or income in tax haven countries, so it cannot be taxed.

Fourth, not hold Double Tax Avoidance Agreement (DTA) with countries that need information. The existence of Double Tax Avoidance Agreement (DTA) is to obtain information about a citizen in a country which has a wealth in tax haven countries, to be levied taxes payable. Such as Bahama, Bermuda, and Cayman Islands. Bahamas only levy a tax of \$ 100 a year for all companies in the Bahamas. This country does not have an agreement to avoid double taxation (tax treaty) with other countries that require information. Since 1960, the country's long-term guarantees to not burden the tax on manufacturing companies. Bermuda also not entered into double taxation and burdensome sort of costs and limited liability companies are moderate. Cayman Islands guarantee will not tax foreign companies for 20 years, and, like the Bahamas and Bermuda, the Cayman Islands are also not hold double taxation treaties with other countries.¹¹

Fifth, lax monitoring on traffic exchange and deposits. Lax supervision over foreign exchange flows, including deposits from foreign countries, both individuals and entities. This does not mean that the tax haven countries cannot be strict controls on foreign exchange flows in the country, but it is purposed held to attract the owners of money that comes from abroad to deposit money or funds to tax haven countries.¹² Thus, factor that loose control over foreign exchange flows and deposits was deliberately done so that more people are depositing their wealth to tax haven countries.

2. Islamic Law Perspective on Tax Haven

In Islam, was known some of the principles that determine whether the business activities carried out contrary to Islamic law or otherwise. Among some of principles that business activities do not contain the elements of *riba*, *maysir*, *gharar*, *haram*, and *zalim*.

¹⁰ Munir Fuady, *Hukum Perbankan Modern...* p. 238.

¹¹ Mohammad Zain. *Manajemen Perpajakan*. (Jakarta: Salemba Empat, 2003). p. 364.

¹² Mohammad Zain. *Manajemen Perpajakan...* p. 368.

a. Riba

Riba, normatively has forbidden in the Qur'an. God has given clues about the prohibition of usury through the condemnation of usury in the Jewish community. This is conveyed in Surah an-Nisa verse 161 which reads:¹³

وَأَخْذُهم الرِّبَا وَقَدْ نَهَوْا عَنْهُ وَأَكْلُهم أَمْوالِ الناسِ بالباطِلِ وَأَعْتَدْنَا لِلْكَافِرِينَ مِنْهم عَذاباً أَلِيماً

The system of *riba* or interest in reality containing aspects such injustice exploitation of the parties against the other parties. Economic justice and social balance may not be realized when the interest-based system is still practiced.¹⁴ In tax haven country, the system of bank used is conventional system. So that the system of interest is still practiced. The system of interest in tax haven country it can be by selling buying exchange transaction that not cash, in the connection with the free of traffic exchange among countries. And it can be by deposits, so that the saving become fold pleated that one of characteristic of *riba*.

b. Maysir

Gambling (*maysir*) is a form of the object which is defined as a place to make easy something. God has banned all forms of gambling that are cast in the letter of al-Maidah verse 90-91.¹⁵

In the connection with the basic purpose of the existence of tax havens in the conduct of international tax avoidance is as a tool for tax evasion. Tax evasion through tax haven countries can occur in two categories, namely tax evasion in order to minimize the liability to pay tax loophole to exploit the domestic tax laws or which are known as tax avoidance and escape capital in order laundering money or tax evasion form of the stolen money such as corruption, the sale of illegal firearms, gambling, etc are forbidden by law.¹⁶ Thus, that act is forbidden in Islamic law.

¹³ Euis Amalia, *Keadilan Distributif Dalam Ekonomi Islam*. (Jakarta: PT. Raja Grafindo Persada, 2009). p. 134-136.

¹⁴ Euis Amalia, *Keadilan Distributif Dalam Ekonomi Islam...* p. 134-135.

¹⁵ Ismail Nawawi, *Ekonomi Kelembagaan Syariah; Dalam Pusaran Perekonomian Global Sebuah Tuntutan dan Realitas*, (Surabaya: CV. Putra Media Nusantara, 2009). p. 39-40.

¹⁶ Irfansyah, "Analisis Peran Tax Haven Dalam Melakukan Penghindaran Pajak Lintas Batas Negara", Skripsi, (Depok: FISIP-UI, 2010).

c. *Gharar*

Etymologically, *gharar* means unknown or certain danger. Meanwhile, according to the terminology or the *fiqih* term, *ghahar* interpreted by specialists in religious law as a result of ignorance of the case (transaction), or ambiguity between the good with the bad.¹⁷

Tax haven, which has been widely used by individuals or entities such as multinational corporations, has been detrimental to many countries that are not tax havens. Such as Indonesia, India, and Africa, as well as other countries where income tax state of the sector continues to decrease. This is due to the taxpayers who manipulate the amount of tax payable by the financial statements. Thus, the own country of taxpayers do not know the actual information, and can only tax the information provided by the taxpayer. As is often the case that the economic activity of the people who use tax havens. As proposed by Zaharuddin in his article entitled Differences Between Islamic and Conventional Banks, that "the avoidance of economic activities involving Speculation (*ghahar*)."¹⁸ That is why such actions are forbidden in Islamic law.

d. *Haram*

In Nawawi Ismail book that the title *Institutional Economics Sharia; In A Global Economy Vortex Claims and Reality* in outline, unlawful categorized into two, namely:¹⁹

- a. *Haram* in substance, such as pigs, khamr, blood, carrion, gambling, and everything that is dedicated to other than Allah.
- b. *Haram* due process adopted to obtain something. *Halal* food or goods obtained by false (stealing, robbing and others) is not *halal*.

Based on the explanation above, it can be concluded that something illicit substances can be located on the goods themselves (pork, khamr, blood, carrion, gambling, etc.) and can also be located in such a way to obtain items that are not good deeds. As already explained that the basic purpose of tax haven in international tax evasion is as a tool for tax evasion. In other word, taxpayers who take

¹⁷ Shalah ash-Shawi & Abdullah al-Mushlih, *Fikih Ekonomi Keuangan Islam*, (Jakarta: Darul Haq, 2001). p. 379.

¹⁸ Ust Hj Zaharuddin Hj Abd Rahman, "Differences Between Islamic Bank and Conventional," <http://zaharuddin.net/senarai-lengkap-artikel/38/297-differences-between-islamic-banks-a-conventional.html>, accessed at 16 February 2015.

¹⁹ Ismail Nawawi, *Ekonomi Kelembagaan Syariah; Dalam Pusaran Perekonomian Global Sebuah Tuntutan dan Realitas...* p. 43.

advantage from tax haven countries to get benefit as much as possible in economic activities, but by way to avoid paying taxes from the own country, is against the law. This can be detrimental to the own country. So that according to Islamic law, including the ways in which the forbidden category to be done because of the process is not well taken, by way of escape from the obligation to pay taxes to the state.

e. *Zalim*

Zalim is an act forbidden by Allah and includes one of the major sins. Humans who do *zalim* will get a reply in the world and a painful punishment in the hereafter. In a prohibited transaction if it violates the principle of:

" لا تظلمون ولا تظلمون "

namely the principle of do not oppress and do not be *zalim* or tyrannized.²⁰

Pay taxes to the state is an obligation for taxpayers. Because taxes are remitted to the state to finance state expenditures are intended for general benefit. If the taxpayer does not pay taxes, or pay taxes but not according to the amount of wealth held, the state has the authority to impose penalties on taxpayers who are not honest, because such actions including *zalim*. While in tax havens there is a factor that supports dishonesty taxpayer. Namely in terms of information exchange with the country of taxpayer own country.

Exchange of information which in practice is done through Double Tax Avoidance Agreement (DTA) is not carried out by tax havens. As with any country such as Bahamas, Bermuda, and Cayman Islands. These countries do not hold Double Tax Avoidance Agreement (DTA), so the amount of information related to the identity and richness of customers is always safe.

Conclusions

1. The concept of tax haven are implemented of low tax rates or not at all, strict bank secrecy, not transparency, do not hold a Double Tax Avoidance Agreement (DTA) with countries that need information, and tax monitoring on traffic exchange and deposits. That's all concepts are favorable for tax haven countries, but not favorable to the non-tax haven countries, and threaten developing of non-tax haven countries.
2. Perspective of Islamic law against tax havens, tax haven concept that contrary to Islamic principles are five, which contains *riba*, *maysir*,

²⁰ Mardani, *Hukum Ekonomi Syariah di Indonesia*, (Bandung: PT. Refika Aditama, 2011). p. 16.

gharar, *haram*, and *zalim*. So, do not be justified under Islamic law perspective to take advantage from tax haven, which are often encountered manipulation elements in their transactions and there is an element of *riba* in its banking system, so that it becomes unlawful done. In addition, the presence of a taxpayers intent in using tax havens include *zalim* to the state, because with the intention to avoid high tax rates to be levied by the state when the amount of wealth which also reported high value.

Suggestions

For Government, especially for General Tax Division, as *ulil amri* that taxed the society of Indonesia, have to taxed appropriate with society ability and used that tax for general benefit. And then for taxpayer, as a taxpayer Indonesia, it is appropriate continue to adhere the regulations in force, including in terms of paying taxes. Then it ought to inform the actual amount of wealth to the state so that the state can tax the people equitably, and can use the tax for joint benefit. The las, for academician, researchers realized that in this study there are many shortcomings that need to be repaired. Therefore, there should be more research related to the theme of this research.

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