

Reconstruction of Cigarettes Taxes Setting of Republic of Indonesia Law Number 28 of 2009 on Regional Tax and Regional Levies

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Submission date: 22-Jul-2019 07:39AM (UTC+0700)

Submission ID: 1153805374

File name: ia_Law_Number_28_of_2009_on_Regional_Tax_and_Regional_Levies.pdf (1.72M)

Word count: 7913

Character count: 41250

8 Reconstruction of Cigarettes Taxes Setting of Republic of Indonesia Law Number 28 of 2009 on Regional Tax and Regional Levies

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9 Abstract

The purpose of this dissertation research is to understand and analyze the occurrence of inconsistencies and disharmonies of legal arrangements on cigarette tax in Act No. 28 Year 2009 on Regional Taxes and Regional Levies, to find and formulate alternative cigarette taxes arrangements which are ideal in accordance with the principles of justice, the principle of expediency, and the principle of legal certainty. Conclusion of this research is inconsistency and disharmonies of legal arrangements and law of cigarette taxes on Law Number 28 Year 2009 on Regional Taxes and Regional Levies occurs because the legislators equate between the local tax and surcharge; the nature of cigarette taxes which is objective has not been consistently functioned towards cigarettes taxation, *budgetair* or *regulerend* functions, and less precise use of the cigarette taxes. Reconstruction of legal arrangements and law on cigarette taxes is assessed on the principle of justice: the distribution division of cigarette tax revenue based on the number of real results of cigarette tax on each of the province and district or city. Reconstruction of legal arrangement and laws on cigarette taxes is assessed on the principle of expediency: the necessary separation of the source of funding for public health services for affected disease due to the effects of secondhand smoke and reconstruction of cigarette tax levies is assessed on the principle of legal certainty, changes to the provisions of Article 1 point 19 and Article 27 of Law No. 28 year 2009 on Regional Taxes and Regional Levies. Recommendation of this study is that The government needs to affirm the direction *regulerend* function in cigarette tax collection by increasing the number of cigarette tax rates. The House of Representatives and the Government needs to amend the provisions of Article 1 point 19 and Article 27 of the Law No. 28 Year 2009 on Regional Taxes and Levies. The provincial government, district, or municipality should establish Pulmonary Medicine Center that specializes in serving the citizens who are affected by disease due to the impact of cigarette smoke, so cigarette tax revenue allocation looks real.

Keywords: Reconstruction, Cigarette Taxes

1. Introduction

Achmad Ali said that the issue of legal purpose can be assessed through three perspectives, namely:¹

1. From the standpoint of law positive-normative, legal purpose in this point is emphasized in terms of legal certainty;
2. From the standpoint of the philosophy of law, then the purpose of the law is emphasized on the aspect of justice;
3. From the perspective of sociology of law, legal objectives focus on terms of expediency".

It is similar to the regulation of cigarette taxes contained in Law No. 28 Year 2009 on Regional Taxes and Levies (hereinafter referred to as the Act PDRD) as the focus of the study of writing this dissertation that in this work will be assessed from the principles of fairness, expediency and legal certainty.

The object of cigarette tax is tobacco consumption on the basis of the imposition which is related to the cigarette excise, so that smoking is meant as levied tax levies by the government, while the levied tax by the government is stated under Law No. 9 of 2007 on Excise using the term tobacco excise. The inconsistencies could be seen in the Constituent from the use of the term of cigarette excise and tobacco excise which grammatically clearly have different meaning. So the question arises whether cigarette tax is a tax or a surcharge.

Cigarette tax is provincial tax, but based on the Minister of Finance Regulation No. 115 / PMK.07/2013 on Procedures for Collecting and Tax Collector Cigarettes, cigarette tax collection is handed over to the Customs and Excise Office; this is not in accordance with the characteristics of the local tax itself, as it is collected in the concerned regions by the local government based on local Regulation, causing disharmony of various provisions governing the cigarettes taxation which can lead to conflicts of norm.

In the provisions of Law Number 28 Year 2009 on Cigarette Taxes, it is determined that at least 50% of cigarette tax revenue both collected by the province and the district/city will be allocated to fund public health services and enforcement by competent authorities. This provision adopts the concept of earmarking tax where the designation and use of taxes should be clear and definite. Thus, earmarking tax in cigarette tax is interesting to study as a matter of philosophy; taxes are derived from the people and the use of taxes should be maximized for the prosperity of the people.

Regarding the cigarette tax revenue sharing for each province is determined proportionally based on population and 70% of non-tax revenue is turned over to the district/city. This provision is not in accordance with the provisions of general taxation based on real results in each region, so that fairness in the distribution of cigarette taxes is still questionable.

Based on the description above, the problems can be drawn into some questions: why do the inconsistency and disharmony of cigarette tax arrangements in Law Number 28 Year 2009 on Regional Taxes and Regional Levies happen and how are the

¹Achmad Ali, Mengembara Di belantara Hukum, First Edition, (Ujung Pandang :Lembaga Penerbitan Universitas Hasanudin, 1990), p. 99.

reconstruction settings of cigarette tax assessed on the principles of fairness, the principle of expediency and principle of legal certainty.

2. Research Method

Research design in writing this dissertation is a normative legal research, namely research that examines the provisions of the positive law and the principles of law relating to the legal issues studied, namely the issue of taxes on cigarettes using philosophical approach (philosophy approach), approach to law (statute approach), conceptual approach (conceptual approach), and historical approach (historical approach).

Operational constraints of this dissertation research is specifically studied the problems of reconstruction (returning to normal orarranging (setting up)) back specifically about the setting of cigarette tax as a local province tax stipulated in the Act PDRD.

3. Results And Discussion

A. Analysis of inconsistency and disharmony of Cigarette Tax Settings

In Indonesian Dictionary, consistently is interpreted the word: "1. Fixed (no change); be consistent; steady; 2. In line, accordingly: should act in accordance with the utterance"¹. The word harmonization is derived from the Indonesian word "harmony" which means harmony; and then to the "harmonious" which means harmony, accord, one mind. The word "harmonious" brings the word "harmonization" means the synchronization, the search for harmony, and suitability.² Inconsistency and disharmony of law can lead to "conflict of norms". AriefSidharta declared that legally conflict of norms in the legislation could occur because of the possibilities as follows:³

1. The inconsistencies vertically in terms of format rules, the lower rules that is contradictive with higher regulations, for example between laws with government regulations;
2. There is an inconsistency vertically in terms of time, example some rules which are hierarchically parallel, for example, fellow of lawsbut the one law effects of the other;
3. There is an inconsistency horizontally in terms of the substance of the rules, that some regulations are hierarchically parallel, such as fellow laws but the substance of the regulations are more common than substance other regulations;
4. There is inconsistency horizontally in terms of the substance in the same regulation, for example Article 1 is contrary to Article 15 of the same law.
5. There is an inconsistency between the different sources of formal law, for example, between law and the judge's decision or the law of habit.

A legal system assumes itself as acomplete order, so that conflict between one another is unwanted. If there is a conflict of legal norms system, they already havetheir own settlement mechanism (legal remedies), namely through the principles of law.

As for the legal principles used in resolving conflicts of norms either vertically or horizontally, the principles are stated as follows:⁴

- "1. Lex superior derogate legiinferiori (regulation of a higher rules out lower regulation);
2. Lex posteriori derogate legi priori (the new regulation rules out old regulation);
3. Lex specialis derogate legi generalist (special rules rule out general regulations);
4. Lex dura sedscriptaTamen (laws are inviolable);
5. Retro Active (rule of law should not be applied retroactively). "

Viewed from the history side, the cigarette tax is something new in history of tax collection in Indonesia, because the first existing cigarette taxesare implemented on January 1, 2014.

Judging politically from local tax setting laws in Indonesia, local tax collection is a permanent legal politics shown by the government's desire to establish local taxes as PAD which is expected to be able to support the implementation of the government in the area. Cigarette tax is expected to be able to add to the regional reception in the provision of public services and general government activities and to finance public health services and law enforcement in particular.

¹Purwadarminta, W.J.S., Kamus Umum Bahasa Indonesia, (Jakarta :Balai Pustaka, 1986), p. 520.

²Ibid. p. 247.

³Arief Sidartain Arba, Rencana Tata Ruang Wilayah Berbasis Lingkungan Hidup (a study in Nusa Tenggara Barat), Disertation, S3 program Fakultas Hukum Brawijaya, Year 2012, p. 78.

⁴Sudikno Mertokusumo, Penemuan Hukum Sebuah Pengantar (Yogyakarta : Liberty, sixth edition, 2009), p. 5.

Judging from the theory of state law basis that everything that exists in the country shall be based on the law, the taxation of cigarettes arranged in Act PDRD is in accordance with the theory of state law because the law has been established that provisions must be met in taxation of cigarettes. What kind of cigarette tax object, who subjects the cigarette tax, what tax base of cigarettes, how the procedures for collection and remittance of taxes on cigarettes and others.

Judging from the theory of law, such as the norm setting requirement should not be ambiguous (creating double interpretation), according to the authors there are inconsistencies in the law makers in the use of the term local tax and excise duty, where the customs shows contra achievements while if taxes there are no cons achievement directly can be appointed. The definition of cigarette taxes, such as the formulation of Article 1 point 19 of Law No. 28 Year 2009 on Regional Taxes and Levies are formulated that the first cigarette tax is a levy on clearance; this formula raises a double interpretation, namely the cigarette tax as a tax or *opsenten* / surcharge on excise. Second, it is levied by the government in conjunction with the collection of excise duty, can be interpreted as the government who make tax payments smoking.

The formula then influence the formulation of article 26 that determines the taxable cigarette is cigarette taxes, so the views of the characteristics is inherent in the cigarette tax, the authors agree with the statement of testimony from government expert (Gunadi) in the Constitutional Court stated that the essence of the cigarette tax is an additional levy (surcharge) on clearance. Also in accordance with the opinion of Kenneth Davey stated there are three regional approaches to gain tax.¹

"1. With tax / revenue sharing, which result to tax levied center

2. Surcharge / *opsenten*, namely surcharges on taxes or customs, for example 10% on Property Tax that ever applies in Indonesia in the 1970s.

3. Tax empowering which levies for its own regional tax and spending. "

Of these three approaches with regard to the formulation of Article 1 point 19, it is mentioned that the Law PDRD Cigarette Tax is a levy on excise, so the definition of cigarette taxes in the provisions of Article 1 point 19 is ambiguous and could lead to legal uncertainty.

Judging from the *recht* philosophical principle, justification of state tax purposes against its people, such as the theory which states that the interests of the State to protect the interests of the people so that the people are legitimate to be taxed. Here the people are protected by the government against the illegal distribution of cigarettes and protecting the interests of smokers from the dangers of smoking by making appeals about the dangers of smoking which are included in each pack of cigarettes. From the principle of the division of the tax burden, such as the theory of bear that specifies that one can be taxed after the first able to meet the primary needs of themselves and their families, but in the collection of taxes on cigarettes this theory cannot be applied because it is difficult to measure the ability of a person, who will measure and how to measure it; the methods need to be thought in the future.

Judging from the theory of decentralization of powers, cigarettes taxation has been submitted to the provincial government, but the authority is transferred then partially diverted (and especially the authority of cigarettes taxation) to the Office of Customs and Excise which causes provincial government to be passive in seeking the collection of taxes on cigarettes so that the dependence on the provincial government to in strengthening local government finances cannot be released.

Generally the purpose of government for setting cigarettes taxation is to reduce / protect the public both active smokers and the passive smokers from the dangers of cigarette smoke, but the government also conducts program of cigarettes taxes, boosts cigarettes tax revenue by allowing people to smoke with operations against excise illegal, also prepares a smoking area for smokers. Herein lies the inequity for cigarette smokers who already pay taxes and contribute to financing public health services but the freedom to smoke is restricted inadequately with the result that they pay their own cigarette taxes anyway. It said that there is an injustice because it is not in accordance with the benefit principle, which states: "the benefits are enjoyed by the taxpayer must be in accordance with the tax paid to the government". Still less like smoking area which are prepared by the government shows less beneficial results for the smokers of cigarette tax itself.

Judging from the source of funding of public health services and law enforcement besides those sourced by the cigarette tax is also funded by deconcentration and co special allocation funds (DAK) of health and results of revenue sharing of tobacco taxes, so the usefulness of the results of tobacco taxes for public health services and enforcement and the empowerment of law become less specific.

B. Reconstruction of Setting Cigarette Taxes Assessed Based on the Principles of Fairness, the Principle of Expediency and Principle of Legal Certainty

1. Legal Purpose

Achmad Ali classifies legal purposes into three (3) streams, namely:²

1. The flow of ethical that considers in principle purpose of law is to achieve justice;
2. The flow of utilities that consider the principle objective of the law is to create expediency;
3. The flow of formal juridical principle that considers the objective of the law is to create legal certainty. "

13

¹Kenneth Davey, *Pembiayaan Pemerintahan Daerah Praktek-praktek Internasional dan Relevansinya Bagi Dunia Ketiga*, Penerjemah A. 4. nullah, dkk, (Jakarta : Penerbit Universitas Indonesia, 1988), p. 28.

²Achmad Ali, *Mengembara di Belantara Hukum*, First Edition, (Ujung Pandang: Lembaga Penerbitan Universitas Hasanudin, 1990), p. 95.

And Gustav Radbruch suggests three basic idea of law or the law of three basic values, namely justice, expediency and legal certainty that are oriented to create harmony implementation of the law. However, in practice, they raise the tension (spannungsverhältnis) for justice, expediency and legal certainty since they contain different demands of each other and give rise to the potency of tension. Tensions can arise during court proceedings in which the application of the law by law enforcement agencies will be affected by the norms applicable to the set out in legislation, issues of personal and social forces. "Not infrequently there is a clash between the rule of law with justice, the collision of legal certainty with expediency, justice, and legal certainty. For example, take a sample in a lawsuit, if the judge is required to take a fair decision, the sense of justice, then others must be sacrificed. If you want justice, then surely expediency and legal certainty is going to be sacrificed."¹

According to Radbruch: "If there is tension between these basic values, we must use the base or the priority principle in which the first priority is always falling on the values of justice, the value of usefulness and usability, and last legal certainty."²

2. Legal Function

To achieve the purpose of the law, then the law must be enable according to certain functions. Friedman stated to be working of the law there are three (3) conditions that must be met, namely the "first, rule / law it must be communicated to the subjects being regulated, second, subjects who arranged to have the ability to enforce it, third, the subject must have the motivation to implementing rules."³

According Lauddin Marsuni, there are some legal functions which are relevant to taxation policy in Indonesia, as follows:⁴

1. Law as a Tool of Social Control

Law is regarded as a social control that sets the behavior of which is an aberration, and what legal sanctions can be applied against the deviant behavior.

2. Law as a Tool of Social Engineering

Law is a tool of social engineering, namely as a tool to transform society in the sense that the law may be used as agent of change or agents of development.

3. The law as a political tool

The application of the law as a political tool gives meaning to the concept of legal politics, that the policy of the State through bodies authorized to establish legislation that is desired for the purpose that can be used to express what is contained in the community and to achieve what is aspired. "

In taxation policy, the law is social control in order to:⁵

- Determine and assess the government's actions in order to determine the tax object, or collect taxes from citizens.
- Determine and assess the actions of tax authorities in order to implement policies or legislation in the field of taxation.
- Determine and assess the actions of the taxpayer in carrying out their obligations in the field of taxation.
- Determine the legal sanctions that can be imposed on the tax authorities or the taxpayer if the acts that deviate in the field of taxation. "

3. Reconstruction of Cigarette Taxes Setting in Accordance with the Principles of Justice

In the history of taxation, taxes do not always serve justice. At the time of the king, for example, tax collection is unlimited but still considered fair, such as a state / kingdom which lost the war must submit the results of the earth or the amount of money each year to the conqueror, it is considered to be fair at the time. At the present time, in order to reflect the sense of justice, the taxation should be based on legislation.

In theory of power to endure, everyone must pay taxes in their capability respectively, by first reducing the overall income with expenditures that must be for primary needs, this theory turned out to only be applied to the taxes which are subjective, for cigarette taxes is objective, because judging from the power to endure, a person should be able to meet all the primary needs to be subjected to have tax obligations, while in general judging visibly and precisely the people that the economy level is medium or even less are more addicted of smoking.

Assessed in terms of the theory of law, cigarette tax collection has done a constitutional basis, namely Article 23A of the Constitution NRI 1945 and the positive law in the field of taxation is made in accordance with the applicable procedures in the formation of legislation as proposed by the president which are discussed in the Parliament and approved together by the President and the House of Representatives and it then is signed by the President and published in the State Gazette. So in terms of fairness in the process of formation of the legislation, it has been met the procedural fairness.

Judging from the fundamentals of the philosophy of law (juridical principle, economical principle and financial principle), cigarette tax arrangements can be described as follows:

¹<http://sharingaboutlawina.blogspot.co.id>, accessed on 11 Januari 2016.

²<http://lapatuju.blog121.co.id>, accessed on 11 Januari 2016.

³Friedmann Dalam Ahmadi Miru, Prinsip-Prinsip Perlindungan Hukum Bagi Konsumen di Indonesia (Jakarta: RajaGrafindo Persada, 2011), p. 5.

⁴Laud Marsuni, Hukum dan Kebijakan Perpajakan di Indonesia, Yogyakarta: UII Press, 2009), p. 9.

⁵Sony Devano dan Siti Kumia, Perpajakan (Konsep, Teori, danis), (Jakarta : Kencana Prenada Media Group, 2006), p. 96.

• Juridical principle: taxation should be based on legislation. In this case, it appears that cigarette tax collection is in accordance with Article 23A of the Constitution NRI 1945, governed by the provisions of Law No. 28 Year 2009 on Regional Taxes and Levies, then it is broken down in provincial regulations throughout Indonesia, and the implementation of the tax collection based on the Minister of Finance No. 102 / PMK.07 / 2015 on Amendment Regulation of the Minister of Finance 115 / PMK.07 / 2013 on the Procedures for Cigarette Tax Withholding and remittance, thus meaning the tax collection meets the juridical principle.

• Economical principle: taxation should not make the taxpayer becoming bankrupt. In the cigarette tax collection, it has not been found accurate data on the impact of cigarette tax on the people's economy level (especially the consumers of cigarettes). In this case, there are opinions for and against the cigarette tax. According to the businessman, because smoking cigarette tax charged by the state, many tobacco companies is out of business. As stated by the Secretary General of the Association of Indonesian Cigarette Manufacturers Association (GAPPRI), Hasan Aoni:¹

"Based on research, in 2009 there were 4,900 cigarette industries and five years later, there are 800 companies, significantly within the last five years there are approximately 4,100 cigarette factories which have been bankrupt and more than 100 thousand workers associated with the production of cigarettes lost their jobs as a result of government policy lack of impartiality."

And Rizki Budi, manager Cigarette Company (PR) Sinta:²

"Throughout 2014 there are approximately 1,300 cigarette companies registered in Kudus, Central Java. And this year there are only about 300 companies only. This means that as many as 1000 cigarette factory are closed in a year. Cigarette tax charge each year continues to be raised with the expectation of limited tobacco circulating products. This is not a problem for large employers, but for small businesses, it is very complicated and it is precisely clamped that products of small tobacco companies are not sold every day, and its products are only sold in West Java."

Based on economic fundamentals, it suggests that the views of the person in charge of tax (employers cigarette manufacturers / producers and importers of cigarettes) facing problems in the collection of cigarettes taxes, because cigarettes manufacturers should bear the advance payment of cigarettes taxes to the government, although the money of cigarette taxes that has been paid will be returned after their cigarettes are sold. But seen from the consumer of cigarettes as *destinataris*, there is no problems in the collection of cigarettes taxes because the consumers of cigarette tax may not know that by buying cigarettes meant they have to pay taxes on cigarettes 10% of the price of cigarettes which is already included in the price of cigarettes. By buying cigarettes, it means that consumers are able and ready to pay the taxes on cigarettes.

So, the justice issues that are arisen in the collection of cigarettes taxes are more dominant emerging from cigarette home industry to bankruptcy every day and having little capital, so that with the taxation of cigarettes, the cigarette manufacturers have had to raise the capital in order to pay taxes on cigarettes which cause many cigarette production home industry becoming bankrupt. This is where the cigarette tax injustice relying on because generalizes the state of all cigarette manufacturers for payment of taxes on cigarettes.

On the other hand, from a humanitarian angle, the injustice of cigarette tax are because of the nature of the cigarette tax itself which is objective, for the same tax, people should pay the same, in the payment of taxes on cigarettes rich and poor people should pay the same tax.

• financial principles, it has seen from the cigarette tax because it is anchored directly on the excise collection costs that could certainly less than the results of the tax collection and not a penny of money from local government coffers out for it.

Based on the Benthamism theory, principle of capacity to pay is guideline for justice. In 1776, Adam Smith already noted this as the first law in taxation, and most of the law is no longer questioned that a fair taxation system wants that richer members of society also pay more taxes than the poor.

The principle of capacity to pay has two separate parts, not only stated that the rich should pay more but also stated that they who are domiciled similarly (i.e. the same income) should pay the same tax as well. The second idea is demanding that "the same should be treated equally", later known as horizontal equity, while the distribution of the tax burden is adjusted for differences in the ability of people to pay for so-called vertical equity.

In the cigarette tax, cigarette tax subject is a consumer of cigarettes which means anyone who buy cigarettes has been directly paying the cigarette tax by not seeing race, religion, nationality age, occupation, rich and poor which is in line with horizontal equity.

Theoretically, the measurement of "The same must be treated the same" must receive additional "are equally exposed to objective tax liability," anyone who has met the objective requirements of tax must pay taxes while the vertical fairness does not apply to taxes on cigarettes because cigarette taxes are included in the tax bracket objectively.

Cigarette taxes as a kind of provincial taxes that are part of the tax law which also aims to achieve justice. Rochmat states:³

"Fairness in the tax law should be given a legal channel, meaning that the tax laws should be a provision that gives way for taxpayers to seek justice. Legal channels are:

a) Through *doleancy* channel, an objection letter belonging to the Judicial Administration is not pure;

b) Through a letter asking channels of appeal which are classified into pure Judicial Administration, which is performed in front of the board tax considerations. (Now the tax court is based on Act Number 14 of 2002 that concerns on the Tax Court, from the researchers).

¹Ekbis.rmol.co/ accessed on 4 Desember 2015.

²M.beritabuana.co/page/category/2page/ accessed on 4 Desember 2015.

³Rochmat Soemitro, Asas dan Dasar Perpajakan 1, (Bandung : Eresco, 1996). p. 14

If administrating the cigarette tax is done by the provincial government, it will be difficult because the trade system of excise tax is still very mobile and provincial government's access to the data of private consumption is still very limited. So that, the cigarette tax administration of the Central Government is through The Directorate General of Customs and Excise, the distribution method using a proportion of the total population. As the result, on one side of the provincial government makes it convenient for living alone receives the results. But on the other hand, it will reduce fiscal independence. Local governments will increasingly rely on the central government's efforts to earn income. This may result in local governments that are not compelled to perform efficiently budget and the local people are not compelled to control local budgets because they are not burdened with taxes.

According to the previous researches, alternative steps that can be done in the future are:

1. Restore the cigarette tax to be entirely local taxes in accordance with the provisions of article 2, paragraph (1) letter e of Law No. 28 Year 2009 on Regional Taxes and Levies with the consequences of changing the mobile business administration cigarettes into immobile, by strengthening cigarette consumption data at the provincial level.
2. The collection of cigarette taxes remain in accordance with the provisions of Article 27 paragraph (3) of Law No. 28 Year 2009 on Regional Taxes and Levies by conducting additional chapters providing certainty in the application of the provisions of Law No. 28 Year 2009 on Regional Tax and Retribution or enforcement of the Act No. 39 of 2007 on excise duty
3. Restoring the cigarette tax, in accordance with the character that is a surcharge from the center to the regions in other words, cigarette taxes were taken back by the government so that a central tax but the results still delegated to the regions.
4. Submit the cigarette tax to the district / city.

Judging from the proximity of the business activities of cigarettes and the impact caused by cigarette smoke is in direct contact with the public district / city and the allocation of tax sharing cigarettes at least 50% to fund public health services and enforcement by competent authorities it would be appropriate taxes on cigarettes reserved for local government district / city thus curbing business activities against tobacco companies and smokers would be more effective to run.

5. Distribution of cigarette taxes.

The impact of cigarette tax distribution to the respective provincial governments will greatly depend on the method of distribution of taxes on cigarettes. When referring to Law No. 28 of 2009 on PDRD, the proxy used in cigarette taxes make distributions to the area is the population by researchers are still not appropriate because cigarette consumption is not illustrated by a number of residents. Not necessarily the most populated area of the province that there are a lot of smokers. Such as: "The province with the largest population in 2015 was 46.7096 million people of western Java, East Java, Central Java 38.8476 million people 33.7741 million, 13.9378 million people of North Sumatra, Banten 11.9552 million, 10.1779 million people of Jakarta, Sulawesi South 8.5203 million people, Lampung 8117.300 people."¹ But according to Health Ministry data" smokers were most numerous in Central Kalimantan and cigarette consumption per cigarette each day in Bangka Belitung most of the lowest in Central Sulawesi."² Then if we view "the population in Central Kalimantan in 2015 is amounted to 2.495 million people and Bangka Belitung islands is amounted to 1.3728 million people, and Central Sulawesi as many as 2.8767 million people."³

As an alternative to approach cigarette consumption per region in the future, for example, the real data of production supply of cigarettes that enter at a provincial and district / city are used, on the basis that sharing the cigarette tax is done, the government split the proceeds of cigarette taxes in accordance to supply the production of cigarettes that enter the area province, then provincial split the proceeds of cigarette taxes to the district / city corresponding production supply of cigarettes that enter each district / city concerned, thus local governments have to participate actively in seeking income for the region, and predictable number of consumers of cigarettes in each of the provinces, regencies / cities in the conduct of budgeting for special health care communities affected by the disease due to the effects of smoking cigarette that will become easier and more transparent.

6. Compliance of cigarette tax as a local tax

Suitability of cigarette tax as a local tax can be evaluated from four aspects, namely, first, taxes are primarily intended as a means of stabilizing the economy and to improve the distribution of income, should be the responsibility of the central government, both in the determination of the base, pricing, as well as the administration, both the tax base that have a high level of mobility (mobile) should not be delegated to the regions. The third, object of local taxes should exist in all regions and local taxes should not be charged to those who are not residents of the area concerned. And the four demands of the tax administration submitted to the region should adapt to the apparatus and the administrative capacity of existing resources in the area.

In assessing the suitability of the cigarette tax as a local tax, it can be exposed to some of the following:

1. The main purpose of applying cigarette tax is strengthening fiscal capacity of local governments and not directed as a means of stabilizing the economy or improving the distribution of incomes. So, the goal of cigarette tax is as a local tax.
2. The cigarette tax base is highly mobile so that in terms of the mobility of the tax base cigarette tax still need to improve the mechanism for the marketing of cigarettes can be an ideal local tax base;
3. Consumption of cigarettes as objects of cigarette tax last throughout the territory of Indonesia, but it is still very difficult if not impossible to detect whether cigarette consumers buy cigarettes in a province and smoking in the province. So in terms of the appropriateness of its location, the cigarette tax still need to improve the mechanism for cigarette trade system may be ideal for cigarette taxes

¹BPPN, BPS, and United Nation Population Fund, *Proyeksi Penduduk Indonesia (population Project)*, Jakarta, 2013, p. 24.

²<https://nirwanfiles.wordpress.com>. Accessed on 10 Desember 2015.

³BPS, *Loc. Cit.* p. 24.

4. Setting the current cigarette tax administration is very easy for local governments to run it, so it is quite appropriate as a local tax.

From the things mentioned above means that although arrangements of cigarette tax is enough to meet the criteria of the local tax base is good, but it need to change to be a local tax which is absolutely ideal, provision cigarette taxes still need improvement, that is by making the marketing of cigarettes that previously mobile becomes immobile, so that at some time the cigarette tax can be levied by local governments that do not rely on the government to obtain revenue.

4. Reconstruction of Cigarette Tax Settings Based on Benefit Principle.

The benefit principle requires beneficial corresponding tax distribution received from the results of tax expenditures. If the tax violates the principle of benefit, then public services is a form of subsidy for the wearer, because the services are received at the expense of others.

There are many benefits that are gained from the tax levied by the government of the people, funds raised from taxes, among others that the tax can be used as the source of state revenue, driving investment and income distribution tool. These functions are closely related to the tax benefit derived from tax collection.

Examined from the budget air function tax, taxation of cigarettes strongly supports an increase in local taxing power to enhance the region's ability to provide public services, especially healthcare, as evidenced by the many funding streams cigarette tax to the account of the General Treasury of Regions for each province based on the decision of the Director General of Fiscal Balance Finance Number 72 / PK / 2015 has been set at December revenue estimation.Rp. 969 155 109 000.and estimates of 2016 amounted to Rp. 13,702,360,000,000. It means that the reception area of the cigarette tax revenue continues to increase.

Examined from *regulerend* function (setting function) the tax on cigarettes, where the government really requires the presence of cigarette tax is expected to reduce the number of smokers / reduce number of consumers who "will not materialized". Thus, it means also that the presence of Law No. 28 Year 2009 on Regional Taxes and Levies which serves as "a tool of social engineering."¹(the law as a tool to transform society, in a legal sense as an instrument or agent of change social change, as planned earlier) has not been able to function as which are expected.

Why this is so? This could be caused due to government policies in the cigarette tax which is still ambiguous. On one hand, the government wants to increase local taxing power that will obviously be realized by making cigarette taxes as a budget air function; put money as much as possible to the general treasury of the province from the results of tax smoking, however, if the number of consumers of cigarettes are reduced, for example by increasing the excise tax and cigarette tax rates which results in the price of cigarettes that are more expensive to affordable only by certain people who have money, automatically the revenues to the local treasury will be reduced.

According to the theory the benefit of every person who has a greater importance should pay more taxes anyway. In the cigarette tax collection, cigarette consumers' interests with government services are not directly connected to the amount of non-tax payments, in the sense that the amount of the cost of public health services has nothing to do with the amount of tax paidcigarettes. Let's say that the use of tobacco taxes for health care assistance to the poor, such as: purchase of medicines; assistance / subsidized treatment to the poor who do not have a National Health Insurance (JKN) Card Healthy Indonesia (KIS) from the central government, there is no amount related to the cigarette tax paid a smoker.

Judging from the cigarette tax provision utilization of at least 50% (fifty) percent for public health services and enforcement by competent authorities in specific means cigarette tax revenues have been appropriated. Theoretically, the government's policy to use the budget revenue sources and expenditures for specific programs using specified allotment is better known as earmarking tax and has been widely practiced in some countries. The concept of earmarking basically is also applied in other government revenue, not only on taxes.

Characters of earmarking tax is "first on the allocation of the results of the tax which is only used to finance activities related to the tax paid is, both when there is a relationship strong benefit of the tax payment with the use of tax revenues to finance expenditures such tax."

Judging from the character, the result of the cigarette tax has not been fully earmarked for public health services and law enforcement as only 50% used for public clearly, while the powerful benefits of tax payments cigarette with expenditure needs in the field of public health services and law enforcement is not clearly visible because of the health service community and law enforcement are not funded from taxes on cigarettes alone but also from the Special Allocation fund, concentrated funds, fund administration and DBH HCT. So earmarking tax on cigarette tax included in the Partial type of earmarking tax and not tax that designs full earmarking tax revenue in which smoking as the sole source of financing of public health services and law enforcement.

5. Reconstruction of Setting Cigarette Taxes Based on Legal Certainty Principle.

According to Gustav Radbruch:²

"There are two kinds of legal certainty definition, the rule of law by the law and legal certainty in or out of the law. It is said as useful, if it successfully legal guarantees legal certainty in many communities. The law should be kept handy, because the rule of law provides other legal duty which is legal justice. Legal certainty in the law is achieved, if the law is as much in the legislation. In the Act, there are provisions to the contrary. Laws are seriously made by *Rechtswerkelijkheid* (state law) and in the legislation there are no terms in which they are interpreted divergently. "

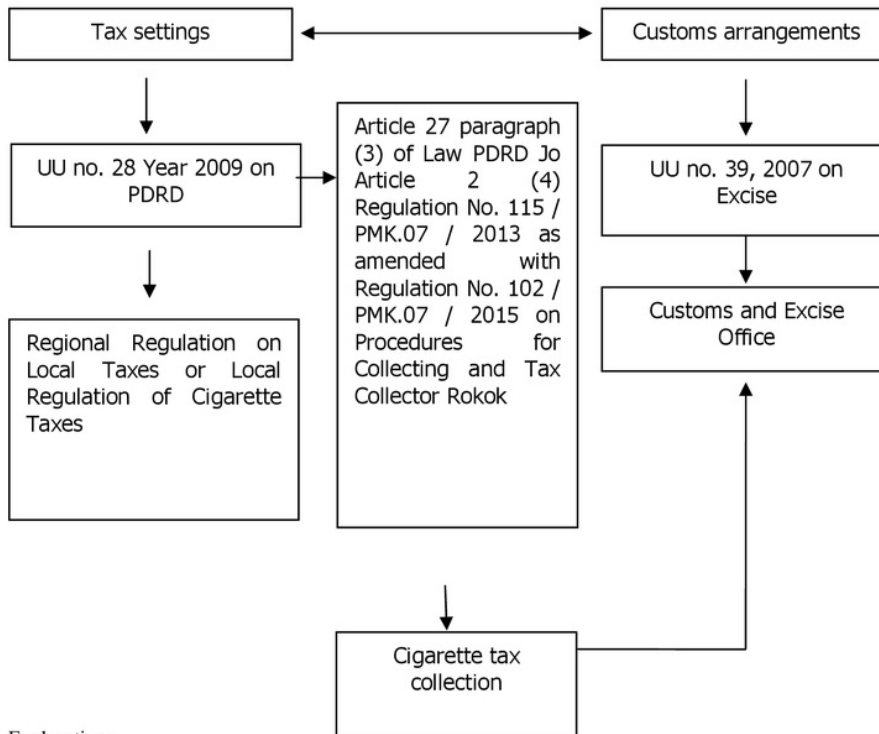
¹Achmad Ali, *Menguak Tabir Hukum*, (Jakarta: Pustaka Prima, 1988), p. 66.

²<http://afnerjuwono.blogspot.com.co.id>. accessed on 3 Desember 2015.

Legal certainty in the cigarette tax is intended to be clear on how much tax should be paid, who will be subjected to tax / taxpayer, what the object of the tax is, what the taxable base is, how the charge is, which must be paid and when to pay the tax.

Placement of Article 27 paragraph (3) of Law No. 28 Year 2009 on Regional Taxes and Levies in conjunction with Article 2 (4) of the Regulation of the Minister of Finance No. 115 / PMK.07 / 2013 as amended by the Finance Minister Regulation No. 102 / PMK.07 / 2015 on Procedures for Tax Withholding and remittance of smoking as provisions in the taxation of cigarettes can shift the applicability of regulatory regions, as illustrated in the following chart:

Chart 1: Delegation of authority Cigarette Tax Collection to the Customs and Excise Office



Explanation:

Cigarette tax arrangements regulated in Law Number 28 Year 2009 on Regional Taxes and Levies then are broke down the Provincial Regulation on Local Taxes, and pursuant to Article 27 paragraph (3) of Law PDRD Jo Article 2 (4) Regulation No. 115 / PMK.07 / 2013 as amended with Regulation No. 102 / PMK.07 / 2015 on Procedures for Tax Withholding and remittance of non-smoking tax authority delegated to the Office of Customs and Excise.

Customs Office is a government apparatus that is subjected to the rules of the center, in the sense of implementing Law No. 39 On Excise and Permendagri 115 / PMK.07 / 2013 as amended with Regulation No. 102 / PMK.07 / 2015 on Amendment Permendagri 115 / PMK.07 / 2013 Procedure of Cigarette Tax Withholding and remittance.

Thus, it means that there is a duality in tax collection arrangements that ,on one hand, the tax arrangements are stipulated in Law No. 28 Year 2009 on Regional Taxes and Levies regulating the tax on cigarettes and ,on the other side, is also applied in the provisions of the Act N0.39 of 2007 on Excise and Permendagri 115 / PMK.07 / 2013 as amended with Regulation No. 102 / PMK.07 / 2015 on Amendment Permendagri 115 / PMK.07 / 2013 Procedure and Collector's Tax Collection of smoking because of the cigarette tax applicable provisions / terms used in the collection of taxes, such as smoking returns tax (SPPR), Cigarette Tax Deposit Letter (SKP-PR), number of excisable goods company (NPPBKC) and the provisions set forth in the regulations in the area of taxation of cigarettes which are ignored. Later, in the cigarette tax collection, there should be no arrangements governing the relationship between the Regional Government Office of Customs and Excise.

4. Conclusion

Inconsistency and disharmony of law in the regulation of cigarette taxes on Law Number 28 Year 2009 on Regional Taxes and Levies area occurs because the legislators equate local tax surcharge and the nature of objective cigarette taxes, yet the

inconsistent direction of the collection function of cigarette tax, towards the budgetair or *regulerend* function, and less precise use of the cigarette tax.

Reconstruction of cigarette taxes arrangements according to the distributive principle of justice division of the cigarette tax is based on the number of results in real taxation of cigarettes in the respective provincial and district / city, reconstruction settings of cigarette taxes according the principle of expediency, the separation of the source of funding for public health services developed for occupational diseases effects of cigarette smoking with other financing sources, reconstruction of cigarette tax arrangements in accordance with the principles of legal certainty which changes to the provisions of Article 1 point 19 and Article 27 of the *Law No. 28 Year 2009 on Regional Taxes and Levies*.

Recommendation: the government needs to affirm the direction *regulerend* function in cigarette tax collection by increasing the number of cigarette tax rates. The House of Representatives and the government needs to amend the provisions of Article 1 point 19 becomes: "cigarette tax is a tax on the purchase of cigarettes collected by government to taxpayers cigarettes, or Tax cigarettes is a tax on the purchase of cigarettes collected by the government through the Office of Customs and Excise to taxpayers smoking". Clause 27 (4) becomes: "cigarette taxes are levied by government agencies as meant in paragraph (3) paid in cash account of common areas proportionally based on the results of a real cigarette tax collection in the province, regency / city". Article 27 should add another verse, namely: "(6) The legal consequences arising from the transitional authority to tax cigarettes in accordance with paragraph (3) and (5) above are settled through the provisions which are stipulated in this law and / or local provincial regulations". The provincial government and the district / city government should establish Lung Medical Center that is specialized in serving people affected by the disease as the impact of cigarette smoke, so t the allocation of cigarette tax revenue can be seen clearly.

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