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HOW SHOULD INDONESIA *DESIGN THE STATUTORY GENERAL ANTI-AVOIDANCE RULE?*

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ABSTRACT

Penelitian ini bertujuan untuk mengeksplorasi perumusan ketentuan *Statutory* GAAR dalam upaya penanganan praktik penghindaran pajak di Indonesia. Penelitian ini menggunakan pendekatan kualitatif melalui studi literatur dan wawancara mendalam kepada regulator, praktisi, dan akademisi terkait perumusan ketentuan *Statutory* GAAR yang ideal untuk diterapkan di Indonesia. Saat ini Indonesia sudah memiliki ketentuan anti-penghindaran pajak seperti SAAR dan ketentuan *Principal Purpose Test* dalam beberapa P3B antara Indonesia dengan negara mitra. Hasil dari penelitian ini adalah dorongan pembentukan *Statutory* GAAR untuk menangani kasus penghindaran pajak secara komprehensif. Selain itu, kriteria penerapan GAAR yang ideal mencakup pengujian atas dasar transaksi, gabungan transaksi, dan *arrangement*; penggunaan *main purpose test*; GAAR diterapkan sebagai upaya terakhir; pembentukan GAAR Panel; pemberian kewenangan pada otoritas pajak untuk menentukan atau membatalkan transaksi berdasarkan cakupan GAAR; penetapan beban pembuktian yang lebih berat pada otoritas pajak; dan perlunya pengaturan *threshold.* Implikasi dari simpulan tersebut adalah perlunya fiskus menyiapkan sumber daya manusia yang memadai dan pedoman GAAR yang jelas.

This study aims to explore the formulation of Statutory GAAR provisions to address tax avoidance practices in Indonesia. This research uses a qualitative approach through literature studies and in-depth interviews with regulators, practitioners, and academics regarding the formulation of the ideal Statutory GAAR provisions to be applied in Indonesia. Indonesia already has anti-avoidance rules such as SAAR and Principal Purpose Test provisions in several tax treaties between Indonesia and partner countries. This research prompts the establishment of a Statutory GAAR to comprehensively address tax avoidance cases. In addition, the ideal application criteria of GAAR include tests on a transaction, combination of transactions, and arrangement basis; the use of main purpose test; GAAR as a provision of the last resort; the establishment of the GAAR Panel; a mandate for authority to determine or cancel transactions based on GAAR coverage; stipulating a heavier burden of proof on the tax authorities; and the need for setting a threshold. The implications of these conclusions are the need for tax authorities to prepare sufficient human resources and a clear set of GAAR guidance.

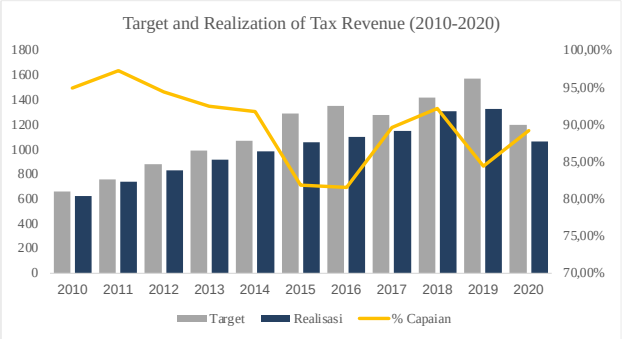
1. INTRODUCTION

1.1. Background of Study

Tax revenue is the main source of state revenue in the state budget (APBN), contributing more than 70% of state revenue. Tax is an instrument of fiscal policy (Amin Al Hasan & Qowiyul Iman, 2017). Fiscal policy as one of the economic policies has an important and strategic role in promoting the economy, especially in achieving national development targets (Fauziah, 2020). Moreover, the revenue target from tax collection is constantly increasing every year.

Having said that, the realization of tax revenue in Indonesia has not yet reached the set target. In the last decade, the tax target has continued to increase, but the target was never achieved (DDTCNews, 2019). In fact, in 2019, tax revenues collection only amounted to Rp1,332.2 trillion or reached 84.44% of the target in the state budget.

Compared to the previous year, tax revenue in 2019 increased by only 1.43% (YoY). Therefore, the tax revenue shortfall in 2019 amounted to Rp245.5 trillion, the largest since 2016. The following are the tax revenue targets and the realization of tax revenues from 2010 to 2020.



Source: Ministry of Finance (2020)
Figure 1. Target and Realization of Tax Revenue (in Trillion Rupiah)

In addition, based on the data from the Ministry of Finance, the ratio of taxes to Indonesia's Gross Domestic Product (GDP) has declined in the last five years. Indonesia's tax ratio was recorded at 10.37 percent in 2016 and then fell to 9.89 percent in 2017, and later peaked at 8.33 percent in 2020.

One of the factors causing these unattainable revenue targets and the low tax ratio is the efforts to avoid tax (Indira Yuni & Setiawan, 2019). Efforts to avoid tax in the form of tax avoidance and tax evasion lead to a tax gap or shortfall in tax revenue to be quite large.

In practice, the company will make every effort to minimize the tax burden, either by exploiting the weakness of tax provisions or in other ways (Puspita & Febrianti, 2017). Cobham et al. (2020) in a report entitled *The State of Tax Justice 2020: Tax Justice in the time of Covid-19* stated that as much as USD 4.78 billion or around Rp67.6 trillion is the result of corporate tax avoidance in Indonesia. Meanwhile, as much as USD 78.83 million, or around Rp1.1 trillion comes from individual taxpayers in Indonesia.

In the Performance Report of the Directorate General of Taxes 2020, the Directorate General of Taxes (2021) recorded defeat in 4,930 trial cases in the Tax Court throughout 2020. The total defeat came from 8,664 decisions, which means that the Directorate General of Taxes' winning rate is only 43.10% of the total decision. In the report, it was stated that the number of defeats was caused by several factors including the perspective of the Panel of Judges which was seen as prioritizing substantive justice and ignoring other regulatory functions.

To prevent tax avoidance practices, there are two types of instruments that can be used, namely the Specific Anti-Avoidance Rule (SAAR) and the General Anti-Avoidance Rule (GAAR). The SAAR instrument aims to prevent certain tax avoidance schemes, while the GAAR instrument aims to prevent tax avoidance schemes that cannot be covered with the SAAR instruments.

To date, Indonesia only has SAAR instruments as stated in Article 18 of the Income Tax Law (UU PPh) such as transfer pricing rules, controlled foreign corporation (CFC) rules, thin capitalization rules, conduit company and international hiring-out of labor (Dwi Nugroho, 2009). Due to their specific nature, SAARs are usually effective only in preventing certain tax evasion schemes.

Table 1. Specific Anti-Avoidance Rule in Indonesia

No.	Type of SAARs	Legal Basis
1.	Thin capitalization	Article 18 paragraph (1) of the Income Tax Law
2.	The controlled Foreign Corporation (CFC) Rule	Article 18 paragraph (2) of the Income Tax Law
3.	Transfer Pricing	Article 18 paragraph (3) and paragraph (4) of the Income Tax Law
4.	The sale of shares through a conduit company	Article 18 paragraph (3b) of the Income Tax Law
5.	The sale or transfer of a conduit company	Article 18 paragraph (3c) of the Income Tax Law
6.	Limitations of benefits	DGT regulation Number PER-61/PJ/2009 and PER-62/PJ/2009 as amended by PER-24/PJ/2010 and PER-25/PJ/2010

Source: Author (data processed from various sources)

Wijaya & Kusumaningtyas (2020) make clear that each country can choose whether to implement SAAR, GAAR, or a combination of both. In general, GAAR cannot be applied if the SAAR and/or the provisions in the Double Taxation Avoidance Agreement (P3B) have been applied to the tax avoidance case. GAAR is the last resort that the tax authorities can use to prevent tax avoidance practices that are supposed to comply with the requirements and interpretations of tax laws. GAAR is usually designed to stop practices that are allowed by the law but are carried out in a way that is contrary to the intent and purpose of the law (Waerzeggers & Hillier, 2016). Meanwhile, SAARs are less likely to create tax uncertainty given the limited scope of their application. However, SAAR under certain conditions can also lead to more aggressive tax planning because taxpayers create certain structures to avoid the application of the SAAR (OECD, 2011).

Johansson et al. (2016) mention that currently countries develop and implement their GAAR differently. However, there are some general characteristics found in the GAAR provisions which include (i) identification of transaction schemes; (ii) quantification of tax benefits or tax advantages through the scheme; (iii) purpose test to assess whether the company obtains tax benefits or tax advantages from the scheme.

At the beginning of its formulation, the bill concerning the Fifth Amendment to Law Number 6 of 1983 concerning General Provisions and Tax Procedures (RUU KUP) as of May 5, 2021 (DPR RI, 2021) which was changed its name to the Harmonization of Tax Regulations Bill (RUU HPP) as of

October 8, 2021, includes the GAAR provisions in Article 18 paragraph (1a) and it is stated that further arrangements will be addressed in a Government Regulation. However, the House of Representatives of the Republic of Indonesia (DPR RI) proposed not to include this provision and in the end, the government agreed to abolish this provision with a view to encouraging business activities and to creating the investment climate in Indonesia to remain conducive (Pangastuti, 2021). Currently, the HPP Bill has been ratified on October 7, 2021 into Law Number 7 of 2021 concerning the Law on Harmonization of Tax Regulations (UU HPP).

The abolition of the GAAR provisions in the HPP Bill raises questions about whether the government's proposed provisions are not robust enough to be approved and implemented in Indonesia.

This study aims to explore the ideal formulation of GAAR provisions in an effort to prevent tax avoidance practices in Indonesia. Research regarding the implementation of GAAR is still very limited in Indonesia. In addition, the impetus to discuss it is still relevant, especially when it has been decided that the GAAR is not included explicitly in the recent tax omnibus law (UU HPP). The answer of why such an important arrangement is not included and how it should be ideally formulated might be of interest for people whose work or study revolved in taxation policy. Therefore, this study is built upon that urge to add a small contribution in discovering the ideal design of Statutory GAAR which is done by conducting interviews with related experts of various roles.

1.2. Research Purpose

The focus of this research is to find the most ideal formulation of GAAR provisions to be applied in Indonesia. It is done by analyzing the prospect for GAAR implementation in Indonesia and analyzing key concepts to implement the ideal GAAR in Indonesia through an in-depth interview with several key persons from different institutions.

2. LITERATURE REVIEW

2.1. General Anti-Avoidance Rule (GAAR)

General Anti-Avoidance Rule (GAAR) is defined as an anti-tax avoidance provision that is general in nature, or is not limited to certain tax subjects or objects. GAAR will target a scheme that involves a transaction that generally would not be carried out, other than for reasons of tax benefits for taxpayers. GAAR stands on the assumption that tax evasion is carried out on transactions or schemes that have no business substance. Therefore, GAAR authorizes the tax authorities to cancel or correct a transaction fiscally if the transaction does not have economic substance or is carried out solely for tax benefits (Tooma, 2008).

Freedman (2014) reminds that GAAR is an important part of the modern tax system, because specific laws (SAAR) will not cover every abuse. A properly designed GAAR with the appropriate safeguards can provide administrators and courts with tools to use in tax evasion cases.

In general, there are two approaches that can be taken to combat tax avoidance practices (Arnold, 2008). The first is an approach without using special provisions in the regulations through the judicial general anti-avoidance doctrine (judicial doctrine) which was developed mainly by court decisions. This can be found mainly in countries with common law systems. The second is through the statutory general anti-avoidance rule (GAAR), which is a special provision in the regulations that authorizes tax authorities to cancel the tax advantages of transactions that meet the criteria as tax avoidance. This implementation applies in countries with civil law systems, which are mainland European countries and their colonial countries, including Indonesia, adhering to the codification of laws as the main source of law (Yunus et al., 2022).

2.2. Tax Avoidance

According to Kirchler et al. (2003), the definition of tax avoidance refers to efforts to reduce tax payments in a legal way such as taking advantage of loopholes in existing tax laws and regulations. In Surbakti (2012), tax avoidance is described as a legally and morally valid action related to savings in the aspect of tax payments and is an action taken by taxpayers in an effort to increase tax burden efficiency.

By the same token, Darussalam (2017) interpret tax avoidance as a transaction scheme that aims to minimize the tax burden by exploiting loopholes in a country's tax provisions. Brown (2012) states that tax avoidance is an arrangement of transactions to obtain profits, benefits, or tax reductions in a way that is not desired by the tax law.

Tax avoidance is difficult to define accurately, but it can be generally defined as tax deduction using legal means (no fraud, undisclosed or misapplied). Some tax avoidance is acceptable (acceptable tax avoidance) while there is also unacceptable tax avoidance (UN, 2017). Tax evasion is included in unacceptable tax avoidance and subject to criminal code in any countries. Thus, it is important to design tax mitigation policy, by distinguishing tax avoidance and tax evasion. It is hoped that policy makers will not ignore the rights of taxpayers in an effort to minimize tax evasion (Shome, 2019).

2.3. Substance Over Form Doctrine

According to Shobe (2018), substance over form is a common law doctrine that allows courts to ignore covert forms of transactions to examine the true nature of transactions and attach adequate legal implications to them.

The principle of substance over form basically explains that the rights and obligations that arise formally as a result of transactions carried out by taxpayers will still be recognized, however the characterization of transactions carried out for tax purposes will be determined based on how the

substance of the tax regulation characterizes the results of the transaction (Arnold, 2008). Therefore, under this principle, the facts and tax consequences of a transaction are determined based on the commercial substance that arises, and not solely seen from its formal form.

The substance over form doctrine is one of the most well-known doctrines in Indonesia, but its application in practice is not very commonly used except as an additional argument for a basis for correction in audits, such as in determining beneficial owners, hidden dividends and so on (Brown, 2012).

2.4. Previous Research

There are several findings from previous studies related to the General Anti-Avoidance Rule (GAAR) in Indonesia. Research conducted by Efendi (2012) found that the application of SAAR and substance over form is not comprehensive enough to fight tax avoidance in Indonesia. Statutory GAAR will be effective in overcoming the growing tax avoidance schemes. Moreover, the adoption of GAAR in many countries took a long time to stabilize.

This notion is also supported by Astuti (2021) who adds that Indonesia needs to have anti-tax avoidance regulations, especially GAAR to fight aggressive tax planning. According to Wijaya & Kusumaningtyas (2020) and Sinaga & Innaka T. (2021), the application of the Specific Anti-Avoidance Rule (SAAR) and the principle of substance over form cannot be applied properly or less impactful, so GAAR is necessary. Yang (2016) in ATPETSI (2017) mentions that the design of provisions regarding GAAR must be clearly formulated in order to ensure a fair tax system and respect for the rule of law.

Research conducted by Suryani & Devos (2016) conclude five elements that must be included as the main principles in the formulation of GAAR provisions, namely the scope of GAAR in identifying schemes; the selected purpose test must be a dominant/main purpose test; the mandate to the tax authority must be made available in these provisions and accompanied by detailed procedures in derivative regulations; considering the establishment of GAAR Panel; and the needs to regulate the burden of proof.

In addition to the findings above, there are several other studies that can be used as references, such as the research conducted by Sueb (2020) which states that the government should have an anticipatory GAAR in order to prevent taxpayers from conducting transaction schemes that aim to avoid taxes. GAAR can be a useful tool for developing countries and can operate in the same way that developed countries do. However, the challenges of carrying out effective tax reforms faced by developing countries suggest a more careful design of regulations and the introduction of protections for taxpayers (Rosenblatt, 2017).

3. RESEARCH METHODOLOGY

This study uses a qualitative research approach. Qualitative research is research that is based on the post-positivism paradigm whose knowledge is formed by data, evidence and logical considerations, using certain measurement instruments filled out by participants or by making in-depth observations in the field Creswell (2010). The research data is gathered through in-depth interviews and literature study.

According to Hamidi (2010), the unit of analysis is the unit under study which can be in the form of individuals, groups, objects or a background of social events such as individual or group activities as research subjects. In this case, the researcher asks informants or resource persons, people who provided sufficient information when researchers carried out data collection activities. This research uses data analysis units at the level of individuals of regulators, practitioners and academics who understand and follow developments in the issue of the General Anti-Avoidance Rule (GAAR).

The research data analysis technique was carried out using the stages as proposed by Miles & Huberman (1992), as follows. First, data were collected through literature studies, including articles, books, scientific journals related to GAAR and the results of interviews with informants. Arikunto (2011) defines literature study as a method of collecting data through books, magazines, newspapers or other literature that aims to form a theoretical basis.

In addition to the literature study, data collection was also performed through interviews with parties relevant to the research title. Moleong (2018) states that the data analysis process begins with examining all existing data from various sources, which can be from interviews, notes from direct observations, personal documentation, official documents which can be in the form of pictures, photographs and so on.

Second, considering that the data obtained were quite large and varied, data and information were first sorted out according to the relevance of the research. Third, after filtering the data, the information is presented in descriptive form by organizing it into a discussion structure to be discussed with the experts from various backgrounds to produce the answer of the problem posed in this study. The fourth part draws a conclusion and provides suggestions for policy improvement from data and information generated from literature studies and interviews conducted.

In-depth interviews were conducted face-to-face through online meeting application with those who mastered the topic being researched. In the process of collecting data for the purpose of this study, the interview session was conducted separately with each informant. Interview guidelines have been previously submitted along with an interview request letter to the agency intended for interview. Interviews were conducted between December 2021 and February 2022. The selection of informants in the interviews was based on their knowledge related to GAAR issues.

Therefore, Neuman (2000) provides several criteria in the selection of sources as follows:

1) Resource persons understand the main research pertaining to issues raised;
2) Parties directly involved in implementation in the field;
3) Have time to conduct interviews;
4) Resource persons are using more non-analytic reasoning at the time of the interview and they tend to be more pragmatic.

The term non-analytic in number 4) simply means that the resource person is encouraged to deliver their views to be more straightforward and only focus on things which are being asked. This is derived from two assumptions. First, the resource person already prepared their materials before the interview or second they have already had a steady view regarding GAAR formulation. Further, pragmatic means the resource persons are aware that the explanation given must be within the bounds/realms of possibility by taking into account the political feasibility and regulator capacity to properly design and implement GAAR.

According to the criteria, the appropriate informants to be interviewed must consist of the following role.

1) Regulator
   Interviews were conducted to find out, among others, the background of the proposed GAAR provisions, the benefits that Indonesia will get from implementing GAAR, GAAR implementation strategies and the obstacles that may be faced in implementing GAAR. In this case, the in-depth interview informants were with the Fiscal Policy Agency (FPA) and the Directorate General of Taxes (DGT).
2) Practitioner
   Parties who have practical experience in the field of taxation, especially those related to GAAR could bring about the perspective in regard to the degree of applicability. In this case, the informants for in-depth interviews were with the Danny Darussalam Tax Center (DDTC) and the Center for Indonesia Taxation Analysis (CITA).
3) Academics
   Academics in the field of taxation, especially those related to GAAR could help author discover another impact or consequence of establishing GAAR. In-depth interview informants from academics were with the Polytechnic of State Finance STAN.

The following is a list of experts who became the interviewees of the author.

Table 2. List of Resource Persons

No	Role	Name	Job Description, Institution
1	Regulator	Melani Dewi Astuti S.S.T., M. Int.Tax	Policy Analyst, Fiscal Policy Agency
2		Subagio Efendi, S.S.T., M.P.F., Ph.D	*Transfer Pricing, MAP & APA Analyst*, Directorate General of Taxes
3	Practitioner	Yusuf Wangko Ngantung LL.B., LL.M Int. Tax., ADIT	*Associate Partner*, Danny Darussalam Tax Center (DDTC)
4		I Wayan Sudiarta S.E., M.M., CWM, BKP	*Senior Adviser*, Center for Indonesia Taxation Analysis (CITA)
5	Academics	Ferry Irawan, S.E., Ak., S.S.T., Akt., S.H., M.M., M.E., M.P.P.	Lecturer at Polytechnic of State Finance STAN.

Source: Author (2022)

4. RESULTS AND FINDINGS

4.1. Prospect of GAAR Implementation in Indonesia

4.1.1. Reasons for not Including GAAR in the HPP Law

At the beginning of its formulation, the Bill concerning the Fifth Amendment to Law Number 6 of 1983 concerning General Provisions and Tax Procedures (RUU KUP) as of May 5, 2021, which was changed its name to Harmonization of Tax Regulations Bill (RUU HPP) on October 8, 2021, incorporating the GAAR provisions in Article 18 paragraph (1a) and Article 18 paragraph (1b). The formulation of the GAAR provisions contained in Article 18 paragraph (1a) and Article 18 paragraph (1b) is as follows:

> *"(1a) The Director General of Taxes is authorized to re-determine the amount of tax that should be payable, in the event that the Taxpayer performs one or a combination of transactions with the aim of:*
> *a. reducing;*
> *b. avoiding; and/or*
> *c. postponing*
> *the payment of taxes that are contrary to the intent and purpose of the provisions of laws and regulations in the field of taxation.*
> *(1b) Provisions regarding the re-determination of the amount of tax that should be owed as referred to in paragraph (1a) shall be regulated by a Government Regulation"* (Article 18 (1a) and Article 18 (1b) of the KUP Bill dated May 5, 2021)

Research conducted by Efendi (2012) found that the application of SAAR and substance over form is not comprehensive enough to fight tax avoidance in

Indonesia. It is enough reason to conclude GAAR in the latest omnibus law of taxation. Having said that, GAAR is still not included in the law ultimately except in the Elucidation Part, in which the legal force is still under debate.

Based on the results of interviews with related parties regarding the reasons for not including the Statutory GAAR provisions in the Law on the Harmonization of Tax Regulations, there are several possible reasons as follows:

1) GAAR has not yet received parliament approval due to concerns that its implementation will be extensive and there is also a high risk of abuse.
2) The spirit of the HPP Law to facilitate investment and certainty is a very important indicator for investors. It is feared that it will be counterproductive to investment with the implementation of GAAR.
3) In the draft proposed by the government, there are no clear signs regarding GAAR provisions so that it tends to create uncertainty for businesses.
4) Indonesia's tax dispute level is still very high, it is feared that if GAAR is applied, there will be more tax disputes.
5) Indonesian tax authority extremely concerned that imposing the GAAR clause could have hindered the passage of overall tax reform in the HPP Bill.

We asked Melani Dewi Astuti for her opinion in this matter. As a Policy Analyst at the Fiscal Policy Agency, she explained that in exchange for the GAAR provisions which have not been included in the HPP Law, the Government has included a substance over form clause which is a form of judicial GAAR in the Elucidation of Number 8 Article 18 of the HPP Law.

This was also emphasized by Subagio Efendi as a Transfer Pricing, MAP & APA Analyst at the Directorate General of Taxes. He mentioned that the proposed Article 18 (1a) in the previous KUP Bill was not completely lost, but there are still two elements included in the HPP Law, namely the definition of tax avoidance and the principle of substance over form which is included in the Elucidation of Number 8 Article 18 of the HPP Law as the following:

"The government has the authority to prevent tax avoidance practices as an effort by taxpayers to reduce, avoid, or delay the payment of taxes that should be owed which is contrary to the intent and purpose of the provisions of the legislation *in the field of taxation. One way to avoid tax is to conduct transactions that are not in accordance with the actual situation which is contrary to the principle of substance outer form, namely the recognition of economic substance above its formal form."* (Explanation of Number 8 Article 18 UU HPP)

However, the substance over form concept is limited in its application because it can only be applied if the economic substance is different from its formal form. If there is no difference, even though there is tax avoidance, substance over form cannot be used (Astuti in Interview December 31, 2021).

This is generally derived from Directorate General of Tax Regulation Number PER-25/PJ/2018 regulates the procedures for implementing tax treaty under Indonesian tax regime. Article 5 of the regulation only require two things, in regard to the 'substance over form' concept, for a scheme or transaction so that they are not considered as a tax treaty abuse. First is the existence of economic substance regardless of the formal form. Second is the formal form must be the same or relevant to the economic substance. Therefore, if the economic substance is just the same with the legal form, even though the tax auditor deems that there is a tax treaty abuse, the judge will decide in favour of the business because the interpretation of judge in civil law system just adhere to the regulation.

In legal term, this ruling already in line with *ne bis vexari rule* principle. It means that every action in administering the state is based on statutory regulations (written rules) although the practice to regulate the administrative conduct through PER-25/PJ/2018 is not adequate in terms of legal power. Even if one look into a certain case, as long as the recording and the acknowledgement are in accordance with accounting standard, the judge often decide that the principle of 'substance over form' already fulfilled. This is because, in Sinaga & Innaka T. (2021) opinion's, the recording and acknowledgement in accounting process took precedence over the legal form, especially when the company has paid all the withheld taxes in accordance with the rights and obligations mandated in the tax law.

Tooma (2008) already mentions that the state, represented by the tax authorities is authorized to cancel or correct a transaction fiscally if the transaction does not have economic substance or is carried out solely for tax benefits. Shobe (2018) has explained that substance over form is a concept that commonly found in common law system. Indonesia used this concept to prevent the misuse of tax treaty prior to the introduction of GAAR in the HPP Law. However, the difference in the legal interpretationbetween the judiciary and tax authority hinder the state to fully carry this ability.

4.1.2. Urgency and Readiness of GAAR Implementation in Indonesia

Several countries in the world have implemented GAAR and even some countries have implemented it for quite a long time. Several countries that have implemented Statutory GAAR include Canada, Australia, Japan, Germany, New Zealand, and India. The application of GAAR in various countries has different characteristics, as this is greatly influenced by the legal system adopted by that country.

One of the reasons has something to do with whether they adopt civil law or common law. Countries with civil law such as Indonesia, are accustomed to interpreting the law as it is, noting that the judge adheres to the explicit text of article as passed by the parliament. Civil laws lie in the assumption of extensive written laws which are designed to cover all eventualities. This means that the introduction of new laws, especially when they bring as significant changes

as GAAR does, is heavily dependent on the political commitment and constellation of a country.

Meanwhile, a common law legal system is developed by judges on a case by case basis, building on the precedent and interpretation of earlier court decisions. Written laws may be made on matters not covered by case law or with the intention of overriding case law. However, written laws may not cover every eventuality. That is why in common law the judge opinion and written law goes hand in hand.

For instance, in Australia the original GAAR introduced in 1936 was interpreted in an excessively narrow way in court judgments, leading to a perceived increase in tax avoidance scheme. Consequently, a new GAAR clause was introduced in 1981. The lesson learned is even with the help of judges' ruling, the implementation of an optimum GAAR might still be long.

Following the similar legal system, the implementation in developing countries also need to be more flexible to find the more acceptable doctrine so that the legislators are more mindful about the importance of GAAR. South African Supreme Court of Appeal decided to introduce the Duke of Westminster doctrine in its deliberations for applying the GAAR to tax abuse cases. Considering this situation, the South African Tax Administration drafted an amended GAAR, which was promulgated by parliament in 2006. The amendment focused on delineating more precisely the type of agreements to which the GAAR is applicable and extended the rule's scope to any tax, duty, or levy instructed under the Income Tax Act or any other law administered by the Commissioner (Mosquera et al., 2022).

In contrast with common law countries, as a civil law country, Indonesia must bring the urge and the importance of GAAR first to the parliament since the judge cannot make any ruling expanding from current law. Nonetheless, parliament has decided that that GAAR implementation probably will be extensive and most likely with a high risk of abuse. In addition, the tax authority cannot elaborate proper boundaries in designing an effective GAAR.

As a consequence, Indonesia could only rely on the SAAR to minimize the practice of tax avoidance. However, the tax authority was able to introduce the concept of GAAR in HPP Law, albeit just in the Elucidation part.

Wijaya & Kusumaningtyas (2020) have elaborated that the application of the specific anti-avoidance tax regulation such as Specific Anti-Avoidance Rule (SAAR) and the principle of substance over form in the Elucidation of Number 8 Article 18 of the HPP Law cannot be applied properly, thus makes GAAR crucial. Astuti (2021) said that it is very important for Indonesia to have GAAR. This is because Indonesia has provided many incentives, whereas there are still many provisions in providing these incentives that have legal loopholes. There are no instruments to overcome these gaps to date.

Yusuf Wangko Ngantung as an Associate Partner of DDTC elaborated that GAAR is a good idea, especially to overcome arrangements that have not been regulated in tax laws and regulations since business developments are always faster than regulatory developments. However, Ngantung (2022) also mentioned that GAAR has weaknesses in regard to its legal certainty. Indonesia needs to have GAAR, but there are several elements that must be strengthened in the GAAR provisions, to ensure legal certainty in particular.

Efendi (2022) elaborates further on the convenience of Indonesia having a Statutory GAAR so that the tax courts are more comfortable and confident in implementing it. This is also related to the legal environment in Indonesia. Since Indonesia adopts civil law, judges tend to follow what is written in the law. Thus, having a Statutory GAAR becomes very important for Indonesia.

A different view emerged based on an interview with Ferry Irawan, a Permanent Lecturer at PKN STAN. He said that GAAR was not needed by Indonesia at this time, because the government was focusing on investment.

Regarding the readiness to implement GAAR in Indonesia, several sources expressed different opinions. Astuti (2021) states that actually Indonesia is not ready to implement GAAR. Nevertheless, Indonesia should already have GAAR because the government has provided many incentives and there are loopholes that needs to be addressed.

Ngantung (2022) said that Indonesia is not ready to implement GAAR because Indonesia does not yet have jurisprudence meaning that the judge's decision is not yet consistent. It is feared that if GAAR is implemented, the wave of disputes will rise. Ngantung (2022) added that if other regulatory disputes are clearer and the number of disputes can be reduced, the government is ready to focus on more crucial matters such as the implementation of GAAR.

CITA's Senior Adviser I Wayan Sudiarta assumed a different view. He saw that there was already a willingness from the government because the government had dared to propose the Statutory GAAR provisions in the legislation. DGT's capacity is also all set and will be able to follow if the provisions are really approved.

Efendi (2022) said that regulatory needs are the starting point for any tax reform. In order to promote a novel regulation such as GAAR, strong supports from the community is beyond question. The DGT's regulatory instruments are good to go in terms of exhaustivity, legal basis and governance. What they lack is the reasonable justification so that people perceive the benefit of Statutory GAAR. Therefore, the understanding that the countermeasure against tax avoidance to increase state revenue which ultimately leads to an improvement in the quantity and quality of government spending needs to be given in explaining the importance of implementing GAAR.

4.2. Key Concept in Formulating the Ideal GAAR for Indonesia

Combining the general characteristic of GAAR as suggested by Johansson et al. (2016) and Suryani & Devos (2016), the author has extracted seven critical aspects to be discussed with the experts in light of Indonesian legal taxation system how to develop an ideal support system for GAAR to be established and what are the challenges of each criteria.

4.2.1. Identification of transaction schemes

Sueb (2020) mentioned that the government should have an anticipatory GAAR in order to prevent taxpayers from conducting transaction schemes that aim to avoid taxes. Astuti (2021) argues that the scope of GAAR must include not only transactions, but also arrangements that can cover all mechanisms; because not all arrangements are in the form of transactions. Those may also in the form of agreements or dealing. Australia uses not only transactions but also dealing. This can include arrangements which do not result in immediate transactions but agreements that causes postponed or even indirect transactions.

Efendi (2022) proposes that GAAR provisions must cover both transactions, combinations of transactions, and arrangements. Ngantung (2022) also elaborates that GAAR must target not only one transaction, but can include a combination of transactions which, when viewed in the big picture, can lead to tax avoidance.

4.2.2. Purpose Test

Astuti and Irawan (2021) are unanimous that the use of "the main purpose" phrase is more precise and measurable. This means the risk will be fewer compared than if using "one of the main purpose" which will be too broad and can be applied extensively.

Ngantung (2022) added that tax has always been one of the goals but not the only purpose of taxpayers making transactions. There is also a business purpose. In the same fashion, Irawan (2021) said that the motives of taxpayers are very diverse, not only avoiding taxes. The motive that is often found is cash management. The similar view has also been held by Pangastuti (2021) in which she worried that the emergence of GAAR could be captured as a negative signal for investment activity.

Sudiarta (2022) reminded that a stringent formulation of GAAR would curb Indonesia's capacity to increase economic growth and attract investment.

4.2.3. Relationship of GAAR, SAAR and Principal Purpose Test

Wijaya & Kusumaningtyas (2020) has made clear that each country can choose whether to implement SAAR, GAAR, or a combination of both. Nevertheless, GAAR cannot be applied if the SAAR and/or the provisions in the Double Taxation Avoidance Agreement (P3B) have been applied to the tax avoidance case. The interaction among these mechanisms is further explained by the resource persons.

Ngantung (2022) explained how GAAR works to bolster SAAR. GAAR can only be used if only SAAR cannot be applied. This preposition is also supported by Astuti (2021) and Efendi (2022). They emphasized that GAAR is a last resort mechanism meaning that as long as SAAR adequately covers a transaction or scheme in question, GAAR may not be used. This is a common practice in many countries.

According to the OECD (2017), many countries have included GAAR provisions in their domestic laws in an effort to prevent tax evasion that cannot be handled through SAAR or judicial doctrine. However, the application of GAAR in domestic law raises questions about the possibility that the provisions of GAAR will conflict with the provisions in the Tax Treaty. The OECD states that in the vast majority of cases such conflicts will not arise. The following is the Commentary on Article 1 in the OECD Model Tax Convention:

"The application of such general anti-abuse rules also raises the question *of a possible conflict with the provisions of a tax treaty. In the vast majority of cases, however, no such conflict will arise."* (Commentary on Article 1, OECD MTC)

Ngantung (2022) complements that the relationship between GAAR and the Principal Purpose Test (PPT) in the Tax Treaty depends on the constitutional or legal system of a country; whether it adheres to a monist or dualist system. Common law countries tend to apply a dualist system, which means that international law and domestic law are like two different worlds.

Additionally, Astuti (2021) makes clear that not all countries regulate GAAR can be applied to cases of treaty abuse. If Indonesia wants to stipulate GAAR so that it can also be applied to cases of treaty abuse, it must be mentioned that tax benefits also include treaty benefits. If it is not stated clearly, GAAR should not be applied to treaty abuse cases.

In a slightly different opinion, Efendi (2022) assumes that GAAR can be applied to treaty abuse cases on condition that GAAR is a last resort provision. This may happen when SAAR or other provisions cannot be used, then GAAR can be used. This is because the nature of GAAR is overarching. There are several anti-avoidance provisions in tax treaties that can be used beforehand such as beneficial owners and PPT. If all cannot, then GAAR can be used.

Efendi (2022) added that Indonesia does not need to regulate the treaty override provision in particular. However, several countries have added a treaty override provision to assert the justification of judges.

4.2.4. Administering GAAR

Some countries have a special committee commonly referred to as the GAAR Panel. All sources are in complete agreement that in implementing GAAR Indonesia needs a GAAR Panel.

Ngantung (2022) said that the GAAR Panel is needed to maintain the independence of the decision while maintaining the consistency of the decisions

related to GAAR. This is also further elaborated by Irawan (2021) who states that the Panel is needed to ensure that moral hazard does not occur. This is in line with the concept of accountability and transparency that is being promoted by the government. This is also a part of government efforts to ensure a fair tax system and respect for the rule of law as suggested by Yang (2016) in ATPETSI (2017)

Efendi (2022) explained that the GAAR Panel is important to mitigate the application of GAAR which can be very broad. Panels are necessary to ensure that governance, verification, and identification are running well.

Based on the results of the interview, there is an understanding that the GAAR Panel has at least the following functions:

1) Maintain the independence and conflict of interest of the DGT as the unit tasked with securing state revenues.
2) Maintain the consistency of GAAR implementation and decisions which can later become a reference for Taxpayers.
3) Provide quality assurance and ensure that GAAR is applied as a last resort.

Regarding who should be included in the GAAR Panel, the interviewees tend to mention that the GAAR Panel must consist of academics, representatives from business associations and the government, which in this case is the Directorate General of Taxes (Ministry of Finance). Efendi (2022) added that the involvement of the Tax Supervisory Committee in the GAAR Panel can be an alternative.

4.2.5. Tax Authority Domain

Prior to the assessment by the GAAR Panel, the tax authority has the sovereignty to determine which transactions are considered to be included in the scope of GAAR. The tax authority is also authorized to cancel the transaction if it is proven that the Taxpayer has taken actions that fall into the category of tax avoidance, or in more legal terms of Tooma (2008), the transaction does not have economic substance or is carried out solely for tax benefits. Moreover, tax avoidance which the tax authority has been addressing supposedly by using GAAR are the practices whom Waerzeggers & Hillier (2016) defined as practices that are allowed by the law but are carried out in a way that is contrary to the intent and purpose of the law.

All sources agreed that there is no need for special penalties or sanctions for Taxpayers in following the inteneded GAAR. The sanctions that will be received by the Taxpayer are sufficient to comply with the provisions of the existing tax laws and regulations.

Efendi (2022) views that sanctions should be given to promoters or advisers of this act. This is to provide a deterrence effect for the consultant, as the party that suggests the tax avoidance scheme.

Efendi (2022) also added that it would be better if the GAAR regime was coupled with the Mandatory Disclosure Rule (MDR) regime which is a recommendation from the Base Erosion and Profit Shifting (BEPS) Action 12. If Indonesia implements the MDR and the taxpayer has a particular scheme in their planning but decides to comply with the tax regulations, Taxpayers can register and open up their scheme with the tax authorities. If the tax authorities have approved the scheme and come into a reasonable assurance that the risk of tax avoidance is low given that the main motive is anything except avoiding taxes, that Taxpayer can proceed to execute their scheme. This mechanism also allows for more certainty for taxpayers.

4.2.6. Burden of Proof

The burden of proof is one of the topics that has not been widely researched yet. Different countries have different approaches when it comes to the burden of proof.

In an interview on January 14, 2022, Ngantung highlighted that the burden of proof for GAAR should be on the tax authorities because they have the authority to request data from taxpayers, especially with the development of exchange of information in the past few years. There is no reason for the tax authorities to find it difficult to obtain data.

The same view is also conveyed by Irawan (2021) that the burden of proof should be on the tax authority. Due to the self-assessment system, the taxpayer is always considered correct unless the tax authority declares it otherwise.

A different view was conveyed by Astuti (2021) who said that the burden of proof equally rests on the tax authorities and taxpayers. The tax authority must have evidence or initial findings which will later be submitted to the Taxpayer. If the Taxpayer does not agree with the initial evidence or the findings, that Taxpayer in return must prove it.

Efendi (2022) further elaborates that the burden of proof lies in both the tax authorities and the taxpayers. If the tax authority has suspicions based on the risk of tax evasion, the tax authority must be the first to provide initial evidence and then that taxpayer also needs to provide evidence that the purpose of their business scheme is not for tax evasion.

4.2.7. Threshold and Exclusion

Astuti (2021) suggests that the application of GAAR should be limited and not too broad so that transactions with small values are not regulated with GAAR. GAAR should have a threshold, for example transactions above IDR 5 billion as in the Transfer Pricing Documentation rule. Therefore, GAAR is applied only to transactions that are indeed significant in number.

However, Astuti (2021) also added that there is no need to exclude transactions according to the type. Exceptions should be made in the form of a threshold only. If there are certain exceptions it will cause discrimination and administratively it will also be difficult. This argument is also supported by Efendi (2022) who states that the idea of GAAR is to be made

as broad as possible to capture various kinds of schemes that have not been resolved by SAAR. Certain exceptions will only reduce the scope of GAAR.

Irawan (2021) mentions that tax planners are always one step ahead than regulators. If there is a threshold, it will be easy to get past it. However, the existence of a threshold will at least provide legal certainty.

Efendi (2022) emphasizes that a threshold is needed so that only transactions of material value will be covered with GAAR. Efendi (2022) also adds that GAAR is quite costly. However, because GAAR is a last resort, it is unlikely that there will be too many cases using GAAR.

Efendi (2022) also elaborates further that GAAR has a high administrative cost, not to mention the procedure is also gradual, namely through a review at the Tax Office level, a review at the DGT Regional Office level, a review at the DGT Head Office level, and finally a review by the GAAR Panel.

Source: Author (encrypted from the sources in 2022)

Figure 2. The Illustration of GAAR Tiered-Review Process

5. CONCLUSIONS AND RECOMMENDATIONS

The government has proposed that GAAR provisions be included in the Fifth Amendment to Law Number 6 of 1983 concerning General Provisions and Tax Procedures Bill (RUU KUP) as of 5 May 2021 (DPR RI, 2021) which was changed its name to the Harmonization of Tax Regulations Bill (RUU HPP), but the GAAR provisions have not been approved for the following possible reasons:

First, there are concerns that the application of GAAR will be extensive and the risk of abuse is high. Second, the spirit of the HPP Law to facilitate investment and certainty is a very important indicator for investors. Third, the draft submitted by the government is still very general. It does not include a clear principle on how GAAR should be implemented. Thus, it may create uncertainty for businesses. Fourth, there is a concern that GAAR will just increase the already high number of tax dispute cases in Indonesia.. Ultimately, from Indonesian tax authority perspective, they extremely concerned that imposing the GAAR clause could have hindered the passage of overall tax reform in the HPP Bill.

Currently, Indonesia already has several anti-avoidance rules such as SAAR and the Principal Purpose Test (PPT) provisions in several Indonesian tax treaties with partner countries. Having a Statutory GAAR is very important for Indonesia because of the many cases of tax evasion that cannot be handled by existing regulations and the number of tax incentives that still have loopholes and cannot be overcome by existing regulations. The ideal formulation of GAAR provisions are drawn from general characteristics of GAAR from Johansson et al. (2016) and Suryani & Devos (2016) that has been discussed with all resource persons, which should include the following key concepts:

1. GAAR shall be applied on the basis of transactions, combinations of transactions and arrangements. GAAR must include definitions of tax avoidance and tax benefits. If GAAR is to be applied to treaty abuse cases, it must be clearly stated what is meant by tax benefits as well as the treaty benefits.
2. The use of the main purpose test as a form of testing. The majority of countries use the main purpose test as a form of testing because it is easier to measure.
3. GAAR should be implemented as a last resort provision, considering that the implementation of GAAR requires high degree of effort and cost. The SAAR and PPT provisions in the tax treaty must be the main guard for the settlement of tax avoidance. If there are cases that cannot be resolved through SAAR and PPT in the tax treaty, then GAAR can be applied.
4. It is necessary to establish a GAAR Panel to maintain the independence and consistency of the decisions issued and to act as the party providing quality assurance.
5. The tax authority has the authority to determine which transactions are considered to be included in the scope of GAAR. The tax authorities are also authorized to cancel the transaction if it is proven that the Taxpayer has taken actions that fall into the category of tax avoidance.
6. The burden of proof must be heavier on the Tax Authorities. Taxpayers have a portion of proof in terms of providing data and information after initial findings from the Tax Authority.
7. It is necessary to have a threshold in the application of GAAR, so that only transactions whose value is material and significant will be included in the scope of GAAR.

To further optimize the formulation of Statutory GAAR provisions in Indonesia, the authors provide the following ways forward based on the interviews:

1. Tax authorities need to prepare sufficient human resources. The preparation of these resources can be done through debriefing/training to tax auditors to better understand the provisions related to GAAR.
2. In order to provide legal certainty for taxpayers, it is necessary to provide guidance on examples of transactions or schemes that are included in the realm of tax avoidance, including previous ruling. The guidance is issued after receiving input from the GAAR Panel.
3. There is a need for a study that focuses on the format and design of the GAAR Panel. It must be made clear about the criteria of the member and staff who should be part of the GAAR Panel, administration, and delivery of judgments.

4. There is a need for further studies on the ideal threshold in the context of implementing GAAR in Indonesia.

6. LIMITATIONS

The research was conducted with qualitative methods and used primary data obtained through in-depth interviews. Nevertheless, this research cannot be separated from the existing limitations. The limitation of this study is that research on the Statutory General Anti-Avoidance Rule (Statutory GAAR) in Indonesia are still few. Another limitation is that during the COVID-19 pandemic, the author cannot meet directly with the speakers. Therefore, the interaction is minimum and thus the interview cannot expand on a wider scope as compared with physical in-person meeting. Author has also made the best efforts to choose the best resource persons available in light of GAAR discussions by following Neuman's (2000) criteria. However, this also does not free from interviewer bias.

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