



## PROBABLE CAUSE IN THE LOCAL TAX AND LEVY CRIMINAL

Leo B. Barus

Central Tapanuli Regency Government, Pandan, North Sumatera, Indonesia. E-mail: [barusleob@gmail.com](mailto:barusleob@gmail.com)

Article	Abstract
<p><b>Keywords:</b> criminal law, levy criminal, probable cause, regional tax</p> <p><b>History of Article</b> Received: March 04, 2022; Reviewed: April 07, 2022; Accepted: April 16, 2022; Published: April 30, 2022</p>	<p>Criminal provisions for local or regional taxes and levies, as regulated in Article 181 and Article 183 of Law Number 1 of 2022 concerning Financial Relations between the Central Government and Local Governments, can create challenges for local taxes and levies and the potential for pre-trial. Based on juridical studies, two main conclusions are drawn: primary legal materials, secondary legal materials, and tertiary legal materials. First, the criminal provisions of Law Number 1 of 2022 do not provide legal certainty, considering that there is no lex specialist for investigators in the field of local taxation and levies in interpreting sufficient probable cause. Second, it is necessary to renew the criminal provisions in Law Number 1 of 2022 as the lex specialist of criminal law, including formulations of definitions, parameters, and standards of sufficient probable cause. It is recommended that the renewal of the criminal provisions of local taxes and levies contain normative provisions regarding adequate probable cause.</p>

### 1. INTRODUCTION

Criminal provisions in the field of local taxes and levies have been regulated in Law No. 1 of 2022 concerning Financial Relations between the Central Government and Local Government. However, the provisions of Article 181 and Article 183 of Law No. 1 of 2022 can pose local tax challenges and levies, especially the potential for the pre-trial rise.

Indeed, there has been no pretrial criminal act in the field of local taxes and levies since the enactment of Law No. 1 of 2022. However, reflecting on the rise of pretrial in some unique criminal acts, such as corruption and criminal acts in the field of taxation, it is necessary to conduct a juridical study related to "sufficient preliminary evidence" or known as "probable cause" because of the Constitutional Court (MK) Decision No. 21/PUU/XII/2014 has determined that the phrase "preliminary evidence," "sufficient preliminary evidence," and "sufficient evidence" as specified in Article 1 number 14, Article 17, and Article 21 paragraph (1) of Law No. 8 of 1981 concerning Criminal Procedure Law (KUHAP) contrary to the Constitution of the Republic of Indonesia of 1945 (NRI Constitution of 1945) as long as it is not interpreted that "preliminary evidence," "sufficient preliminary evidence," and "sufficient evidence" are at least two pieces of

evidence contained in Article 184 of the KUHAP. The probable cause itself is one of the qualifications that must be fulfilled in anticipating the occurrence of pretrial as stipulated in Article 77 letter a KUHAP which, according to Constitutional Court Decision No. 21/PUU/XII/2014, includes the determination of suspects, searches, and seizures. Thus, with the issuance of Law No. 1 of 2022, whose criminal provisions can cause potential pretrial in connection with the absence of probable cause arrangements in the event of local tax and levy crimes, it is necessary and urgent to answer the two formulations of existing problems. First, how is the legal certainty of sufficient preliminary evidence in handling criminal acts in the field of regional taxation and retribution? What is the ideal of sufficient insufficient evidence in criminal acts in the field of regional taxation and discipline?.

## 2. METHODS

Normative juridical research uses a qualitative approach by researching library materials or secondary data<sup>1</sup>. Qualitative methods are more direct and relevant to policy making and practice than complex quantitative approaches. It should use large samples to facilitate generalizations designed to control variables and so on<sup>2</sup>. Thus, using a qualitative approach using secondary data can produce sufficient preliminary evidence for reformulation in handling local tax challenges and levies, especially regarding the rise of pretrial in Indonesia. Furthermore, the qualitative approach carried out includes the study of Legal Principles, Legal Systematics, Vertical and Horizontal Synchronization of Law, and Legal Comparison. This study concerns ideally sufficient preliminary evidence in Indonesia's local tax and levy crimes.

## 3. ANALYSIS AND DISCUSSION

### a. Overview of Criminal Provisions in the Field of Regional Taxation and RetriBution

Criminal provisions in the field of local taxes and levies have been regulated in Article 181 and Article 183 of Law No. 1 of 2022. The formulation of Article 181 paragraph (1) of Law No. 1 of 2022 expressly stipulates that Taxpayers who, due to their negligence, do not fulfill tax obligations as intended in Article 5 paragraph (5) of Law No. 1 of 2022, to the detriment of Regional Finance, threatened with imprisonment for a maximum of 1 (one) year or a fine of at most 2 (two) times the amount of tax owed that is not or underpaid, while the formulation of Article 181 paragraph (2) of Law No. 1 of 2022 stipulates that taxpayers who deliberately do not meet tax obligations as intended in Article 5 paragraph (5) of Law No. 1 of 2022, to the detriment of Regional Finance, threatened with imprisonment for a maximum of 2 (two) years or a fine of at most 4 (four) times the amount of taxes owed that are not or underpaid. The entire formulation of Article 5 para-

<sup>1</sup> Soekanto, Soerjono dan Sri Mamudji, *Penelitian Hukum Normatif*, Jakarta: PT. Rajagrafindo Persada, 2007.

<sup>2</sup> Martyn Hammersley, *Questioning Qualitative Inquiry: Critical Essays*. London: SAGE Publications Ltd, p. 3. 2008.

graph (5) of Law No. 1 of 2022 is "The document of the local tax notification letter as intended in paragraph (4) must be filled out correctly and completely and submitted by the Taxpayer to the Local Government by the provisions of the laws and regulations".

Furthermore, the formulation of Article 183 of Law No. 1 of 2022 regulates the criminal act of Compulsory Retribution, as the whole sound confirms that mandatory retribution that does not carry out its obligations as intended in Article 87 paragraph (4) of Law No. 1 of 2022, to the detriment of Regional Finance, is threatened with imprisonment for a maximum of 3 (three) months or a fine of at most 3 (three) times the amount of the outstanding levy that is not or underpaid. The entire formulation of Article 87 paragraph (4) of Law Number 1 of 2022 is "Mandatory Retribution as intended in paragraph (3) shall pay for the services used/enjoyed".

Furthermore, in terms of local tax criminal liability and retribution as everyone's element in the criminal act in the field of local taxes is "Taxpayer," while in the criminal offense in the area of retribution is "Mandatory Levy," Law No. 1 of 2022 has firmly defined the subject of the criminal law. As for what is meant by taxpayers is a person or entity, including taxpayers, tax-cutters, and tax collectors, who have tax rights and obligations by the provisions of laws and regulations, as formulated in Article 1 number 24 of Law No. 1 of 2022. While what is meant by Mandatory Retribution is a person or entity that, according to the laws and regulations, is required to make payment of the levy, including certain levy collectors, as formulated in Article 1 number 26 of Law No. 1 of 2022.

Local taxes consist of taxes levied by the provincial government and the district/city government levied. Based on Article 4 paragraph (1) of Law No. 1 of 2022, taxes levied by the provincial government consist of Motor Vehicle Tax (PKB), Motor Vehicle Name Back Duty (BBNKB), Heavy Equipment Tax (PAB), Motor Vehicle Fuel Tax (PBBKB), Surface Water Tax (PAP), Cigarette Tax, and Non-Metal and Rock Mineral Tax (MLB) Opsen. While the taxes levied by the district/city government based on Article 4 paragraph (2) of Law No. 1 of 2022 are Land and Rural and Urban Buildings Tax (PBB-P2), Land and/or Building Ha Katas Acquisition Duty (BPHTB), Certain Goods and Services Tax (PBJT), Billboard Tax, Groundwater Tax (PAT), MLB Tax, Swallow's Nest Tax, PKB Opsen, PKB Opsen, and Opsen BBNKB. The various types of regional taxes confirm that every Taxpayer contained in Article 4 paragraph (1) and paragraph (2) of Law No. 1 of 2022 if there is a violation, either because of its negligence or deliberate-ness does not meet tax obligations, can be subject to Article 181 of Law No. 1 of 2022.

#### **b. Probable Cause in Prevailing Law in Indonesia**

Probable cause must be understood in conducting local taxes and levy crime investigations. Black's Law Dictionary defines probable cause or known in several other designations, such as reasonable cause, sufficient cause, reasonable grounds, or reasonable excuse, is "a reasonable ground to suspect that a person has committed or is committing a crime or that a place contains specific items connected with a crime."<sup>3</sup> In addition to the Black's Law Dictionary, several experts have also put forward the concept of probable

---

<sup>3</sup> Bryan A. Gardner, (Chief of Editor). Black's Law Dictionary. St. Paul: West Publishing Co. 2009

cause. Probable cause, according to Dressler and Michaels, is a justification for believing that a person is designated as a suspect for having committed a crime, so law enforcement who determines a suspect without probable cause will be considered to be committing an unconstitutional act<sup>4</sup>. Then, Hamzah compared the probable cause in the United States, which is the basis used by law enforcement officials in the United States to believe that someone has committed a criminal act. In contrast, the constitution of the United States has given the authority to judges to decide the amount or fundamentals of whether sufficient preliminary evidence is met<sup>5</sup>.

One of the Constitutional Court Decisions No. 21/PUU/XII/2014 has determined that the phrases "proof of beginning," "sufficient preliminary evidence," and "sufficient evidence" as specified in Article 1 number 14, Article 17, and Article 21 paragraph (1) of the KuHap have no binding legal force as long as it is not interpreted that "preliminary evidence," "sufficient preliminary evidence," and "sufficient evidence" are at least two pieces of evidence contained in Article 184 of the KUHAP. Of course, the Constitutional Court Decision No. 21/PUU/XII/2014 is also binding in terms of handling criminal acts in the field of local taxes and levies.

In addition to the Constitutional Court Decision No. 21/PUU/XII/2014, sufficient preliminary evidence is also contained in Law No. 30 of 2002 concerning the Corruption Eradication Commission (KPK Law), Decree of the Head of Police of the Republic of Indonesia (Kapolri) Number Pol. SKEEP/04/I/1982 dated February 18, 1982, and The Governor's Regulation of the Special Region of the Capital City of Jakarta Number 31 of 2020 concerning procedures for examining evidence of the beginning of criminal acts in the field of regional taxation. Article 44, paragraph (1), and paragraph (2) of the KPK Law stipulate that no later than seven working days from the date of sufficient preliminary evidence are found, then the investigator reports to the Corruption Eradication Commission (KPK), where enough insufficient evidence is considered to have existed if at least 2 (two) pieces of evidence have been found, including and not limited to the information or data spoken, sent, received, or stored either by regular or electronic or optical. Meanwhile, the Decree of the Police Chief No. Pol. SKEEP/04/I/1982 confirms that sufficient preliminary evidence is evidence that is the evidence and data contained in the following two of the following which after it is concluded to show that there has been a crime, namely: Police Report, News of the examination event at the crime scene (crime scene), Report of investigation results, Expert witness/ witness statement, and evidence of evidence. Then, Article 1 number (4) of the Jakarta Capital Special Regional Governor Regulation Number 31 of 2020 defines sufficient preliminary evidence in local taxes as Preliminary Evidence that provides clues to the strong allegation that there is or has been a Criminal Act in the Field of Regional Taxation committed by anyone who can cause regional income losses.

---

<sup>4</sup> Joshua Dressler and Alan C. Michaels. *Understanding Criminal Procedure, Volume 1: Investigation*. Massachusetts: LexisNexis. 2013.

<sup>5</sup> Chandra M. Hamzah, *Penjelasan Hukum (Restatement) tentang Bukti Permulaan Yang Cukup*. Jakarta: Pusat Studi Hukum dan Kebijakan Indonesia (PSHK). 2014.

As a comparative study, probable cause is regulated in the United States. Every search and sei, including an arrest, must be based on probable cause. At first, probable cause can be traced to the English grand jury, but now it has shifted to the scope of government<sup>6</sup>, in this case, the investigation. Every citizen in the United States has the right to be tried and the opportunity to stand trial, and the opportunity to hold officials, governments, and law enforcement institutions accountable for civil rights violations<sup>7</sup>.

Some of the above understandings, both juridically and conceptual frameworks and the opinions of some experts, show that probable cause is the most crucial step in legally justifying a suspect designation, search, and seizure if there has been a substantial allegation of a criminal offense.

### **c. Legal Reformulation of Probable Cause in Local Tax and Levy Criminal**

The determination of suspects, searches, and seizures received legal protection in the form of pretrial as affirmed in Article 77 letter a kuhap and constitutional decree No. 21/PUU/XII/2014. Of course, the decision of the Constitutional Court No. 21/PUU/XII/2014, which requires the fulfillment of at least two pieces of evidence as a requirement for the completion of preliminary evidence, is sufficiently in line with Article 77 letter a and Article 183 of the Kuhap which affirms that pretrial must be submitted to the district court, wherein each judge's decision with at least two valid evidence he obtained a conviction.

The existence of Article 77 letter a kuhap and constitutional decree No. 21/PUU/XII/2014 remains the legal basis for the fulfillment of preliminary evidence enough in the investigation of local tax and levy crimes as the criminal provisions formulated in Law No. 1 of 2022. In fact, the procedures for examining preliminary evidence and procedures for investigating local taxes and levies issued by the local government are still very minimal, considering that until now, only DKI Jakarta Province regulates the methods for examining evidence of the beginning of criminal acts in the field of regional taxation, by the Dki Jakarta Governor Regulation Number 31 of 2020. Some provisions related to sufficient preliminary evidence in the Dki Jakarta Governor Regulation Number 31 of 2020 are:

- a) The Incident Report is a written report on the existence of a Criminal Event that contains sufficient Preliminary Evidence as to the basis for an Investigation.
- b) The results of the Preliminary Evidence Examination as outlined in the PrPreliminaryvidence Examination Report as an investigation in the event that sufficient preliminary evidence is found.
- c) That sufficient preliminary evidence obtained against criminal acts that are known immediately can be followed up with an Investigation without preceding the Preliminary Evidence Association.
- d) If that sufficient preliminary evidence is obtained from the activities of handling criminal acts that are known immediately, the development of preliminary evidence

---

<sup>6</sup> Amanda Peters, "Mass Arrests & the Particularized Probable Cause Requirement", *Boston College Law Review*, Vol. 60, Issue 1, p. 228, pp. 217-270. 2019.

<sup>7</sup> *Ibid.*, p. 270.

examinations, or the development of investigations, then the Incident Report can be made without a Preliminary Evidence Examination.

Regarding the lack of provisions on sufficient preliminary evidence in the criminal conditions of local taxes and levies, it is appropriate between civil servant investigators authorized in local taxes and levies and taxpayers and taxpayers with the levy obligations to prioritize active participation in the form of dialogue or communication that is proportionate, transparent, and accountable to produce an agreement that recovers the loss of tax revenue that has occurred. The active participation implementation corridor must still be based on good General Principles of Government (AAUP) and also sound governance principles to avoid and prevent opportunities for Collusion, Corruption, and Nepotism (KKN) among taxpayers and officials<sup>8</sup>. This is in line with Miller's opinion that a descriptive approach to a probable cause requires careful and thorough analysis and is in line with one of the essential principles in Article 10 paragraph (1) of Law No. 30 of 2014 on Government Administration, namely the principle of legal certainty. This principle is a principle in the state of law that prioritizes the foundation of rules and regulations, decency, and fairness in every policy of the State Organizer. Thus, the primary purpose of local taxes and levies for the most significant amount for regional finances can be recovered through the legal settlement of state administrations the urgency in the legal system in Indonesia has been affirmed in the National Medium-Term Development Plan 2020-2024, which confirms that the improvement of the judicial system will be realized through one of the crucial strategies, namely the implementation of restorative justice through optimizing the use of regulations available in laws and regulations, including prioritizing efforts to provide rehabilitation, compensation restitution for victims<sup>9</sup>.

The absence of the provisions of "sufficient preliminary evidence" in Law No. 1 of 2022 as a lex specialist of local taxes and levies will potentially make it difficult for local governments to investigate local tax and levy crimes, even though the types of local taxes are very diverse and need immediate efforts in recovering losses on local income, for example through confiscation and or other forced actions, Which requires probable cause. Thus, to strengthen preliminary evidence examination based on good AAUP and sound governance principles, ideally, restorative justice in the prior evidence examinations must meet material requirements, formal requirements, and mechanisms. One of the conditions formilnya is the provision of probable cause which should be regulated in the legal order (in this case, the Law related to local taxes and levies), considering that Article 23A of the 1945 NRI Constitution has mandated that all tax collection and other coercive levies must be based on the current Law and the KUHAP has not formulated its understanding and parameters as its material condition. Thus, "sufficient preliminary evidence" in local tax and levy crimes is carried out within the

<sup>8</sup> Sarwini. Implementasi Restorative Justice dalam Hukum Pajak. *Yuridika*, Vol. 29, No. 3, pp. 380-396. 2014.

<sup>9</sup> Badan Perencanaan Pembangunan Nasional. 2019. "Rancangan Teknokratik Rencana Pembangunan Jangka Menengah Nasional 2020-2024", accessed on April 1, 2022, [https://www.bappenas.go.id/files/rpjmnn/Narasi%20RPJMN%20IV%202020-2024\\_Revisi%2028%20Juni%202019.pdf](https://www.bappenas.go.id/files/rpjmnn/Narasi%20RPJMN%20IV%202020-2024_Revisi%2028%20Juni%202019.pdf).

framework of a structured and measurable authority attribution. Structured meaning refers to the structure and steps in conducting preliminary evidence examinations determined by legitimate authorities. In contrast, the measurable definition refers to examining insufficient evidence that must be carried out according to the rule of law at the highest level to the lowest level, as formulated in Law No. 12 of 2011 concerning the Establishment of Laws and Regulations as amended last by Law. Number 15 of 2019.

#### 4. CONCLUSION

The study yielded two conclusions. First, the criminal provisions in Law No. 1 of 2022 still do not provide legal certainty considering the absence of lex specialists for investigators in the field of regional taxation and retribution in carrying out or enforcing sufficient preliminary evidence. Second, it is necessary to update the criminal provisions in Law No. 1 of 2022 as a lex specialist of the criminal law, which formulates the definition, parameters, and or standards of sufficient preliminary evidence. It is recommended that there be an update of the local tax and criminal levy provisions containing normative provisions about sufficient insufficient evidence, as well as the need for local regulations (both provinces and districts/cities) on the procedures for examining preliminary evidence and procedures for investigating local taxes and levies as one of the crucial efforts in recovering losses in regional finances. One of the Laws that has established two evidence tools as one of the parameters of sufficient preliminary evidence is the KPK Law. In contrast, one of the regions that have formulated the procedure for examining preliminary evidence is the DKI Jakarta Provincial Government.

#### 5. REFERENCES

- Badan Perencanaan Pembangunan Nasional. 2019. "Rancangan Teknokratik Rencana Pembangunan Jangka Menengah Nasional 2020-2024", accessed on April 1, 2022, [https://www.bappenas.go.id/files/rpjmnn/Narasi%20RPJMN%20IV%202020-2024\\_Revisi%2028%20Juni%202019.pdf](https://www.bappenas.go.id/files/rpjmnn/Narasi%20RPJMN%20IV%202020-2024_Revisi%2028%20Juni%202019.pdf).
- Daerah Khusus Ibukota Jakarta, Peraturan Gubernur Daerah Khusus Ibukota Jakarta Nomor 31 Tahun 2020 tentang tata cara pemeriksaan bukti permulaan tindak pidana di bidang perpajakan daerah.
- Dressler, Joshua, dan Alan C. Michaels. *Understanding Criminal Procedure, Volume 1: Investigation. Massachusetts: LexisNexis*. 2013.
- Gardner, Bryan A. (Chief of Editor). *Black's Law Dictionary. St. Paul: West Publishing Co.* 2009.
- Hammersley, Martyn, *Questioning Qualitative Inquiry: Critical Essays* London: *SAGE Publications Lt.* 2008.
- Hamzah, Chandra M. *Penjelasan Hukum (Restatement) tentang Bukti Permulaan Yang Cukup.* Jakarta: *Pusat Studi Hukum dan Kebijakan Indonesia (PSHK)*. 2014.
- Kepolisian Republik Indonesia, Surat Keputusan Kepala Kepolisian Republik Indonesia Nomor Pol. SKEEP/04/I/1982 tanggal 18 Pebruari 1982.

- Mahkamah Agung. Antinomi Investigasi dan Pemeriksaan Pajak: Suatu Tinjauan atas Prinsip-Prinsip Yuridis Fiskal. *Jakarta: Biro Hukum dan Humas Badan Urusan Administrasi Mahkamah Agung Republik Indonesia*. 2016.
- Miller, Nancy Chase, "Probable Cause Standards for Administrative Searches in the Context of Internal Revenue Service Summary Tax Proceedings: In Re Carlson", *Denver Law Review*, Vol. 56, Issue 2, pp. 375-393. 1979.
- Republik Indonesia, Undang-Undang Dasar Tahun 1945.
- \_\_\_\_\_, Kitab Undang-Undang Hukum Pidana.
- \_\_\_\_\_, Undang-Undang Nomor 1 Tahun 2022 tentang Hubungan Keuangan antara Pemerintah Pusat dan Pemerintah Daerah.
- \_\_\_\_\_, Undang-Undang Nomor 30 Tahun 2014 tentang Administrasi Pemerintahan.
- \_\_\_\_\_, Undang-Undang Nomor 12 Tahun 2011 tentang Pembentukan Peraturan Perundang-Undangan sebagaimana telah diubah terakhir dengan Undang-Undang Nomor 15 Tahun 2019.
- \_\_\_\_\_, Undang-Undang Nomor 30 Tahun 2002 tentang Komisi Pemberantasan Korupsi.
- \_\_\_\_\_, Undang-Undang Nomor 6 Tahun 1983 tentang Ketentuan Umum dan Tata Cara Perpajakan sebagaimana telah beberapa kali diubah terakhir dengan Undang-Undang Nomor 7 Tahun 2021 tentang Harmonisasi Peraturan Perpajakan.
- \_\_\_\_\_, Undang-Undang Nomor 8 Tahun 1981 tentang Hukum Acara Pidana.
- Peters, Amanda, "Mass Arrests & the Particularized Probable Cause Requirement", *Boston College Law Review*, Vol. 60, Issue 1, 2019, pp. 217-270.
- Sarwini. Implementasi Restorative Justice dalam Hukum Pajak. *Yuridika*, Vol. 29, No. 3, pp. 380-396. 2014.
- Soekanto, Soerjono dan Sri Mamudji, *Penelitian Hukum Normatif*, Jakarta: PT. Rajagrafindo Persada, 2007.
- Yoserwan. Fungsi Sekunder Hukum Pidana dalam Penanggulangan Tindak Pidana Perpajakan (The Secondary Function of Criminal Law in Combating Tax Crime). *Jurnal Penelitian Hukum DE JURE*, Vol. 20 No. 2, hlm. 165-176. 2020.