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Legal Review of the Application of the Systematic Lex Specialis Principle in Handling Tax Criminal Cases

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Abstract. *One of the characteristics of the legal principle is dynamic so that it can be adjusted to the development of the times. Likewise, the principle of lex specialis derogat legi generali has undergone theoretical development. One of the derivatives of the principle of lex specialis derogat legi generali is the principle of lex specialis systematic. This study aims to determine the legal review of the application of the principle of lex specialis systematic in handling tax crime cases. In this study, the approach method used is: a normative legal approach by studying library materials. The research specification used is Descriptive Analytical, which is an effort to analyze and explain legal problems related to objects with a comprehensive and systematic description of everything related to the application of the principle of lex specialis systematic in tax crimes. The concept of applying the principlesLex Specialis Systematis namely, it is determined by which Special Law is enforced, meaning that the criminal provisions of a special nature if the legislators of the Law indeed intend to enforce the criminal provisions as a special criminal provision or it will be special from the existing special provisions, then the general tax provisions law is the one enforced, even though other special laws (such as the Corruption Crime Law have elements of a crime that can cover it) are of an acceptability nature.The position of the principle of Lex Specialis Systematis in Law No. 28 of 2007 concerning General Provisions on Taxation in Tax Crimes, if the dispute is within the scope of taxation, then the law on taxation shall be used.*

keywords*: Criminal; Specialis; Systematics; Taxes.*

1. Introduction

The government has a very large capital in realizing a prosperous, democratic, and just Indonesian society that has long been desired. Tax is a tool or instrument that can realize this dream if used optimally.[1]

Tax is a source of state revenue that has a large contribution so that tax revenue is a mainstay for national development. Tax is one of the instruments for the government to measure how much public awareness is to pay taxes or fund the organization of the state and measure the value of real income and welfare of the community. The higher public awareness and the increasing number of taxpayers indicate that the level of public trust in the organization of the state is getting higher and the attitude of nationalism or feeling of belonging to the

[1]Mardiasmo, 2008, Taxation Revised Edition 2008, Andi Publisher, Jakarta, p. 1

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country is also getting higher.[2]

That the State Budget revenue in 2009 had reached more than 1000 trillion, most of which came from the tax sector. This was revealed by Finance Minister Sri Mulyani Indrawati as a lecture material on tax law presented by Ruslan Hambali.

However, there is one problem or even a stumbling block in efforts to maximize tax revenue, namely the emergence of crimes in the field of taxation. In addition to administrative law enforcement that uses administrative sanctions as its instrument, in the field of taxation there is also criminal law enforcement. Criminal law enforcement in the field of taxation certainly also has a specific purpose, namely so that legal provisions in the field of taxation can be implemented properly so that they can realize justice, certainty, and balance between the parties involved in it. Why is that, because tax matters are very identical to money or all kinds of things. Throughout history since the time humans knew the taxation system, since then tax crimes have been detected and the modus operandi of tax crimes has continued to develop following the sophistication of the world of taxation itself. Today, tax crimes have many models, most of which are of course white collar crimes, even though they are conventional tax crimes.[3]

One example, the Assistant Treasurer of Expenditures, namely Ms. Asri Murwani, is a civil servant who is tasked with deducting PPh21 from the salary of ASN of the Salatiga City Government in 2007 to 2018. A difference was found between PPh21 on the SP2D and the actual amount deposited into the State Treasury. The defendant Asri Muwarni deposited the difference in value between PPh 21 on the SP2D which should have been deposited into the state treasury account, to the Welfare Fund Account at Bank Jateng, Salatiga Branch. The welfare fund account is not included in the official account of the Salatiga City Government but rather a personal account in the name of the single specimen of the defendant Asri Muwarni.

This case is interesting because the Public Prosecutor, the defendant's legal advisor and the panel of judges in terms of implementing the applicable legal provisions of the Corruption Eradication Law, should have settled income tax (PPh21) using the Law on General Provisions and Tax Procedures.

Legal problems in dealing with the growth of special criminal law outside the codification gave birth to the development of the principle of lex specialis derogat legi generali into lex specialis systematici. This principle is to answer when there is a conflict between one law and another law, both of which are special criminal laws. For example, there is criminal tax law with corruption crimes regulated in Articles 2 and 3. The objects of both laws are the same, namely related to state financial losses. Although criminal tax law is theoretically called ius singular, in reality the actions of the tax authorities or tax officers that harm state finances are tried with the law on corruption crimes, for example the case of Gayus Tambunan who received a cassation decision in 2012 was prosecuted by the prosecutor's office using the Corruption Law, not with the provisions of criminal tax law.

[2]Ruslan Hambali, 2009, Tax Law Lecture Material, p. 4
[3]Mudzakkir, Indonesian Legislation Journal Volume 8, April 1, 2011, Criminal Law Regulations in *Taxation Field and Its Relationship with General and Special Criminal Law.*

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With the background described above, the author is interested in writing an individual working paper entitled "LEGIDAL REVIEW OF THE APPLICATION OF THE SYSTEMATIC LEX SPECIALIS PRINCIPLE IN HANDLING TAX CRIMINAL CASES"

2. Research methods

This study uses normative legal research, namely using norms in laws with a conceptual approach and a special approach. The method used in this study is normative juridical. This study goes through the stages of literature study, the data obtained is then analyzed through a qualitative analysis approach. Qualitative data processing and analysis generally emphasizes its analysis on the process of deductive and inductive conclusions and the dynamics of the relationship between observed phenomena using scientific logic.

3. Results and Discussion

3.1. The Concept of Implementation of the Principle of Lex Specialis Systematis

The emergence of special criminal legislation outside of general criminal law occurs in every country. For Indonesia, this is possible with the existence of Article 103 of the Criminal Code which states that the provisions contained in Chapter I to Chapter VIII Book 1 of the Criminal Code also apply to criminal provisions in other laws and regulations unless the law determines otherwise, so the provisions in the 8 Chapters of Book I of the Criminal Code also apply to crimes spread outside the Criminal Code unless the law determines otherwise. This means that the law in question determines special rules that deviate from the general rules.[4]

Pompe, a Dutch criminal law expert, was the first to describe special criminal law in a broad sense, which includes legal aspects, both material criminal law and formal criminal law.5.There are two criteria put forward by Pompe to indicate the concept of special criminal law, namely a special person or perpetrator (subject) and a special act that can be subject to criminal punishment.

In relation to the special criminal law above, Sudarto also provides an understanding of the term special criminal law with at least 3 groups that can be qualified, namely:6

1. Uncodified laws, for example: Law on the Eradication of Criminal Acts of Corruption, Law on Narcotics Crimes, Law on Immigration Crimes;

2. Administrative legal regulations containing criminal sanctions, for example the Basic Agrarian Law;

3. Laws containing special criminal law (ius singular, ius speciale), which contain crimes for certain groups of people, for example: Wetboek van Militair Strafrecht (Army Criminal Code), Law on Sales Tax, Law on Economic Crimes;

The understanding of special criminal law in various criminal law literature is always associated with the principle of "Lex Specialis derogate Legi Generali" as stated in Article 63 paragraph (2) of the Criminal Code which states:[7]

[4]Andi Hamzah.1985. Offences spread outside the Criminal Code With Comments. Jakarta, PradnyaParamita, Jakarta. P.15.
[5]Arda Nawawi Arif.1996. Anthology of Criminal Law Policy. Bandung, PT. Citra Aditya Bakti. P.48

[6]Sudarto.1981. Selected Chapters on Criminal Law. Bandung, Alumni. Pg.57
[7]PAF. Lamintang. 1983. Indonesian Criminal Law. Bandung, Sinar Baru. P.47

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"If an act that falls under a general criminal rule is also regulated in a special criminal rule, then only the special one will be applied."

The principle of criminal law regarding the principle of lex specialis, which is dynamic and limited in nature, can primarily determine (1) which special law must be enforced among two or more laws which are also special in nature and (2) which provisions are enforced in a special law.[8]

In relation to this, Schapffmeister in the principle of "Lex Specialis derogate Legi Generali" states that there are two ways of viewing a special criminal provision, in order to be able to say whether the criminal provision is a special criminal provision or not, namely: first, by viewing it logically or what is called "logische specialiteit" (logical speciality) and second, by viewing it systematically or what is called "systematische specialiteit" (systematic speciality).

In order to be able to say that a criminal provision is actually a special criminal provision, Noyon-Langemeijer, who is also in line with Van Bemmelen, provides a guideline, namely:

1. A criminal provision can be considered a criminal provision of a logically specific nature ("logische specialiteit"), if the criminal provision, in addition to containing other (specific) elements, also contains all the elements of a general criminal provision.

2. A criminal provision can be considered as a systematic special criminal provision ("systematische specialiteit"), if the criminal provision, although it does not contain all the elements of a general provision, can still be considered as a special provision, namely if it can be clearly seen that the legislator intended to enforce the criminal provision as a special criminal provision.

In line with that, according to Indriyanto Seno Adji, to determine the provisions (Articles) that are enforced in/on a special law, the principle of Logische Specialiteit or logical specialness applies, meaning that criminal provisions are said to be special if, in addition to containing other elements, these criminal provisions also contain elements of general criminal provisions. Meanwhile, to determine which Special Law is enforced, the principle of Systematische Specialiteit or systematic specialness applies, meaning that criminal provisions are special if the legislators intend to enforce the criminal provisions as special criminal provisions or they will be special from existing special provisions.

The term "systematic speciality" was first used by Ch.J. ENSCHEDE in his writing entitled "Lex Specialis Derogat Legi Generali" in the Tijdschrift van het Strafrecht in 1963 on page 177, stating that criminal provisions are based on the view that considers a general provision as a special provision, namely if it can be clearly seen that the legislator intended to enforce the criminal provision as a special criminal provision. This is called systematic speciality or systematic specialness.

Regarding the application of "logical specificity" in assessing a criminal provision, Lamintang has provided several examples, for example:

1. The criminal provisions in Article 374 of the Criminal Code which regulate the issue of

[8]Indriyanto Seno Adji. 2010. Corruption: Criminalization of State Apparatus Policy?. Paper *delivered at the National Working Meeting of the Association of Indonesian Provincial Governments (AAPSI)*). Bandung. Page 14.

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embezzlement in office are criminal provisions which regulate more specifically the issue of embezzlement as regulated in Article 372 of the Criminal Code;

2. The criminal provisions in Article 363 of the Criminal Code which regulate the problem of theft by burglary and so on are criminal provisions which regulate more specifically the problem of theft which has been regulated in Article 362 of the Criminal Code;

3. The criminal provisions in Article 341 of the Criminal Code which regulate the issue of murdering a newborn baby are criminal provisions which regulate more specifically the issue of murder as regulated in Article 338 of the Criminal Code.

To apply the teaching of "systematic specificity" AZ Abidin and Andi Hamzah provide an example of a case of criminal smuggling as regulated in Law Number 10 of 1995 concerning Customs. If a person smuggles goods into Indonesia, it means that he does not pay duties, and that means that it is part of what can be called self-enrichment and will certainly harm the state's finances. Therefore, according to AZ Abidin and Andi Hamzah, this act has fulfilled all the core parts of the crime of corruption as stated in Article 2 of Law Number 31 of 1999 as amended by Law Number 20 of 2001, but the corruption law cannot be applied because it is general in nature, while the crime of smuggling in Article 102 of Law Number 10 of 1995 is specific.[9]

The Supreme Court of the Republic of Indonesia in the 2007 National Working Meeting has stated that: laws and regulations which have their own character and dimensions may not be mixed up with each other.

Thus, according to the author's analysis, the principle of logical specialness (Logische Specialiteit) and systematic specialness (Systematische Specialiteit) as a way of viewing a special criminal provision, namely to be able to determine whether the criminal provision is a special criminal provision, which is dynamic and limitative, especially to determine;

1. Which special law should be enforced between two or more laws which are also special in nature and

2. Which provisions are enforced in a special law.

So the concept of the principle of Logische Specialiteit or logical speciality and the principle of Systematische Specialiteit or systematic speciality can be explained as follows:

1. to determine the provisions (Articles) that are applied in/on a special legislation, then the principle of Logische Specialiteit or logical specialness applies, meaning that criminal provisions are said to be special, if these criminal provisions, in addition to containing other elements, also contain all elements of general criminal provisions, for example Article 341 of the Criminal Code must be applied rather than Article 338 of the Criminal Code in a case of murder where the perpetrator is a mother against her child or Article 12B of Law No. 31 of 1999 as amended by Law No. 20 of 2001 is applied rather than Article 5 paragraph 1 letter a of Law No. 31 of 1999 as amended by Law No. 20 of 2001.

2. To determine which Special Law is enforced, the principle of systematic specialiteit or systematic specialness applies, meaning that criminal provisions are special if the legislators

[9]Andi Zainal Abidin and Andi Hamzah. Forms of Manifestation of Crimes, in Elwi Danil. 2005. Crimes in the Banking Sector as Criminal Acts of Corruption. Jurnal Delicti. Volume I Number 3. Pg.7

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intend to enforce the criminal provisions as special criminal provisions or they will be special from the existing special provisions. For example, personal subjects, objects of alleged acts violated, evidence obtained, the environment and area of crime are in the context of taxation, then the general taxation provisions law is the one enforced, although other special laws (such as the Corruption Crime Law have elements of crimes that can cover them) are acceptable in nature.

3.2. Position of the Principle of Lex Specialis Systematis in Law No. 28 of 2007 concerning General Provisions of Taxation in Tax Crimes.

In relation to the dilemmatic legal issue, namely the problem of tax crimes related to the Corruption Eradication Law in its implementation so far. For that reason, it is necessary to explain the position and role of the corruption eradication law and taxation law on the one hand which are strengthened by criminal provisions.

In the Criminal Code, Article 63 Paragraph (1) states: "If an act falls under more than one criminal regulation, then only one of those regulations will be imposed; if they differ, the one containing the most severe principal criminal threat will be imposed." Article 63 Paragraph (2): "If an act, which falls under a general criminal regulation, is also regulated in a special criminal regulation, then only the special one will be imposed."

For the determination of systematic lex specialis between the law on the eradication of corruption and the taxation law in the event of a tax crime, in essence there will be certain difficulties because of the material differences or the contents of the articles regarding actus reus, mens rea, criminal sanctions, and the purpose of establishing the two laws are very striking. To find out to what extent a tax crime can be categorized as violating the provisions of the law on the eradication of corruption or the taxation provisions themselves, it can be clearly seen through what are the elements of actus reus, mens rea, and criminal sanctions and the purpose of establishing the laws and regulations. Actus reus, mens rea, and criminal sanctions and the purpose of establishing the laws and regulations are then linked to the provisions of the laws on corruption and taxation.

As is known, the principle of actus non facit reum nisi mens sit rea has several constituent elements, namely:[10]

1. Criminal acts (actus reus)
2. Criminal liability (mens rea)
3. Criminal sanctions.

In legal doctrine, tax laws and regulations fall under the realm of state administrative law, so that legal problems that arise in relation to violations of tax laws and their enforcement are carried out through administrative law resolution mechanisms. Although they are administrative laws and regulations, tax laws and regulations have different characteristics from other administrative laws, because the nature of tax law is to give the state broad authority to collect taxes from taxpayers. The state has the authority to determine taxpayers and force taxpayers to fulfill their obligations.

Although the state has broad authority, the nature of administrative law and taxation laws and

[10]Hambali, Ruslan, 2009, Tax Law Course, Faculty of Law, Hasanuddin University.

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regulations provide room for taxpayers to file objections to taxes imposed on taxpayers because there is an alleged error in the calculation of the amount of tax to be paid. If it cannot be resolved, then the dispute regarding the calculation of the tax is known as a tax dispute, and can be submitted to the Tax Court. Law Number 14 of 2002 concerning the Tax Court in Article 1 number 5 stipulates:

"A tax dispute is a dispute that arises in the field of taxation between a Taxpayer or a tax payer and an authorized official as a result of the issuance of a decision that can be appealed or sued to the Tax Court based on tax laws and regulations, including lawsuits regarding the implementation of collection based on the Law on Tax Collection with a Distress Warrant."

The tax dispute resolution mechanism shows the strong administrative legal character of tax disputes so that tax administration legal issues are resolved through administrative legal mechanisms with the relevant public officials and if they cannot be resolved, they can be submitted to the Tax Court. Considering that tax calculations are the starting point for tax disputes and all forms of violations of the law in the tax sector involving two parties, namely tax officers and taxpayers, the vulnerable point for deviations or violations of the law is in the relationship between the two parties. Thus, the existence of an independent, objective, transparent, and professional Tax Court is absolutely necessary to prevent deviations and at the same time be a gateway to detect signs of deviations or other violations of the law in tax calculations and tax payments.[11]

For taxpayers who have good intentions to pay taxes according to their obligations, the existence of a Tax Court can provide a guarantee of legal certainty regarding the amount of tax to be paid, conversely, taxpayers who do not have good intentions to pay taxes, through the Tax Court can be used as a form of effort to reduce the amount of tax to be paid. Taxpayers who do not pay taxes in accordance with the laws and regulations in the field of taxation can be subject to sanctions according to the level of violation, namely from administrative sanctions, administrative criminal sanctions, to general criminal sanctions. Meanwhile, tax officers who abuse their authority can be subject to sanctions based on laws and general criminal sanctions. Thus, the existence of legal sanctions for violators of tax laws and regulations is needed to encourage all parties, both taxpayers and tax officers, to have good intentions to comply with laws and regulations in the field of taxation.[12]

As previously described, the special administrative legal character of tax law, the existence of administrative sanctions is needed so that taxpayers are warned early on to fulfill their obligations administratively to fulfill their obligations to pay taxes. The obligation to fulfill administrative requirements and the imposition of administrative sanctions on parties who ignore them is a form of implementing administrative sanctions and has binding legal force. For taxpayers who do not fulfill administrative requirements and have been warned and subject to administrative sanctions, according to criminal law, it can be used as an indicator of whether the taxpayer has good faith or bad faith to fulfill his obligation to pay taxes.

The imposition of administrative sanctions on taxpayers to comply with the provisions of laws and regulations governing the field of tax administration will then become the basis for

[11]English: Nugroho, Adrianto Dwi, 2010, Indonesian Tax Criminal Law, Bandung, PT.
[12]Saidi, Muhammad Djafar, 2007, Tax Law Update, Jakarta, Rajawali Press.

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determining unlawful acts and errors in criminal law if the taxpayer commits an act that violates criminal law. As stipulated in Article 8 paragraph (3) which in essence states that even though an inspection has been carried out, but an investigation has not been carried out regarding the existence of untruths committed by the taxpayer as referred to in Article 38, no investigation will be carried out regarding the untruths of the taxpayer's actions, if the taxpayer voluntarily reveals the untruths of his actions accompanied by payment of the underpayment of the actual amount of tax owed along with administrative sanctions in the form of a fine of 150% (one hundred and fifty percent) of the amount of tax underpaid.

Thus, taxpayers who violate the provisions as referred to in Article 38 as long as an investigation has not been carried out, even though an investigation has been carried out and the taxpayer has revealed his mistake and at the same time paid the actual amount of tax owed along with administrative sanctions in the form of a fine of 150% (one hundred and fifty percent) of the amount of tax underpaid, will not be investigated. However, if an investigation has been carried out and the commencement of the investigation has been notified to the Public Prosecutor, the opportunity to correct himself is closed for the taxpayer concerned.[13]

This is in accordance with the criminal law doctrine regarding the use of the threat of criminal sanctions in administrative law, namely as a last resort or ultimate weapon (ultimum remedium) when the imposition of the threat of administrative sanctions is ineffective or is ignored, only then is the ultimate weapon used in the form of the imposition of criminal sanctions.

As previously explained, the imposition of criminal sanctions (administration) as the ultimate weapon in overcoming violations in the field of administrative law, then in resolving tax disputes, administrative settlement is prioritized and prioritized. In accordance with the nature of tax law, it is not appropriate if tax settlements prioritize criminal law and ignore or set aside administrative settlements on the pretext of harming state finances. Tax law basically has its own characteristics compared to other laws, namely that the state needs funds from the community and the community has a legal and moral obligation to pay taxes to the state. Therefore, all forms of legal problems that arise in relation to tax implementation, in essence, encourage taxpayer awareness to pay their obligations, with a persuasive approach to taxpayers through the use of administrative law facilities and administrative sanctions. With such an approach, this is intended for taxpayers to boycott by not paying taxes on the pretext that the government is arbitrary (authoritarian) towards taxpayers.

The position of general criminal sanctions for violations of laws and regulations in the field of taxation which include criminal acts are criminal acts in the field of taxation. In accordance with the characteristics of tax law, criminal acts of taxation are known as administrative criminal acts in the field of taxation and are the domain of tax law.

In the application of general criminal acts or special criminal acts related to tax crimes, it is necessary to be done carefully and cautiously, considering that in the act of violating criminal acts in the field of taxation, it is almost always related and covered by the formulation of other criminal acts that are general criminal acts or special criminal acts, but the settlement is carried out using the legal basis of the Taxation Law. The norms of criminal acts in the field of

[13]Rochim, 2010, Modus Operandi of Tax Crimes, Jakarta, Solusi Publishing

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taxation have duplication (covered) in their regulations in criminal acts contained in the Criminal Code (KUHP) and other laws, so in accordance with the principles of criminal law and the principles of criminal law enforcement, the violation is subject to criminal acts in the field of taxation, because of the nature of the criminal law which is specifically in the field of taxation and the specificity of criminal acts in the field of taxation.

In the Law on Criminal Offenses in the Field of Taxation, it is expressly stated that criminal acts in the field of taxation are "able to cause losses to state revenues" which means that it is included in the definition of "able to harm state finances or the state economy". Meanwhile, criminal acts of corruption as contained in Article 2 paragraph (1) and Article 3 also formulate the emergence of consequences, namely "able to harm state finances or the state economy".

If both regulate criminal acts that "can cause losses to state revenue" or "can harm state finances or the state economy", then in accordance with the principle of the application of criminal law to laws that regulate criminal acts with the same object, a law that specifically regulates the material of the criminal act is applied. Tax crimes adhere to the principle of systematic lex specialis where state finances that are the object of criminal acts in the field of taxation are finances in the field of taxation, then criminal acts in the field of taxation are applied. As for state finances that come from tax funds that have been included in the state financial inventory (APBN/APBD) are state finances (meaning there are no more tax disputes), then these state finances are no longer the domain of tax crimes but corruption crimes.

Money laundering is related to tax funds originating from Taxpayers that must be deposited into the state treasury. The potential for money laundering in relation to tax crimes is Taxpayers (individuals or corporations) who do not fulfill their obligations to pay taxes or taxes owed, then the funds are diverted or hidden, so that Taxpayers do not fulfill their obligations. It can also happen that Tax Officers/Officials who work together with Taxpayers abuse their authority (or commit unlawful acts) which reduce the amount of tax that is the taxpayer's obligation and the funds are then diverted or hidden. It can also happen that Tax Officers/Officials do not deposit tax funds originating from Taxpayers into the state treasury or inventory, then divert or hide them. The crime of money laundering is the act of placing, transferring, diverting, spending, paying, granting, depositing, taking abroad, changing the form, exchanging with currency or securities or other acts on assets that are known or reasonably suspected to be the result of a crime in the field of taxation (Article 3) or hiding or disguising the origin, source, location, designation, transfer of rights, or actual ownership of assets that are known or reasonably suspected to be the result of a crime in the field of taxation (Article 4).[14]

4. Conclusion

The concept of applying the principles*Lex Specialis Systematis* namely determined by which Special Law is enforced, meaning that special criminal provisions if the legislators indeed intend to enforce the criminal provisions as special criminal provisions or it will be special from the existing special ones. For example, personal subjects, objects of alleged acts violated, evidence obtained, environment and area of crime are in the context of taxation, then the general taxation provisions law is the one enforced, although other special laws

[14]Udyatmoko, Y. Sri, 2007, Enforcement and Legal Protection in the Tax Sector, Jakarta, Salemba Empat.

(such as the Corruption Crime Law have elements of crimes that can cover it) are acceptability in nature.

The position of the principle of Lex Specialis Systematis in Law No. 28 of 2007 concerning General Provisions on Taxation in Tax Crimes that result in state losses where the state finances that are the object of criminal acts in the field of taxation are finances in the field of taxation, then criminal acts in the field of taxation are applied. As for state finances that come from tax funds that have been included in the state financial inventory (APBN/APBD) are state finances (meaning there are no more tax disputes), then these state finances are no longer the domain of tax crimes but corruption crimes.

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