



## THE FRICTION IN EVIDENCE LAW: CRITICISM ON EVIDENCE OF NEGATIVE WETTELIIK BEWIJSTHEORIE IN TAX CRIMES

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### ARTICLE INFO

#### **Keywords:**

Criminal; Evidence;  
Negative; Tax; Wettelijk  
Bewijstheorie.

#### **DOI :**

10.26532/jh.v41i1.41491

### ABSTRACT

*Enforcement of criminal tax law is still a complex problem with the application of the theory of positive legal evidence replacing the theory of negative legal evidence, prioritizing formal evidence over court decisions. This study aims to analyze criticism of the application of evidentiary law in the due process of law of tax crimes and describe the shift in the application of the negative legal evidence theory. This study uses a normative juridical method. The application of negative legal evidence in criminal decisions has been criticized for its strict assessment of evidence, the inability of the Tax Court to handle criminal tax cases even though the taxation contains criminal elements, and the judge's dependence on legally valid evidence based on personal beliefs. The assessment of evidence primarily functions as formal evidence or authentic evidence, with witness statements serving as supporting evidence to confirm fraudulent transactions. The novelty of this analysis lies in its critical examination of the negative legal theory, arguing that in cases of tax crimes, formal documentary evidence has greater evidentiary value, thus leading to the dominance of the positive legal theory in legal reasoning.*

## 1. Introduction

The history of taxation was recorded in Egypt by Pharaohs represented by Scribes to collect taxes on cooking oil.<sup>1</sup> In the era of Ancient Greece, taxes such as Eisphora aimed for war expenses and metoikion for non-Athenians. During

<sup>1</sup> Glayds Frantz-Murphy., *Conversion in Early Islamic Egypt: the Economic Factor, Muslims and Others in Early Islamic Society*, Routledge, 2004, page. 1

the Roman era, import and export taxes were called portoria.<sup>2</sup> Emperor Augustus established a 5% inheritance tax for the military. In the English era, starting with Lady Godiva and the Earl of Mercia reduced taxes for the inhabitants of the city of Coventry. The Duke of Lancaster (1377 AD) introduced the Income Tax for office owners and clergy, and the King's Writ initiated the idea of progressive taxation. Then, in the United States, taxation began with the Molasses Act of 1764. This was later amended with taxes on imported syrup, sugar, and beer (Sugar Act), which was further refined with the Stamp Act of 1765 for newspapers and documents.<sup>3</sup> Taxation in Indonesia was introduced by Lieutenant Governor Thomas Stafford Raffles during the British Colonial Government in 1813 with the Regulation of Landrente Stelsel.<sup>4</sup> The history of tax classification comprises three phases, the first phase being Land Tax. Landrente was ratified by Raffles from India, where the government-supervised taxes and leased land were divided into large or small parcels with time contracts. During the Japanese occupation, the tax system was altered to tax the land. The second phase was Income Tax, where before 1920, taxes were imposed on European traders (tax patent duty), farmers, laborers, village heads, and government employees (business tax). The third phase was Corporate Tax, where the principle of unification or equality of status for all classes was applied from 1914-1918. In 1925, the Ordonantie op de Vennootschapsbelasting was issued, which was later revised by Law No. 8 of 1970 and amended by the Income Tax Law of 1983.

A tax is a compulsory contribution to the government, imposed in the common interest of all, for the purpose of defraying the expenses incurred in carrying out the public functions, or imposed for the purpose of regulation, without reference to the special benefits conferred on the one making the payment.<sup>5</sup> The juridical status of taxation is summarized in Law No. 7 of 2021 on Harmonization of Tax Regulations (HPP Law 2021).<sup>6</sup> This status annuls several tax provisions, including revoking Article 5 paragraph (1) letter b of Government Regulations in Lieu of Law (Perppu) No. 1 of 2020, revoking the Provision of Article 5 paragraph (1) letter b of Law No. 2 of 2020, and amending several laws, comprising Law No. 16 of 2009, Law No. 5 of 2008, Law No. 9 of 1994, Law No. 16 of 2000, Law No. 28 of 2007, Law No. 6 of 1983, Law No. 7 of

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2 Darwin L. King, Carl J. Case, and Jared L. Roosa., The Comprehensive Taxation System Existing During The Roman Empire, *Journal of Business and Accounting*, Vol.12 No.1, 2019, page.64-147

3 Mustaqiem., *Perpajakan Dalam Konteks Teori Dan Hukum Pajak Di Indonesia*. Yogyakarta: Buku Litera, 2014, page. 3

4 H.R, Agus Salim, and Haeruddin., *Dasar-Dasar Perpajakan (Berdasarkan UU & Peraturan Perpajakan Indonesia)*. LPP-Mitra Edukasi, 2019, page.3

5 Robert W. McGee., *The Philosophy of Taxation and Public Finance*, Kluwer Academic Publishers, Norwell, Massachusetts USA, 2004, page.9

6 Candra Safitri, Anita Damajanti, Tri Endang Yani, and Yulianti Yulianti., Sosialisasi Undang-Undang Nomor 7 Tahun 2021 Tentang Harmonisasi Peraturan Perpajakan pada Wajib Pajak Orang Pribadi Pedagang Eceran Kriteria Usaha Mikro di Kota Semarang Guna Meningkatkan Pengetahuan dan Kepatuhan Pajak, *Jurnal Masyarakat Merdeka*, Vol.5 No.1, 2022, page.53-61

1983, Law No. 17 of 2000, Law No. 36 of 2008, Law No. 7 of 1991, Law No. 10 of 1994, Law No. 8 of 1983, Law No. 11 of 1994, Law No. 18 of 2000, Law No. 42 of 2009, Law No. 11 of 1995, as well as Law No. 39 of 2007.

The Organization for Economic Co-operation and Development (OECD) identified the actus reus<sup>7</sup> of taxation. Several categories and examples of actus reus based on OEDC can be seen in the table below:<sup>8</sup>

**Table 1: Tax crimes according to The Organization for Economic Co-operation and Development (OECD)**

CATEGORY	EXAMPLES
<b>Non-compliance offenses (may apply irrespective of intent or result)</b>	<ul style="list-style-type: none"> <li>▪ Failure to provide the required information, document, or return</li> <li>▪ Failure to register for tax purposes</li> <li>▪ Failure to keep records</li> <li>▪ Keeping incorrect records</li> <li>▪ Making a false statement</li> <li>▪ Non-payment</li> </ul>
<b>Intentional Tax Offenses</b>	<ul style="list-style-type: none"> <li>▪ Destroying records</li> <li>▪ Deliberate failure to comply with tax law to obtain financial advantage</li> <li>▪ Evading tax or receiving refunds by fraud or illegal practices</li> <li>▪ Planned reduction of tax using false documents, fictitious invoices</li> <li>▪ Counterfeit or forged documents to reduce tax</li> <li>▪ Intentionally or by gross negligence, providing misleading information in a tax return to obtain a tax advantage</li> <li>▪ Fraudulently obtaining refund/credit</li> <li>▪ Tax evasion in aggravated circumstances, such as considerable financial benefit or conducted in an organized</li> </ul>

<sup>7</sup> Rizqiqa, Larasati Dwi, and Budi Arta Atmaja., Penentuan Mens Rea Dalam Unsur Perencanaan Terlebih Dahulu Pada Perkara Penganiayaan Pasal 353 Ayat 2 KUHP Ditinjau Dari Perspektif Penegakan Hukum Di Indonesia. *Jurnal Belo*, Vol.6 No.2, 2021, page.126-147

<sup>8</sup> The Organization for Economic Co-operation and Development (OECD). *Fighting Tax Crime: The Ten Global Principles*. Paris: OECD Publishing, 2017, page.32

	manner
	▪ Theft from or defrauding the government
	▪ Obstructing an official of the tax authority
	▪ Accessory offences
<b>Specific Tax Offenses</b>	▪ Entering an arrangement that would make a person unable to pay tax
	▪ Committing tax evasion as a member of a gang
	▪ Commercial commission of tax evasion
	▪ Illegal use of zappers or sale suppression software
	▪ Identity theft

Based on the global economic crisis has continuously highlighted the problem of tax evasion, there is a literature that estimates the relative technical efficiency of tax administration performance in 28 OECD countries over the period 2004–2017.<sup>9</sup> The OECD categorizes tax crimes into three broad classifications: non-compliance offenses,<sup>10</sup> intentional tax offenses, and specific tax offenses, each varying in severity and intent. Non-compliance offenses, which may occur regardless of intent or outcome, include failures such as not registering for tax purposes, keeping inaccurate records, or making false statements. While some of these violations may result from negligence or lack of awareness, they still disrupt the integrity of the tax system and can lead to significant revenue losses. Intentional tax offenses, on the other hand, involve deliberate attempts to evade taxes, manipulate records, or obstruct tax authorities for financial gain. Acts such as using counterfeit documents, fraudulently claiming refunds, or deliberately misleading tax officials not only constitute criminal behavior but also indicate a conscious effort to exploit legal loopholes. More severe cases, categorized under specific tax offenses, involve organized schemes like gang-related tax evasion, systematic identity theft, or the use of suppression software to conceal sales. These offenses not only deprive governments of essential revenue but also undermine public trust in the fairness of tax enforcement. Addressing these crimes requires stringent regulatory measures, robust enforcement, and international cooperation to close loopholes and hold offenders accountable.

9 Yolanda Ubago Martínez, Pedro Pascual Arzoz, Idoia Zabaleta Arregui., Tax collection efficiency in OECD Countries Improves Via Decentralization, Simplification, Digitalization and Education, *Journal of Policy Modeling*, Vol.44 Issue.2, 2022, page.298-318

10 Lorena Bachmaier Winter and Donato Vozza, Corruption, Tax Evasion, and the Distortion of Justice: Global Challenges and International Responses, *Law and Contemporary Problems*, Vol.85, 2023, page.75-100

Several elements related to criminal tax offenses consist of illegality, where the perpetrator is a taxpayer<sup>11</sup> or a tax withholder/collector (withholding tax), elements of intentionality, elements of violating tax laws, and elements of state loss.<sup>12</sup> The concept of criminal responsibility entails conditions necessary to impose penalties on perpetrators of criminal offenses. The formulation of criminal responsibility in the negative is stipulated in Law No. 1 of 1946 concerning the Criminal Code (KUHP 1946) Articles 44, 48, 49, 50, and 51.<sup>13</sup> The KUHP 1946 has been amended into Law No. 1 of 2023 concerning the KUHP (KUHP 2023). Clauses justifying criminal offenses are listed from Articles 31 to 35 of the KUHP 2023. Criminal responsibility under the KUHP 2023 is articulated starting from Articles 36 to 39. The grounds for exoneration from criminal liability under the KUHP 2023 are regulated from Articles 40 to 50. The objectives and guidelines for sentencing under the KUHP 2023 are regulated from Articles 51 to 56. Meanwhile, the aggravation of penalties as part of criminal responsibility under the KUHP 2023 is regulated in Articles 58 to 59. Regarding sentencing to hold someone accountable in criminal law;<sup>14</sup> there must be an opportunity for the accused to explain why they acted as such. If the legal system does not provide such an opportunity, it would negate the due process in holding the perpetrator of criminal offenses accountable.<sup>15</sup>

The causes of the perpetrators of tax crimes, including the first cause of tax provisions,<sup>16</sup> are not aligned with the wealth of the perpetrators as taxpayers. F. Vaniscendael, quoting M.J. Graetz, stated it as the principle of nonretroactivity:

"..... taxpayers should be able to make economic decisions with knowledge of their tax consequences and that it is unfair to provide tax consequences for an investment or other economic decision that differ from the tax treatment at the time the decision was made. ...., however, this principle would preclude any change in law because any change, even if effective only in the future, affects the value of existing wealth."<sup>17</sup>

For example, in the first year, A's wealth is valued at IDR 100,000,000.00; in the second year, it decreases by IDR 50,000,000.00. A believes that taxes can

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11 Richard A. Musgrave, Peggy B. Musgrave., *Public Finance in Theory and Practice*, New York, 1989, page.35

12 M. Hary Djatmiko., *Sengketa Pajak Dalam Mekanisme Peradilan Pajak Di Indonesia*. Jakarta: Biro Hukum dan Humas Badan Urusan Administrasi MA.RI, 2016, page.19

13 Chairul Huda., *Tiada Pidana Tanpa Kesalahan" Menuju Kepada "Tiada Pertanggungjawaban Pidana Tanpa Kesalahan" Tinjauan Kritis Terhadap Teori Pemisahan Tindak Pidana Dan Pertanggungjawaban Pidana*. Edisi Pertama. Jakarta: Prenada Media, 2006, page.14

14 Tommy J. Bassang., *Pertanggungjawaban Pelaku Tindak Pidana Deelneming, Lex Crimen*, Vol.4 No.5, 2015, page.122-128

15 Grace Yurico Bawole., *Penerapan Sistem Hukum Pidana Civil Law Dan Common Law Terhadap Penanggulangan Kejahatan Korporasi, Lex Crimen*, Vol.3 No.3, 2014, page.75-82

16 Alexander Psaltis, *LAW55144 Introduction to Taxation Law*, Final Exam Notes, 2009, page.29

17 Thuronyi, Victor, and Frans et.al Vaniscendael. *Tax Law Design and Drafting*. Edited by VictorVaniscendael, Frans Thuronyi. IMF Graphics Section, Washington D.C, 1996, page.54

reduce their previously declined wealth. A will try not to reduce their wealth, including neglecting taxes.

The second cause is the taxpayer's misplaced trust in the tax collector (fair play). 'On the other hand, the principle of public order would suggest that if the tax administration erroneously applies the tax law, it is entitled to correct this application, even if this were disadvantageous to a taxpayer acting in good faith. Since both principles are usually applied simultaneously, there are sometimes contradictory decisions in the courts.'

Tax regulation and tax collection are governed by a hierarchy of legal instruments,<sup>18</sup> including laws, ministerial regulations, and directives from the tax directorate general, ensuring the proper functioning of the taxation system. A taxpayer, as a legal subject, bears the obligation to comply with these regulations, with their wealth serving as the taxable object. However, the mens rea of a taxpayer their mental state concerning tax laws plays a crucial role in determining whether a tax offense is committed intentionally or negligently. The three causes of conditions nonretroactivity, fair play, and noncompliance provide insight into the primary motivations behind tax offenses, highlighting how unclear legal provisions, perceived unfairness, or deliberate refusal to comply can drive criminal behavior. Once these elements align, the actus reus of tax crimes materializes through unlawful actions such as tax evasion, fraud, or obstruction of tax authorities. Law enforcement in tax crimes then steps in to impose sanctions, where the litigation process determines the appropriate penalties based on the severity of the offense and the intent of the perpetrator. The interplay of these components underscores the complexity of tax crime enforcement and the need for a balanced legal framework that deters violations while ensuring fairness and compliance.

Taxes absorb at least one-quarter of national income in the typical mixed economy, and governments usually regulate private economic activities and use taxes and subsidies to affect incentives to use resources.<sup>19</sup> The tax postulate reforms since 2000 and thereafter have not yet reflected the constitutional rights of taxpayers. Tax procedural law should align with the universally recognized human rights adopted in the 1945 Indonesian Constitution (UUD NRI 1945).

Research from Dewa states that corporate criminal responsibility is not only based on legal aspects, but also on moral values and decency that apply in society. This article emphasizes the importance of tax education and socialization to increase taxpayer awareness and compliance in order to support

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18 Corinna Coupette (etc)., Measuring Law Over Time: A Network Analytical Framework with an Application to Statutes and Regulations in the United States and Germany, *Front. Phys.*, Vol.9, 2021

19 David N. Hyman., *Public Finance: A Contemporary Application of Theory to Policy*, Tenth Edition, South-Western Cengage Learning, Natorp Boulevard Mason, 2011, page. 8

the country's development.<sup>20</sup> Other research from Rohi states that criminal law in an effort to overcome crime in the field of taxation is to create unity in the criminal law policies that are implemented, the impact of which will not make it difficult for law enforcement officials to apply them in tax legislation. The imperative element contained in tax legislation is to include a principle that the use of criminal sanctions must still pay attention to the principle of subsidiarity.<sup>21</sup>

This study aimed to analyze the criticisms of application the evidence law in the trial process (due process of law) of criminal tax offenses and to describe the shift in the implementation of the *negatief wettelijk bewijs theorie* in the criminal verdict.

## **2. Research Methods**

This type of research is normative juridical which emphasizes the acquisition of logical truth from a normative perspective that is not limited by laws and regulations.<sup>22</sup> The normative juridical approach uses journals, especially on the proof of *Negatief Wettelijk*, and uses a legislative approach, namely reviewing laws and regulations related to the problem.<sup>23</sup>

## **3. Results And Discussions**

### **3.1. Criticism of the Application of the Evidence Law on *Negatief Wettelijk Bewijstheorie* in Law Enforcement of Criminal Tax Offenses**

Law No. 14 of 2002 concerning Tax Courts<sup>24</sup> is a judicial body for taxpayers in tax disputes. It is a specialized court within the administrative court system based on Article 9A of Law No. 5 of 1986 concerning State Administrative Courts as amended by Law No. 51 of 2009. This court examines and decides tax disputes at the first and final levels.<sup>25</sup> Thus, the tax court does not have jurisdiction to adjudicate criminal cases because they are handled within the jurisdiction of administrative courts. Criminal cases are examined and decided in general courts or district courts. The evidence of law in criminal investigations is regulated in Article 183 of the KUHP, which adopts the *negatief Wettelijk Bewijstheorie*. Wirjono Prodjodikoro cited B. Bosch-Kemper, who explained that

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20 Renada Cipta Dewa., Tanggung Jawab Pidana pada Korporasi dalam Tindak Pidana Perpajakan, *Jurnal Hukum Indonesia*, Vol.3 No.3, 2024, page.96-106

21 Glenn Merciano Eben Rohi, I Nyoman Sugiarta, and Ni Made Puspasutari Ujianti, *Jurnal Analogi Hukum*, Vol.4 No.3, 2022, page.226-231

22 Ibrahim, Johnny., *Teori Dan Metodologi Penelitian Hukum Normatif*. Malang: Bayumedia, 2013, page.21

23 Peter Mahmud Marzuki., *Penelitian Hukum*. Jakarta: Kencana Prenada Media Group, 2005, page.27

24 Anis W. Hermawan, Voluntary Disclosure Program In Taxation And Its Cetificates: A Philosophical Perspective, *Journal of Tax Law and Policy*, Vol.1 No.2, August 2022, page.63-70

25 Miriam Millen Mulyana, Ara Hasna Khairunnisa., Conflict Of Legal Norms In Tax Laws And Their Solutions, *Jurnal Equitable*, Vol.10 No.1, 2025, page.186-208

the theory of evidence law requires two criteria. First, judges only impose penalties if there is a conviction that valid evidence of criminal acts has occurred. Second, judges only determine the defendant's guilt if there is valid minimum evidence.<sup>26</sup>

The legal subject of a Verdict of MA.RI No. 3363 K/Pid.Sus/2019 (Verdict of MA.RI No. 3363) is the perpetrator identified as LEW Defendant, who was adjudged by the fact-finding judge (*judex facti*) of the South Jakarta District Court on March 28, 2019. The legal object of MA.RI. No. 3363 is the actions of LEW, which, by the adjudicating judge (*judex jurist*), is found to have committed several independent criminal offenses. The *conditio sine qua non* of the legal subject and object of Verdict of MA.RI No. 3363 are: LEW instructed Was a witness to input tax invoices, invoices, and delivery notes of PT. GMI, in the years 2016 - 2017, redirected invoice orders from several companies, such as PT. BSDA, PT. FTK, PT. MTI, PT. PJM, and PT. WS. Under LEW Defendant's instruction, PT. GMI became a fictitious tax invoice for those companies. LEW Defendant was assisted by several witnesses such as W, DKK, ST, L (investigated separately), N, R, and AS, in the year where the *locus delicti* was at Brigif IV Street No. 18A RT.012 RW.006 Ciganjur South Jakarta. The structured nature of the fraud, involving coordination among several actors and the systematic issuance of fake invoices, underscores the premeditated intent to deceive tax authorities for financial gain. Such fraudulent activities not only result in substantial financial losses for the government but also distort fair market competition by enabling certain entities to unlawfully reduce their tax liabilities. Effective prosecution of this case is crucial to maintaining tax law enforcement, deterring similar fraudulent schemes, and reinforcing the credibility of Indonesia's tax system.

The tax invoices, invoices, and delivery notes submitted by LEW Defendant, together with W and M as witnesses, to the taxpayers of those companies are fictitious tax invoices,<sup>27</sup> and there was no concrete provision of services or work, except with PT. WS. This manipulation of tax documentation was a deliberate attempt to create false transactions, allowing the involved companies to unlawfully reduce their tax liabilities through fraudulent deductions and credits. The absence of real business activities behind these invoices underscores the intentional nature of the tax fraud, as the sole purpose of issuing these documents was to deceive tax authorities and obtain financial advantages. By fabricating transactions, the defendant not only violated tax laws but also contributed to significant state revenue losses and market distortions. This case highlights the critical need for strict regulatory oversight

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26 Wirjono Prodjodikoro., *Hukum Acara Pidana Indonesia*. Sumur: Bandung, 1974, page.34

27 Hidayat, Y.T. and Sinaga, H.D. Legal Reconstruction On Tax Invoices Not Based On Actual Transactions: The Legal Meaning Of The Ultimium Remedium Principle In Sustainability Of Taxpayer's Business In Indonesia. *Scientia Business Law Review (SBLR)*. Vol.1 No.2, Nov. 2022, page.15–35.



and enforcement mechanisms to prevent similar fraudulent practices that undermine the integrity of the tax system.<sup>28</sup>

LEW Defendant gained profits from the issuance of the fictitious tax invoices mentioned above, ranging from 10% - 20% of the total value-added tax amount stated in the tax invoices. By engaging in this fraudulent activity, LEW not only facilitated tax evasion for the involved businesses but also personally profited at the expense of the state's revenue. Such actions not only violate tax laws but also contribute to economic imbalances, as they allow certain entities to gain an unfair advantage over law-abiding taxpayers. The deliberate nature of this scheme demonstrates the severity of the offense, emphasizing the necessity for stringent enforcement and legal consequences to deter similar fraudulent practices and uphold the integrity of the tax system.

The actions of LEW Defendant referred to contravening the KUP Law of 1983 as last amended by KUP Law of 2009 in conjunction with Article 65 Paragraph (1) of the KUHP as stated in the sole indictment by the Public Prosecutor.<sup>29</sup> These violations, as outlined in the sole indictment by the Public Prosecutor, underscore LEW's deliberate intent to manipulate tax regulations for financial gain. By fabricating transactions and enabling tax evasion, LEW not only facilitated unlawful tax deductions but also engaged in repeated criminal acts, as recognized under Article 65 Paragraph (1) of the KUHP, which addresses continuous criminal conduct. The defendant's actions resulted in significant losses to state revenue, undermining the effectiveness of the taxation system and distorting fair economic competition. Given the gravity of these offenses, the application of these legal provisions highlights the necessity of strict penalties to deter similar fraudulent schemes and reinforce tax.

Finally, the *judex jurist* of the MA.RI decided the Cassation of LEW Defendant with the verdict as follows: Rejecting the cassation petition from the Cassation Petitioner/ LIAW EDI WIRAWAN Defendant; Amending the criminal verdict of the DKI Jakarta High Court No. 171/PID.SUS/2019/PT DKI, dated June 21, 2019, amended the criminal verdict of the South Jakarta District Court No. 113/Pid.Sus/2018/PN.JKT.SEL, dated April 11, 2019 regarding the provision of fines to "impose a sentence on the LIAW EDI WIRAWAN Defendant with imprisonment for 4 (four) years and 6 (six) months and a fine of IDR. 12. 254,817,964.00 (twelve billion two hundred fifty-four million eight hundred seventeen thousand nine hundred sixty-four rupiah) with the provision that if the fine is not paid within 1 (one) month after the verdict with permanent legal force, the property of the Defendant shall be confiscated by the Prosecutor to be auctioned to pay the restitution; Ordering the Defendant to bear the litigation costs at the appellate level amounting to IDR2,500.00 (two thousand five hundred Indonesian Rupiah).

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28 Edward Elgar., *Tax, Law and Development*, Edward Elgar Publishing Limited, 2013, page. 8

29 Mahkamah Agung R.I., *Putusan Pidana Mahkamah Agung Republik Indonesia No. 3363 K/Pid.Sus/2019*, 2019. <https://putusan3.mahkamahagung.go.id/>

The evidence system in Indonesia adheres to a negative system of evidence according to law (*negatief wettelijk bewijstheorie*) where evidence must be based on law, namely with at least two valid pieces of evidence.<sup>30</sup> The first criticism of the *negatief wettelijk bewijstheorie*<sup>31</sup> is that judges must be careful, thorough, and mature in evaluating the probative value. They need to examine the minimum threshold of *bewijs kracht* (evidential strength) of each piece of evidence in Article 184 of KUHP. Similarly, how the probative strength inherent in each piece of evidence is used and evaluated must be restrictive within the law's limits.<sup>32</sup>

The second criticism is that, as a specialized court, the Tax Court does not accommodate criminal cases within its power. However, taxation involves the management of state finances, which inevitably includes criminal elements. Lilik Mulyadi argued that criminal law is classified into general criminal law (*ius commune*) and special criminal law (*ius singulare*, *ius speciale*, or *bijzonder strafrecht*). General criminal law provisions apply universally, as in the KUHP. In contrast, special criminal law, according to W.P.J. Pompe, H.J.A. Nolte, Sudarto, and E.Y. Kanter, refers to criminal law provisions regulating specific subjects and actions (*bijzonder lijkfeiten*).<sup>33</sup>

The third criticism is that the judge's subjectivity is limited to the judge's objectivity in deciding cases. Article 3 paragraph (1) of Law No. 48 of 2009 concerning Judicial Power describes the "judge's conviction" as the independence of the judge, free from external interference and free from all forms of physical or psychological pressure, while the judge's conviction is based on belief up to a certain extent supported by clear legal arguments (*laconviction raisonnee*). Thus, the legal assessment of valid evidence predominates over the "judge's conviction" from the judge's conscience-based judgment. Ultimately, the judge's conviction in the *negatief wettelijk bewijstheorie* is limited and dominated by law or regulations.

The constraint of law enforcement in criminal tax litigation in France<sup>34</sup> prioritizes civil evidence in submitting the contents of tax invoices, "...the French courts have always recognized the authority of the tax administration to submit evidence about the real nature of the transaction so that it should be requalified

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30 Ali Yusran Gea., Development of Criminal Evidence Law in Indonesia, *Legal Brief*, Vol.13 No.3, 2024, page.768-779

31 Henry Indragunaa and Faisal Santiago., The Effectiveness of Confiscation of Criminal Assets in Fair Law Enforcement, *Journal of Legal Ethical and Regulatory Issues*, Vol.24, Special Issues.1, 2021

32 M. Yahya Harahap. *Pembahasan Permasalahan Dan Penerapan KUHP: Pemeriksaan Sidang Pengadilan, Banding, Kasasi, Dan Peninjauan Kembali: Edisi Kedua*. Jakarta: Sinar Grafika, 2006, page.43

33 Lilik Mulyadi., Asas Pembalikan Beban Pembuktian Terhadap Tindak Pidana Korupsi Dalam Sistem Hukum Pidana Indonesia Dihubungkan Dengan Konvensi Perserikatan Bangsa-Bangsa Anti Korupsi 2003. *Jurnal Hukum Dan Peradilan*, Vol.4 No.1, 2015, page.101-132

34 Umüt Turksen, Donato Voza, Reinhard Kreissl and Fanou Rasmouki, *Tax Crimes and Enforcement in the European Union: Solutions for Law, Policy and Practice*, Oxford: Oxford University Press, 2023, page.49

for tax purposes. ..., French courts developed the theory of abuse of law in civil law."<sup>35</sup> In England, criminal tax litigation is constrained<sup>36</sup> by the will of the Parliament of the British House of Lords, not by regulatory will. "...specific acts of tax avoidance where Parliament has not done so and that at the end of the day the question will always be whether the event or combination of events relied on amount to a chargeable transaction or give rise to allowable relief within the meaning of the relevant statutory provisions." In the United States, rather than interpreting the law narrowly, its tax courts prioritize the aspect of legal benefits, "...U.S. courts stick to their judicial doctrines, probably because of the common law tradition of legal analysis, where interpreting facts and rules with common sense plays an important role."

### **3.2. Criminal Liability and Shifts of the *Negatief Wettelijk Bewijstheorie***

The OECD states the reasons why perpetrators commit criminal tax offenses as 'most taxpayers voluntarily comply with their tax obligations.'<sup>37</sup> However, some taxpayers persevere in being non-compliant and use any means to evade their tax obligations...<sup>38</sup> According to the theme, the formulation of *actus reus* is the element of action prohibited by tax law. Conversely, *mens rea* is defined as the mental state of the taxpayer and tax officials acting against tax law, depicted in intent and negligence.

The concept of criminal liability is necessary to impose penalties on perpetrators of criminal acts.<sup>39</sup> In the decision-making for punishment in criminal law, there must be openness for the perpetrator to explain why they acted as such. If this openness is disregarded, it negates the *due process* in holding criminal perpetrators accountable. Excuse reasons require the perpetrator to be forgiven due to being unable to act otherwise because of abnormal circumstances. Then, justification reasons need the inability to blame the perpetrator's criminal acts in front of criminal law as a preventive and repressive function of criminal law. Criticism of criminal law disappears because of the proven excuse reasons for the abnormal situation that forced the perpetrator to commit the act.

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35 Nurul Qamara., *Perbandingan Sistem Hukum Dan Peradilan Civil Law System Dan Common Law System*. Makasar: Pustaka Refleksi, 2010, page.32

36 Branislav Hock, Policing Fiscal Corruption: Tax Crime and Legally Corrupt Institutions in the United Kingdom, *Law And Contemporary Problems*, Vol.85 No.4, 2022, page.158-183

37 U Turksen (etc), *Tax Crimes and Illicit Money Flows in the EUs: Comparison and Key Findings*, Tax Crimes and Enforcement in the European Union Solutions for Law, Policy and Practice, Oxford: Oxford University Press, 2023, page. 14-66

38 The Organization for Economic Co-operation and Development (OECD), Fighting Tax Crime: The Ten Global Principles. *Op. Cit*, page 45

39 Doni Anggara., Analisis Tindakan Pemidanaan Percobaan Kejahatan Dalam Delik Aduan, *AL-DALIL: Jurnal Ilmu Sosial, Politik, Dan Hukum*, Vol.2 No.3, 2024, page.38-43

There are three excuses for criminal tax offenses:<sup>40</sup> first, if someone misunderstands the law when dealing with circumstances that constitute tax criminal elements. Second, the presence of coercion beyond the perpetrator's will. Third, the aspect of power command is based on hierarchical position. On the other side, corporate criminal liability<sup>41</sup> in taxation consists of several doctrines: 1) identification doctrine, which focuses on corporate executives; 2) vicarious liability doctrine, which emphasizes the proof of individual or personal mistakes within the corporation; 3) strict liability doctrine, criminal liability that does not require the existence of *mens rea* when the perpetrator commits an offense; and 4) the functional doctrine of criminal liability, which focuses on groups of people based on their functional duties.<sup>42</sup>

Based on the assessment of *judex jurist* in relation to the criminal verdict of MA.RI No. 3363 identified that the object of criminal action of LEW Defendant is the existence of fictitious tax invoice evidence. This evidence becomes dominant in formulating the formal and material delicts of LEW Defendant's crime. Witness testimony becomes accessory evidence to explain the LEW Defendant's fictitious tax invoice evidence.<sup>43</sup> Regarding criminal liability, LEW Defendant deserves to be blamed under criminal law because fault elements are fulfilled, and there are no excuses. LEW Defendant omitted criminal tax offenses by profiting from his actions from the corporations of PT. BSDA, PT. FTK, PT. MTI, PT. PJM, and PT. WS. Thus, the element of strict liability of LEW Defendant has been fulfilled, and he deserves to be blamed by tax criminal law with its legal sanctions.

The evidence of fictitious tax invoices<sup>44</sup> becomes dominant in formulating the formal and material delicts of LEW Defendant's criminal offense. Witness testimony served as accessory or supportive evidence to the aforementioned fictitious tax invoice evidence, aiming to clarify the truth of LEW Defendant's fictitious tax invoice evidence. This proves that the *judex jurist ex officio in casu* assesses the fictitious tax invoice evidence as determinative of LEW Defendant's guilt. In this case, the *negatief wettelijk bewijstheorie* is not fulfilled by the *judex jurist*. Thus, the *positief Wettelijks bewijsheorie* is applied.

Generally, the *positief wettelijk bewijstheori* application is when the defendant has provided valid evidence according to the law; then, the defendant can be

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40 Jadidah, F., The Principle Of Ultimum Remedium In Criminal Tax Matters. *IBLAM LAW REVIEW*, Vol.3 No.3, 2023, page. 124–137.

41 Irawan, D., On One Continued Act In Tax Crime In Indonesia. *Scientia Business Law Review (SBLR)*. Vol.1 No.2, Dec. 2022, page.37–49.

42 Noval Sulaiman and Hudi Yusuf., Strategi Penanggulangan Tindak Pidana Perpajakan Di Indonesia: Studi Tentang Penghindaran Dan Penggelapan Pajak, *Jurnal Intelek Insan Cendekia*, Vol.1 No.9, 2024, page. 5124-5139

43 A.F. Moussa., Electronic Evidence And Its Authenticity in Forensic Evidence. *Egypt J Forensic Sci*, Vol.11 No.20, 2021;

44 Nurdiansyah, D. H., Nawawi, A., Kosasih, K., & Sundamanik, S. J. (2021). Analysis Of E-Invoice Implementation In Input Tax Control: (Case Study at PT.TT Metals Indonesia). *Jurnal Ilmiah Bisnis Dan Ekonomi Asia*, Vol.15 No.1, page.118–125.

declared guilty and must be punished.<sup>45</sup> The judge will try to objectively prove the defendant's guilt without being influenced by personal beliefs. In Europe, the problem regarding proof was in effect during the inquisitorial phase of the law of criminal procedure. The regulation viewed the defendant merely as the subject of examination; in this case, the judge simply became a compliment.<sup>46</sup> S. Tarif elaborated on *inquisitor* as the condition where the suspect is the object to be examined. This examination consists of the suspect's testimony about themselves. Abdurrahman explained that the *inquisitoir* system examines the suspect as the subject in a closed examination. The parties involved in the *inquisitoir* system are the suspect, legal advisers, and the police.<sup>47</sup>

Evidence law<sup>48</sup> of *positief wettelijk bewijstheori* substance revolves around the objectivity of the perpetrator in relation to the criminal verdict of MA.RI No. 3363. The *judex jurist* assesses the objectivity of the perpetrator manifested in the evidence of fictitious tax invoices. These fictitious tax invoices serve as both the *actus reus* and *mens rea* of LEW Defendant. The dominance of proof by *judex jurist ex officio in casu* is directed towards the fictitious tax invoices as the truth. Thus the *negatief wettelijk bewijstheorie* does not apply, instead of the *positief wettelijk bewijstheori* that is applied. This analysis is based on *judex jurist* assessment in relation to the criminal verdict of MA.RI No. 3363 as follows:

The criminal liability of LEW Defendant has been proven for committing an offense and the absence of any justifiable reason according to the legal norms stipulated in Article 39 A letter a jo. Article 43 Paragraph (1) of Law No. 14 of 2021 jo. Article 65 Paragraph (1) of KUHP of 1946. This is evidenced by the intentional creation of invoices not based on actual transactions, and LEW Defendant benefited from the creation of these fictitious invoices.

The assessment of evidence from fictitious tax invoices, invoices, and delivery notes from PT. MGI manipulated by LEW Defendant for ordering tax invoices for several companies dominates evidentiary value. Hence, the judge's *mens rea* towards the defendant is set aside. The assessment of evidence in the case against Defendant LEW heavily relies on the fictitious tax invoices, invoices, and delivery notes from PT. MGI, which were manipulated to facilitate tax fraud for multiple companies. This overwhelming evidentiary value establishes a clear pattern of fraudulent intent and execution, making it the primary basis for judicial evaluation. As a result, the judge's consideration of the defendant's

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45 Hafidz Yanuar Ramadhani and Waluyo., Implementasi Prinsip Exclusionary Rules Of Evidence Dalam Sistem Pembuktian Peradilan Indonesia, Vol.9 No.2, 2024, page.318-330

46 Darwan Prinst. *Hukum Acara Pidana Dalam Praktik*. Jakarta: Djambatan, 1998, page. 28

47 Alfitra. *Hukum Pembuktian Dalam Beracara Pidana, Perdata Dan Korupsi Di Indonesia*. Jakarta, Penebar Swadaya Grup, 2002, page.53

48 Nausheen Atta, The Relationship between The Rule of Law And Environmental Sustainability: Empirical Evidence from The Analysis of Global Indices, *International Journal of Sustainable Development & World Ecology*, Vol.31 Issue.8, 2024, page.1023-1039

mens rea<sup>49</sup> or subjective intent is set aside, as the objective evidence itself sufficiently proves the criminal act. In tax-related offenses, especially those involving document falsification, the existence of manipulated records often outweighs the need to establish the psychological state of the perpetrator, as the fraudulent nature of the transactions is evident. This evidentiary dominance reinforces the strength of the prosecution's case, demonstrating that the fraudulent scheme was not incidental but systematically orchestrated. Consequently, the defendant's liability is determined based on the material proof of wrongdoing rather than any potential claims regarding their intent or awareness, underscoring the strict approach to tax crime enforcement.

The assessment of invoice evidence<sup>50</sup> is related to formal proof or authentication proof. Formal proof involves ensuring that the invoices comply with legal requirements, such as proper issuance, accurate tax identification numbers, and valid transaction details. Authentication proof, on the other hand, determines whether the invoices genuinely represent actual business transactions or are merely fabricated to manipulate tax liabilities. In cases involving fictitious invoices, authorities examine whether the documents correspond to real transactions by cross-checking financial records, delivery notes, and other supporting documents. If an invoice fails authentication meaning it does not reflect a legitimate exchange of goods or services it serves as crucial evidence of fraud. Since tax crimes often involve document falsification, establishing authenticity is a key step in proving fraudulent intent and ensuring that tax laws are properly enforced.

Witness testimony serves as supporting evidence for the existence of fictitious tax invoices. Witnesses, particularly those directly involved in the creation, processing, or submission of these invoices, can confirm whether the transactions were real or fabricated. Their statements help establish the systematic nature of the fraud, revealing details about how invoices were issued without actual business transactions, who authorized the manipulation, and how the scheme operated. Additionally, witness testimony can clarify discrepancies in tax records, verify the deliberate intent behind issuing false invoices, and expose the involvement of multiple parties. In legal proceedings, such testimonies strengthen the prosecution's case by corroborating documentary proof, making it harder for the defense to claim ignorance or unintentional errors. Ultimately, witness statements serve as a vital component in proving tax fraud, ensuring that the evidence is not solely dependent on paperwork but also supported by credible human accounts.

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49 Rauzi, F., Hadi, M. Z. P., & Willems, J., 2023, Motive Evidentiary in Premeditated Murder: Aligning the Norms and Practical. *Jurnal Hukum Novelty*, Vol.14 No.2, page.192–207.

50 Ning Ding, Xinnan Zhang., Risk Assessment of VAT Invoice Crime Levels of Companies Based on DFPSVM: A Case Study in China, *Risk Manag*, Vol.23, 2021, page.75–96

#### 4. Conclusion

The first criticism of the law of proof of the application of *negative wettelijk bewijstheorie* is that judges must be careful, precise, and mature in assessing the value of evidence, by observing the minimum limit of evidentiary strength (*bewijs kracht*) of each piece of evidence in Article 184 of the Criminal Procedure Code. The second criticism is that the Tax Court as a special court does not accommodate criminal cases that are within its authority. However, taxes concern the management of state finances which do contain criminal elements. The third criticism is that the 'judge's belief' based on legally valid evidence is more dominant than the 'judge's belief' based on conscience. The judge's belief in negative wettelijk bewijstheorie is ultimately limited by laws or regulations, not conscience. On the other hand, the criminal liability of the defendant CHT has been proven and there is no justifiable reason according to the legal norms of Article 39A letter a in conjunction with Article 43 paragraph (1) of the 2021 HPP Law in conjunction with Article 65 paragraph (1) of the 1946 Criminal Code. The negative evidentiary law of legal theory in the criminal decision of the Supreme Court of the Republic of Indonesia No. 3363 does not apply, but rather the positive evidentiary law applies. Based on the analysis of the assessment of the evidence of fictitious tax invoices, invoices, and delivery notes, all of these evidence are evidence manipulated by the defendant for several companies. This dominates the evidentiary value, so that mens rea is set aside. The assessment of the evidence serves to prove the letters as formal evidence or valid evidence. Witness statements serve as supporting evidence related to the defendant's fictitious tax invoices.

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