

## Prevention of Tax Avoidance by a Notary on Stock Grant Deeds Affected by Private Relationships

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### Abstract

*Grant transactions are often considered by the public to be an exception to the object of Income Tax. This provision is a mandate of the Income Tax Law by considering the relationship between the giver and recipient of the grant. Stock grant transactions can be excluded as a tax object if they are given to blood relatives in a straight line of one degree and there is no relationship with business, work, ownership, or control between the two parties. Stock grant transactions are carried out with a deed of transfer of rights to shares which can be done privately or by notarial deed. Notaries as public officials who are authorized to make authentic deeds have an obligation to provide recommendations and ensure supporting documents attached by the parties. In terms of preventing tax avoidance, notaries can provide consultation and education based on their general understanding of taxation and review data related to the parties attached to the deed. Based on this, the role of notaries in carrying out their duties in preventing tax avoidance in stock grant transactions will be discussed.*

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## 1. INTRODUCTION

Indonesia is entering an era of information openness, where the tax information system is being digitized to support tax data banks which contain information related to taxpayers, both financial and non-financial. This digitalization, which is managed by the Director General of Taxes, aims to extract data and information for tax monitoring. With this, tax authorities have access to obtain accurate data and monitor taxpayer transactions. Implementation *Single Identity Number* increasing transparency and creating connections and compatibility between state institutions to monitor taxation, based on data that includes information and interactions between taxpayers.

The implementation of the tax system in Indonesia is influenced by taxpayer compliance. The method currently applied is *self-system assessment* where taxpayers have the right to be given freedom in calculating, reporting and making tax payments. In this case there is trust given by the Tax Authority to the public. In reality, there are still efforts or efforts made by the community to reduce it even eliminating tax payments. Various factors encourage taxpayers to take actions that have a negative impact on state tax revenues. Therefore, efforts to avoid taxes that weaken state revenues need to be prevented through collaboration from various parties, including the government, private sector and professions. which impacts compliance with the taxpayer himself. Tax avoidance by the public can have an impact on reducing state income from the tax sector or causing losses

in state revenue. The form taken by taxpayers to escape by exploiting legal loopholes in tax provisions is called *tax avoidance* or tax avoidance. In other words, even though *tax avoidance* which is carried out using legal steps is not a violation, however if it is carried out deliberately for the purpose of reducing the amount of tax owed and causing 'losses to the state treasury' it cannot be justified. Tax avoidance can be carried out by individual taxpayers and business entities. Tax avoidance carried out by business entities carrying out affiliated transactions can be carried out by utilizing unreasonable prices or transaction values, so that even though it can reduce payments for taxes owed, it can still increase profits. Regulations regarding tax authorities being given the authority to re-determine the amount of income and deductions for taxpayers who carry out affiliated transactions are regulated in Article 18 paragraph (3) of Law Number 36 of 2008 concerning the Fourth Amendment to Law Number 7 of 1983 concerning Income Tax as most recently amended by Law Number 7 of 2021 concerning Harmonization of Tax Regulations.

People often think that grant transactions are a form of exemption from income tax objects. This matter motivated the provisions in Article 4 paragraph (3) of the Income Tax Law, which explains that the transfer of assets carried out by means of a gift is not an income tax object. It is important to realize that apart from understanding the provisions regarding grants contained in the Civil Code, there are tax provisions that cannot be separated from additional income or wealth. In accordance with the provisions in Article 1682 of the Civil Code, legal acts in the form of gifts can only be considered valid if they are carried out or stated in a notarial deed. Therefore, related to the problem in this research, namely share grants, it can be said that share grants can be stated in a notarial deed. This provision is in line with the regulations in Limited Liability Companies as stated in Article 56 paragraph (1) of Law Number 40 of 2007 concerning Limited Liability Companies. In the case of a share grant, this can be done or stated in a deed of transfer of rights to shares.

The implementation of this share grant transaction includes the role of a notary in making deeds and providing legal counseling in accordance with the provisions of statutory regulations. Notaries have an important role in proving tax disputes in the Tax Court. For proof, the Notary is a third party whose testimony is required at the tax court or at the preliminary evidence examination stage if it is indicated that there are elements of a criminal offense in the field of taxation. Meanwhile, an authentic deed is made in front The notary has the position of perfect evidence in court. Deterrent Tax avoidance by taxpayers can not only be carried out by the tax authorities as the tax authority, but also by notaries as public officials and public servants. Taxpayer awareness regarding the importance of tax knowledge can support taxpayer compliance. In this research, we will discuss the provisions regarding share grant procedures carried out by means of a notarial deed as well as the role of notaries when carrying out their position in preventing tax avoidance when parties wish to carry out share grant transactions.

## 2. RESEARCH METHOD (12 Pt)

The preparation of this journal was carried out as part of the writing material for the first author's thesis. In writing this paper, it was supported by the second author and third author. The second author contributed to data completeness, analysis, and refinement of opinions in writing the manuscript. The third author provides opinions on the practices and applications that occur and provides input regarding the practices that occur as a comparison material for countries outside Indonesia.

The research method used is empirical normative research using an approach to judicial *case study*. This legal case study aims to review tax court intervention related to tax avoidance in share grant transactions. Bearing in mind that the decision given by a judge in deciding a case is required to first thoroughly examine all factors that influence the

factual aspects (*question of fact*), then adjusted to legal provisions (*question of law*), guided by the values of justice which are integrated in the legal and regulatory system as part of the positive legal framework.

The data used in this research includes primary data and secondary data. The primary data used is the result of interviews with several sources to support secondary data. Secondary data used in this research uses data collection methods by means of literature study. In this research, the legal materials that support secondary data consist of primary, secondary and tertiary legal materials. The primary legal materials used are laws and regulations related to share grant transaction procedures and tax arrangements. Secondary legal materials consist of written materials including books, journals, dissertations and other written materials. To gain clarity regarding primary and secondary legal materials, tertiary legal materials in the form of dictionaries are used. After the data has been obtained in the research carried out, descriptive conclusions will be drawn which discuss the role of notaries in preventing tax avoidance in share grant transactions.

### 3. RESEARCH RESULTS AND DISCUSSION

#### 3.1. Research result

##### Share Grant Transactions

Based on Article 1 number 1 of Law Number 40 of 2007 concerning Limited Liability Companies (hereinafter referred to as "PT Law"), a Limited Liability Company is a legal entity established based on an agreement to carry out business activities based on authorized capital that has been paid in by shareholders in accordance with the laws and regulations that regulate it. Shareholders have a role in making deposits for the shares they own which is also in line with their interests in the right to attend and vote at the General Meeting of Shareholders (hereinafter referred to as the "GMS"). Therefore, it can be said that shareholders have control over the interests of carrying out business activities in a Limited Liability Company.

In practice, shares owned by shareholders are movable objects that transfer rights or *delivery* must be carried out based on actual delivery based on applicable regulations. Shares issued by a Limited Liability Company are in the name of the owner of the shares. Provisions regarding share ownership can be regulated in the articles of association. If these provisions are not met, share owners cannot exercise their rights as shareholders, and these shares will not be counted in determining the quorum according to the articles of association. Share ownership in a Limited Liability Company is assessed based on the number of shares owned by shareholders. The material rights attached to these shares have an influence on the rights held by shareholders. Therefore, with these material rights, shareholders have full authority to sell or donate their shares, and can transfer ownership rights.

In accordance with the provisions in Article 56 paragraph (1) of the Company Law, the transfer of share rights can be carried out by means of a deed of transfer of share rights either privately or by notarial deed. The share grant itself also refers to the regulations in Article 1682 of the Civil Code which explains that there are formal requirements for the legal act of grant, which are stated in a notarial deed. Regarding the share grant procedure itself, you can first pay attention to the contents of the articles of association of the Limited Liability Company. As regulated in Article 57 paragraph (1) of the Company Law, there are provisions that must be fulfilled when transferring rights, namely:

1. Obligation to make an offer first aimed at shareholders with certain classifications or other shareholders;
2. Obligation to obtain prior approval from the company organs; and/or

3. Obligation to obtain prior approval from the authorized agency in accordance with statutory provisions.

It should be noted that the procedures for transferring rights to shares, whether in the form of share grants or share buying and selling, can also be specifically or specifically regulated in the articles of association of a Limited Liability Company as long as these provisions do not conflict with the Company Law. If the articles of association do not contain the above provisions, then these are not required to be fulfilled. If the above provisions are correlated with a share grant, the only condition that can be fulfilled is the obligation to obtain approval from the competent authority as is known to be related to whether a person can become a party as a recipient of the share grant.

After a share grant transaction is carried out, there are legal consequences. In connection with a share grant, there is a change in ownership rights from the grantor to the share grantee, so there will be a change in the composition of shareholders. Based on Article 50 paragraph (1) jo. paragraph (3) of the Company Law, it can be seen that one of the obligations of a director is to create and maintain a list of shareholders along with any changes in share ownership in a Limited Liability Company.

**Taxation of Special Relationships**

One of the factors causing the decline in tax revenues is the low level of taxpayer awareness and compliance. From this condition, there is an urge to carry out tax avoidance (*tax avoidance*), namely efforts to reduce tax liabilities through legal methods that do not violate legal provisions, although this action often takes advantage of loopholes in tax regulations and ultimately harms the state. In practice, the public as taxpayers are often seen as committing tax evasion by exploiting legal loopholes through share grant transactions. Share grant transactions as regulated in Article 4 paragraph (3) of the Income Tax Law, are an exemption from Income Tax objects if the tax provisions are met.

In practice, tax avoidance often takes advantage of legal loopholes to reduce or eliminate the burden of tax payable. Based on Article 18 paragraph (3) of the Income Tax Law, the Director General of Taxes has the authority to re-determine taxable income for transactions carried out by taxpayers who have special relationships. The meaning of special relationships is regulated in tax-related regulations along with derivative regulations. Based on Article 1 number 15 PMK Number 22/PMK.03/2020 concerning Procedures for Implementing Transfer Agreements, special relationships are influenced by the existence of affiliated transactions between taxpayers and other affiliated parties. This special relationship is based on a state of dependency or connection between the affiliated parties. This situation means there is control between one party over another party or can also be said to be an inability to stand independently.



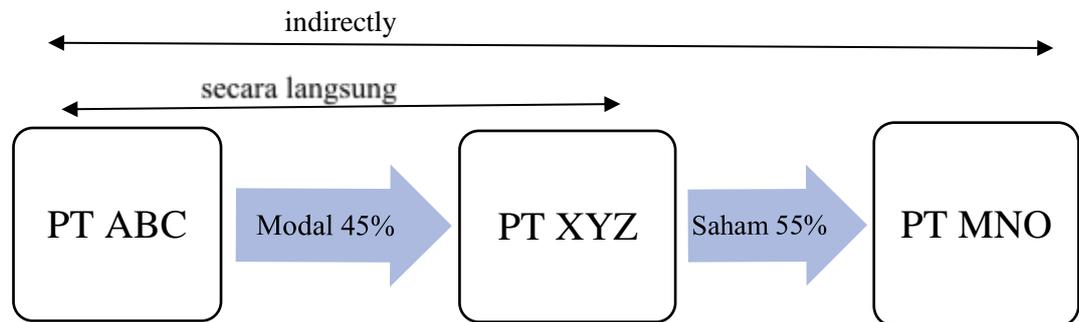
**Figure 1.1 Special Relationship Chart**

As explained in the chart above, affiliate transactions in a special relationship consist of 3 (three) which include:

**1. Ownership relationship or capital participation;**

This ownership is assessed as capital participation by the taxpayer in a company with the following conditions:

- a. Taxpayers have direct or indirect capital ownership of 25% (twenty five percent) of other taxpayers;
- b. There is a relationship between taxpayers based on capital participation of at least 25% (twenty five percent) with 2 (two) other taxpayers or more.



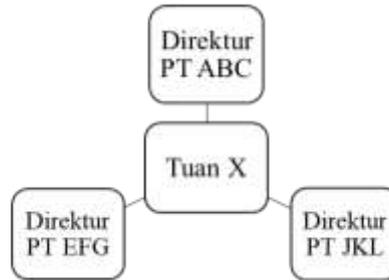
**Figure 1.2 Examples of Special Relationships Based on Capital Participation Directly and Indirectly**

## 2. Dominance relationship

Control is considered to exist if in an affiliate relationship there is a relationship between one taxpayer and another party under the following conditions:

- a. Control of one party over another party, either directly or indirectly;
- b. There are 2 (two) or more parties who are under direct or indirect control;
- c. Control over one and the same party acting in providing decisions both management and operational in a company;
- d. Declare directly that the affiliated parties are in the same business group both commercially and financially; or
- e. Declaring yourself directly that there is a special relationship.

In a control relationship, this can be done through management and technology. Regarding management control, it is carried out directly and indirectly. This can be seen directly based on the business relationships that occur between one company and another without any share ownership. An example of this direct management control is that Budi is the director and Yano is the commissioner at PT DEF, while at PT GHI, Yano acts as director and Budi acts as commissioner. With this, PT DEF and PT GHI are considered to have a direct management control relationship. Or in another example, in a company where a father acts as a director who wants to provide assistance or donations to his son in another company, then there is a direct management control relationship where the receipt of assistance or donations is assessed as a tax object. In indirect management control relationships, it refers to the existence of a relationship without a written management structure of a company. Regarding special relationships based on management control relationships, both directly and indirectly, compliance with the principles of fairness and business standards can be carried out first.



**Figure 1.3 Examples of Special Relationships Based on Dominance Management wise**

Apart from that, there is a special relationship based on mastery of technology. Technological control can occur if there are two or more companies under the same technological control. For example, using a formula that has been created by a company first. So, companies that use this formula do not create or produce but instead use formulas created by other companies. In using this formula, there is technological control by the company that created the formula over the company using the formula. Companies that both use this formula, as well as companies that create and use companies, both have a special relationship based on mastery of technology. If a transaction is carried out, the principles of fairness and business standards must be met first.



**Figure 1.4 Examples of Special Relationships Based on Dominance Technologically**

**3. Family relationships, whether by blood or marriage, in a straight line of descent and/or one degree apart.**

In the explanatory memory of Article 18 paragraph (4) letter c, it is explained that what is meant by blood family relationships in a straight line of one degree of descent are father, mother and child, while blood family relationships in a line of one degree of direct descent are siblings. Meanwhile, what is meant by cementa family in a straight line of one degree is parents-in-law and stepchildren, while family relations in a straight line of one degree are in-laws. So that all transactions or transfers involving the above relationships can be categorized as transactions with parties who have a special relationship based on the Income Tax Law.

Slightly different from the provisions on the exclusion of gift transactions from the object of Income Tax as regulated in Article 4 paragraph (3) f of the Income Tax Law, where gifted assets received by blood relatives in one degree of straight lineage are excluded from the tax object, in this regulation the exception for gifts as a tax object is only limited to the delivery of gifts to blood relatives in one degree of straight lineage as long as there is no relationship with business, employment, ownership or control between the parties concerned.



**Figure 1.5 Differences in Blood and Semenda Family Relations**

Family relationships of one degree of straight line can be assessed from the existence of a relationship between parents and their biological children and there is no business or ownership or control relationship. Therefore, giving gifts which are excluded from this tax object needs to be taken into account regarding their family relationships. Often, there is a misunderstanding regarding blood family relationships with a straight line of one degree and a side line of one degree. One example is the relationship between a father and his stepson.

If the provisions regarding special relationships mentioned above are met in the transaction, then the income from the gift is not subject to income. However, when transferring in any form, including grants, it is necessary to apply the principles of business fairness and customs (*arm's length principle*) which is a comparison between transactions based on a special relationship and transactions with independent parties and can be validated with 'comparable data' which is permitted in accordance with the provisions of the Income Tax Law. This independent relationship is a transaction that is not based on a special relationship. In tax provisions, transactions based on this special relationship must be documented by the Compulsory Officer. Apart from that, Taxpayers are also required to disclose transactions carried out with parties who have special relationships in the Annual Tax Return which is reported every year. The arrangement compared to the documentation requirements is considered to be stricter than the arrangement, and even stricter if the documentation requires disclosure of the transaction transfer price report which will be included in the annual SPT. Based on PMK 213/PMK.03/2016, to carry out transactions based on a special relationship, there is an obligation to attach a Price Determination document or what is known as *Transfer Pricing Document* or called TP Doc. PMK Regulation 213/PMK.03/2016 has now been amended by Minister of Finance Regulation Number 172 of 2023 concerning the Application of Fairness and Business Customary Principles in Transactions Affected by Special Relationships.

### 3.2. Discussion

In connection with Indonesia's entry into the era of information openness, the tax information system is also experiencing digitalization with the aim of supporting tax data banks. The tax data bank contains data and information relating to taxpayers. This data includes financial and non-financial data which is not only limited to the government but also the private sector. Digitization activities to extract data and information are the authority of the Director General of Taxes under the supervision of the Ministry of Finance. One form of effort made by the government to optimize digitalization is *Single Identity Number*. Taxes as state revenue are carried out according

to principles of self-assessment where taxpayers who already have a NPWP can make reports based on their own calculation of the tax owed. Therefore, it can be said that the tax authorities have access to accurate information and carry out *monitoring* on transactions carried out by taxpayers. Implementation of the use of a *Single Identity Number* is a step forward in increasing information transparency. Therefore, it can be concluded that there is implementation of connections and compatibility between coordinating institutions, simplification and synchronization between state institutions which aim to monitor tax activities. The implementation of this connection and suitability mechanism is based on two scenarios, *viz common sense* and *scenario sense* which is data-based which includes information related to taxpayers as well as interactions between taxpayers.

Regarding the background to digitalization of taxation, there is a role that notaries can play in preventing tax avoidance in share grant transactions. The relationship between the notary and the client as the person presenting the authentic deed is assessed by providing services to clients who need notary services, providing services to underprivileged people, as well as providing legal counseling to clients to create legal awareness. Based on the role of the notary, there are 2 (two) things that a notary can do regarding legal counseling in order to prevent tax avoidance in share grant transactions. Referring to the implementation of Article 15 paragraph (2) letter e UUJN, there is counseling provided by notaries regarding tax provisions.

First, notaries can provide legal counseling regarding reporting on receipt of grants in the form of shares. Based on interviews with 2 (two) notaries, to date, to carry out share grant transactions, there is no obligation for notaries to report to the tax authorities. However, tax reporting is still the obligation of filers in their role as taxpayers to report in the Annual SPT report. Based on interviews with tax consultants, even though the applicants considered that the share grant was a transaction that was exempt from tax, the recipients of the grant were advised to still be able to report the assets in their respective annual tax returns. Therefore, the notary can give a warning to the applicant to report the SPT including information regarding the increase in wealth caused by the grant. This goes back to the regulation in Article 4 paragraph (1) of the Income Tax Law, which contains the phrase "income" as an addition to wealth which is not influenced by the name or form of the wealth, but which is determined by the taxpayer or related party in the transaction, more on the substance of the income received by the taxpayer.

Second, Notaries can provide legal counseling in the form of education regarding special relationships in general. As explained above regarding the special relationship criteria for gifts that can be excluded as tax objects, applicants can explain the relationship between the gift giver and the recipient of the shared gift. Notaries can provide legal advice related to family relationships as regulated in Article 4 paragraph (3) of the Income Tax Law. This article is a form of regulation specifically to tackle tax avoidance. In this Article, things are regulated that are not included as tax objects, such as aid, grants, inheritance, assets including cash deposits, contributions, rewards, payments from insurance companies, profits from joint business entities, scholarships, as well as excess balance received by non-profit bodies or institutions that focus on education and/or research/development, and assistance or compensation provided by the Social Security Administering Agency to certain Taxpayers. To prevent tax evasion, the concept is implemented *transfer pricing*. Therefore, to support the prevention of tax avoidance, notaries can direct the meaning of transactions that are not included as tax objects.

Based on the information provided by the applicants, the Notary can confirm whether the relationship between the grantor and the recipient of the grant fulfills the provisions of a straight-line blood family of one degree, such as between parents and biological children, both in terms of ownership and control. Based on a review of 2 (two) tax court decisions, the public may experience errors in understanding blood family relationships of one degree of straight-line descent. Apart from that, in assessing grants as an exception to tax objects, there are aims and objectives in the Income Tax Law which are based on the existence of assistance across families, this can be seen from the existence of the Income Tax Law which is not only a budgetary function, but also a family social welfare function, where the tax system in Indonesia places the family as one economic unit, as stated in Article 8 paragraph (1) of the Income Tax Law.

Capital participation in a Limited Liability Company can be reviewed based on Article 8 paragraphs (1) and (2) of the PT UUPT. The articles of association will also contain the detailed identity of the share owners. Apart from that, the Notary can also pay attention to the statement letter regarding beneficial ownership in a Limited Liability Company which has been registered in the SABH AHU system as one of the systems used by the Ministry of Law and Human Rights of the Republic of Indonesia (Kemenkumham), especially by the Directorate General of General Legal Administration (AHU). Transparency of corporate data regarding ownership or capital participation with a minimum of 25% (twenty five percent) will be recorded in the system based on a statement letter *beneficial ownership*.

Acquisition of share grants that provide fixed profits is considered an income tax object. The notary can also remind the presenters regarding the fulfillment of the requirements for supporting documents, namely *Transfer Pricing Document* (hereinafter referred to as "TP Doc") This document functions as proof that can be carried out by taxpayers in carrying out transactions through special relationships. Based on PMK Number 172 of 2023 concerning the Application of the Principles of Fairness and Business Standards in Transactions Affected by Special Relationships, there are provisions intended for taxpayers to prepare these documents. This document contains information regarding master documents, local documents and country reports. There are provisions that applicants need to pay attention to regarding their obligation to create a TP Doc.

Third, the Notary can carry out verification regarding the identity of the presenters. Based on Article 15 paragraph (3) UUJN, there is the authority of a notary as regulated in statutory regulations. Based on Article 2 of Permenkumham 09/2017 concerning the Implementation of the Principle of Recognizing Service Users for Notaries, the notary can first verify the information of the presenters before making a share grant deed. To strengthen the information provided by the presenters, the notary needs to check the identity of the presenters based on the documents attached by the presenters. This inspection needs to be carried out by a notary to ensure the correctness of the information that will be written in the share grant deed. In accordance with the interests of writing a comparison of share grant deeds, the documents required regarding the identity of the applicants are Resident Identity Cards, Population Identification Numbers, NPWP, Birth Certificates, Family Cards, or a certificate stating that other siblings are aware of the share grant. In addition, the interests of the grantor of shares as a shareholder in a Limited Liability Company can be examined based on the deed of establishment of the Limited Liability Company which contains the articles of association along with other deeds relating to changes to the articles of association. Apart from ensuring that the legal actions carried out by the presenters have fulfilled

the objective and subjective requirements according to 1320 of the Civil Code, this is also done to prevent errors in understanding the intentions of the presenters. As you need to know, the identity and relationship of both parties will be written in the share grant deed. Thus, this verification helps reduce the risk of notaries being involved or participating in tax avoidance practices in the future.

#### 4. CONCLUSION

1. Based on the role of the notary as a maker of authentic deeds, the notary can prevent tax avoidance in share grant transactions to taxpayers who do not have a good understanding of grant transactions which are exempt from tax objects. Notaries have a strategic role in preventing tax avoidance in share grant transactions, through legal counseling regarding tax reporting, understanding special relationships can increase tax compliance of parties as taxpayers through the provisions of Article 4 paragraph (3) of Law Number 36 of 2008 concerning the Fourth Amendment to Law Number 7 of 1983 concerning Income Tax and which has been most recently amended by Law Number 7 of 2021 concerning Harmonization of Tax Regulations.
2. The notary can verify the identities of the parties, as well as ensure that the objective and subjective requirements in the share grant deed are fulfilled so that they comply with applicable tax provisions. Identity verification carried out by a notary based on the documents of the presenters can be used as a way for the notary to provide direction regarding the importance of preparing *Transfer Pricing Document* as a prevention of tax avoidance as regulated in Article 16 paragraph (2) of Minister of Finance Regulation Number 172 of 2023 if the transfer is made to parties who have a special relationship.

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