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THE APPLICABILITY OF ARTICLE 91 SUBSECTION (1) OF LAW NUMBER 28 OF 2009 ON REGIONAL TAXES AND LEVIES CONCERNING THE AUTHENTICITY OF A DEED

I Gede Edy Korneawan, Ni Luh Made Mahendrawati and I Nyoman Alit Puspadma
Magister of Notary, Universitas Warmadewa, Indonesia
Email: edy.korneawan@gmail.com

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Abstract

The Law Number 28 of 2009 on Regional Taxes and Levies creates a conflict: Article 90 says taxes are due when the deed is signed, while Article 91 requires proof of tax payment before the deed can be signed by the Land Deed Official/Notary. This study aims to examine the requirements for drawing up an Authentic Deed in order to have a legal force as solid proof and to examine the legal protection for the community upon the enactment of Article 91 subsection (1) of Law Number 28 of 2009. This study is normative legal research using a statutory and conceptual approach. The legal materials are collected using the document study technique and analyzed using a descriptive method, legal interpretation, and argumentum per analogiam (Legal Analogy). The results of this study indicated that an Authentic Deed is a solid proof comprising head, body and closing of the deed. That deed shall provide certainty on the date of drawing up and signing the deed in order to provide legal certainty. The payment of the Duties on Acquisition of Rights on Land and/or Buildings is not a prerequisite for drawing up an Authentic Deed. The payment may be made after the Notary Deed is ratified and before it is registered to the Land Office by the Land Deed Official. If the Authentic Deed has not been signed or ratified by the Land Deed Official, the transfer of land rights would not happen as there is no written evidence which can protect the buyer.

Keywords: Authentic deed; duties on acquisition of rights on land and buildings (BPHTB); land deed official; notary deed

1. INTRODUCTION

Transferring land rights requires evidence which shall authenticate that there has been a selling and buying process. Evidence in the form of an Authentic Deed can bind the relevant parties and become the legal basis for the transfer of rights. Therefore, the deed shall possess legal force in order to apply as a law and as evidence for the parties to the agreement (Sasauw, 2015).

The signing of the deed shall be done before Notary/ Land Deed Official (PPAT) as a public official who has the authority to make Authentic Deeds hereby having the power to be a solid proof for the transfer of relevant land rights as the PPAT deed (a deed ratified by PPAT) is considered an Authentic Deed (Sutedi, 2006:53). As for the Authentic Deed drawn up by PPAT, in

view of Article 40 of Government Regulation of the Republic of Indonesia Number 24 of 1997 on Land Registration, which is hereinafter called PP 24/1997, the deed shall be registered to the Land Office by the latest seven working days after the signing of the deed has been done.

Before the Deed is registered, there are other requirements which shall be fulfilled, namely Income Tax Payment by the seller and Duties on Acquisition of Rights on Land and Buildings (BPHTB) by the buyer. In relation to the enactment of Law Number 28 of 2009 on Regional Taxes and Levies, the authority to collect BPHTP is delegated to the district/city government.

Article 90 subsection (1) point (a) of Law Number 28 of 2009 on Regional Taxes and Levies stipulates that the payment of BPHTB for the sale and purchase is

effective as the deed is drawn up and signed. Meanwhile, Article 91 subsection (1) of the aforementioned law specifies that the Land Deed Official/ Notary shall only sign the Deed of Land and Building Rights after the taxpayer submits the proof of tax payment. Due to the conflict of norms between Article 91 subsection (1) and Article 90 subsection (1) point (a) of Law Number 28 of 2009 on Regional Taxes and Levies about the signing of the deed by the relevant parties and the Land Deed Official, the date of signing shall determine the authenticity of a deed.

The results study conducted by Anoraga (2018) revealed that Article 90 paragraph (1) letter a and Article 91 paragraph (1) of Law number 28 of 2009 do not have legal certainty, so they can cause legal defects in their implementation. Legal uncertainty is caused because these two articles do not fulfill the principles of making good legislative regulations based on Law number 12 of 2011 concerning the formation of Legislative Regulations. In addition, the results study conducted by Pamelani & Widagdo (2023) showed that a notary must follow the law while putting the parties' preferences or actions into an authentic deed.

Based on the background and the previous study above, this study aims to examine the requirements for drawing up an Authentic Deed in order to have a legal force as solid proof and to examine the legal protection for the community upon the enactment of Article 91 subsection (1) of Law Number 28 of 2009.

2. METHOD

This study is designed in the form of normative legal research, which is also called doctrinal legal research or library research for the reason that this type of research only refers to written laws which are interrelated (Mahendrawati, Sudarsono, Winarno, & Fadli, 2017). The theory underlying this study is the theory of Legal Certainty and Law Protection. In this study, legal materials which have been collected are analyzed using a descriptive method, legal interpretation method, and legal reasoning by analogy.

3. DISCUSSION

The Requirements for Drawing Up an Authentic Deed in Order to Have a Legal Force as a Solid Proof

Article 1868 of the Civil Code mentions types of evidence, one of which is written

evidence. Referring to that article, written evidence is the strongest and fullest evidence among other evidence (Aswani, 2013:34). A deed is written, signed, and prepared as evidence to whom it is subjected (Umbas, 2017).

An Authentic Deed is a legitimate deed made by or before the Land Deed Official as a public official who has the authority to make an Authentic Deed to bind two relevant parties as well as their heirs regarding all matters stated in the letter. Article 1870 of the Civil Code stipulates that if the parties who make the agreement on an Authentic Deed can provide impeccable and irrefutable evidence of what is stated in the deed, this evidence is also valid for the heirs of those to the agreement.

"To those who subject to it, as well as their heirs, or those who inherit their rights, an authentic deed gives a solid proof of what is contained in the deed."

An authentic deed is a binding evidence in which what is written shall be trusted by the judge as it should always be considered true until proven otherwise, as it gives solid proof. The word authentic itself does not require any supporting evidence as it is already binding and impeccable (Subekti, 1990:27).

The strengths of an Authentic Deed as a solid proof are as follows:

The Authentic Deed shows, among the parties subject to, that they have declared what is written in the deed (formal proof);

The Authentic Deed shows, among the parties subject to, that the relevant event has binding evidence (material proof);

The Authentic Deed shall show to the third party that on the date written in the deed the two relevant parties have gone before a Notary/ Land Deed Official to explain what is written in the deed (external proof) (Subekti, 1990).

Henceforth, in order to draw up an Authentic Deed, those requirements shall be fulfilled in compliance with the regulating laws (Rifson, 2010:62).

The failure to meet all the requirements stipulated by the underlying laws can result in the deed only having the power of an underhand deed and this cannot be regarded as solid proof (Rifson, 2010) in relation to Article 1869 of the Civic Code:

"A deed cannot be treated as an Authentic Deed, either because of its incompetence or the incompetence of the public official concerned as well as because

of a defect in its form, has the power as an underhand deed if it is signed by the relevant parties.”

The underhand deed does not have a binding force against the third party as long as it is not affixed with a statement from an authorized public official who in accordance with the regulating law, is a notary, or since the deed can be proven to exist, or since the underhand deed is acknowledged by the third party as stated in Article 1880 of the Civil Code. The underhand deed can only be received as preliminary written evidence.

The Authentic Deed as a solid proof can guarantee legal certainty, both between the parties subject to it and the third party. In order to be able to assure legal certainty, an Authentic Deed has to be drawn up by the public official so its authenticity can conform to Article 1868 of the Civil Code. An authentic deed obtains its authenticity if it meets the following elements:

A deed is drawn up in accordance with the underlying laws and comprises the head, body and closing of the deed. These parts of the deed have to contain authentic elements and what is written in each part will determine if the deed is legitimately written or not.

A deed is drawn up by or in the presence of a public official. If the deed only contains what is experienced and witnessed by a public official, this deed is called a verbal deed or an official deed. This type of deed, to state what is agreed or determined by the parties who come before the notary, is called a *partij deed* (Kansil, 1996:23).

Overall, the requirements of making an Authentic Deed so as to have a legal force as a solid proof is stipulated by Law Number 30 of 2004 on Office of Notary Public as it has been amended to Law Number 2 of 2014 about the Amendments to Law Number 30 of 2004 on Office of Notary Public. As stated in Article 38 of that aforementioned law and in accordance with Article 1868, an Authentic Deed shall be made in the presence of a public official and the form has to conform to the underlying law. Meanwhile, the requirements for authenticity and forms of PPAT Deed (a deed drawn up by a Land Deed Official) are contained in the Regulation of Head of National Land Agency of the Republic of Indonesia Number 8 of 2012 concerning amendments to Regulation of the State Minister of Agrarian Affairs/Head of National Land Agency Number 3 of 1997 concerning

provisions for the Implementation of Government Regulation Number 24 of 1997 on Land Registration, hereinafter referred to as *Perkaban* Number 8/2012. The appendix of the *Perkaban* Number 8/2012 contains the forms of PPAT Deed, which generally has the same form as the deed described in Article 38 of Law on Office of Notary Public (UUJNP), namely head, body and closing of the deed, which is a requirement to determine the authenticity of a deed.

The office of the Land Deed Officials is regulated by Government Regulation Number 37 of 1998 and Government Regulation Number 24 of 2016 as the amendment to Government Regulation Number 37 of 1998 on Office of Land Deed Officials. As Notary and Land Deed Officials (PPAT) are officiated by the same person, and these two positions can complement each other, Law Number 2 of 2014 can also be used to regulate the office of Land Deed Officials, especially in drawing up an Authentic Deed. This is based on the *Argumentum Per Analogiam* (Legal Analogy) method in which similar events as regulated by law are treated the same, in other words, special regulations in the law can be made general to regulate an event that has not yet been regulated by law. This can mean that to fill in the absence of rules regulating the office of Land Deed Officials, the Law on Office of Notary Public (UUJNP) as a special regulation can be made general because of similar events related to agreements, engagements, and drawing up of Authentic Deeds. This is also in accord with the *Lex Superior Derogate Legi Inferiori* principle which says that a higher-level rule abrogates a lower one as Law on Office of Notary Public (UUJNP) has a higher level than Law on Office of Land Deed Officials. Based on what has been discussed above, it can be seen that the payment of Duties on Acquisition of Rights on Land and/or Buildings (BPHTB) is not a requirement in drawing up the Authentic Deed. This BPHTB payment can be done after the Deed of Sale and Purchase has been made and before it is registered with the Indonesian National Land Agency (BPN).

The payment of the Duties on Acquisition of Rights on Land and/or Buildings (BPHTB) shall be made after the signing and ratification of the deed of the transfer of land rights, hereby stipulating that the land rights have been legally transferred. To fulfill the principle of publicity, the transfer of land rights is then registered to BPN and the District/ City

Land Office. When the State is present to fulfill the principle of publicity and the community is obliged to pay the Non-Tax State Revenue (PNBP) to the State, the BPHTB shall be paid off. Article 91 subsection (1) should have stipulated that after the deed of the transfer of land rights is drawn up and signed by the Land Deed Official/ Notary, the taxpayer shall immediately pay off the outstanding BPHTB before the transfer of the land right is registered to the District/ City Land Office.

Legal Protection for The Community upon The Enactment of Article 91 Subsection (1) Law Number 28 of 2009

Sale and purchase are legal acts which require legal certainty and legal protection among the relevant parties. To ensure legal certainty, those who sell and buy need to make an agreement or engagement. An Engagement is a legal act between two people or parties in which one party has the right to demand something from the other party, and that party is obliged to fulfill that demand (Subekti, 2005:1). The agreements contained in a deed must be able to provide legal protection, not only to sellers but also buyers in good faith must be protected by law. The definition of good faith in the Black's Law Dictionary, namely:

"an intangible and abstract quality with no technical meaning or stator definition, and it encompasses, among other things, and honest belief, the absence of malice and the absence of design to defraud or to seek an unconscionable advantage, and an individual's personal good faith is a concept of his own mind and inner spirit and, therefore, may not conclusively be determined by his protestations alone" (Black, 1990:316).

The sale and purchase of land rights results in the transfer of rights from the seller to the buyer. According to Bugerlijk Wet (BW), the buyer will become the owner of the purchased land after completing two types of transfer, namely *de jure* transfer (juridical) and *de facto* transfer (actual). *De jure* transfer is a transfer which is made in accord with the Authentic Deed and is concluded when the Authentic Deed is drawn up and signed by the parties, witnesses, and Land Deed Official (PPAT). The actual transfer is carried out by giving the building keys and the certificate of land rights whose ownership's name has been changed to

the buyer's name. Hereby, the buyer has the right to utilize the land and buildings they have purchased (Siahaan, 2003:81).

In order for the transfer of land rights to be carried out legally, any acquisition of land rights must be done according to the applicable provisions. Currently, the law used as a reference for the transfer and registration of land rights is Article 19 subsection (1) and subsection (2) of the Basic Agrarian Law. Article 1 subsection (4) of Law Number 4 of 1996 and Article 37 subsection (1) of the Government Regulation Number 24 of 1997 require the transfer of land rights to be fully drawn up and ratified by the Land Deed Official (PPAT). If a transfer of land rights is not ratified PPAT, it means that the rights of the land being traded cannot be said to have been transferred to the buyer. In other words, the ownership of land and buildings is still held by the original owner. This is essential for the community, especially the buyers in good faith in order to be harmed (Hastutik, 2006).

The sale and purchase of land rights within the Indonesian National Land Law shall be based on the sale and purchase of customary land with the principle of clarity and cash basis. The clarity principle means that the agreements on the sale and purchase of land rights should be made before the authorized official, which is the Land Deed Official (PPAT), and attended by two witnesses. Meanwhile, a cash basis means the transfer of land rights from the seller to the buyer is legally done when the whole or partial payment is made by the buyer to the seller, in which its settlement can be made when the PPAT deed is signed (Hayati, 2016). The PPAT deed is immediately signed during the process of selling and buying to provide legal certainty to show that there has been a sale and purchase process on that day and date, based on the provision of Article 22 of the Government Regulation Number 37 of 1998.

The Duty for the Acquisition of Rights to Land and/or Buildings (BPHTB) is one of the objective taxes or goods taxes in which the payable tax is first based on what the object of the tax is, and then who the subject of the tax is. The object of the acquisition right must be land or buildings, otherwise, they are not the object of BPHTB (Siahaan, 2003:60). Article 91 subsection (3) of Law Number 28/2009 states that the Head of the Land Office can register the Transfer of Rights after the taxpayer submits proof of their tax payment.

Based on the theory of legal protection, according to Setiono, legal protection is an act or effort to protect the community from arbitrary actions. Referring to that theory, the payment of BPHTB which is made before signing PPAT Deed (a deed drawn up by PPAT) as an Authentic Deed can impose harm on the buyer in good faith, owing to not obtaining legal protection. Accordingly, there is likely a potential for the seller to act arbitrarily and take default actions as there is no Authentic Deed to stipulate that the transfer of land rights to the buyer has been made.

The consequences arising from the enactment of Article 91 subsection (1) of Law Number 28 of 2009 which requires the payment of BPHTB to be made before the PPAT deed is ratified by the Land Deed Official can be summarized as follows:

The PPAT deeds are considered only as Underhand Deeds and aren't accepted as Authentic Deeds;

Buyers have not had solid proof to provide legal protection or to prove that there has been a legal act of selling and buying;

Sellers may take default actions to the buyers;

The PPAT deeds that act as Underhand Deeds may cause unilateral cancellation which can cause harm to the other party;

The cancellation of the sale and purchase after paying off BPHTB harms the buyers as the refund of BPHTB which has been paid takes a long time to process, which causes financial, time, and energy loss.

4. CONCLUSION

The requirements for drawing up Authentic Deeds so as to have a legal force as solid proof are stipulated by the laws. An Authentic Deed comprises the head, body, and closing of the deed. More importantly, it should state the date of drawing up and signing the deed in order to provide legal certainty. The payment of Duty for the Acquisition of Rights to Land and/or Buildings (BPHTB) is not a prerequisite for drawing up the Authentic Deed. Instead, it is an administrative requirement when registering the deed to the Land Office. The BPHTB payment can be made after the deed is ratified and before it is filed by the Land Deed Official (PPAT) to the Land Office. The legal protection for the community upon the enactment of Article 91 subsection (1) of Law Number 28 of 2009 has not been

provided as long as the Authentic Deed has not been signed or ratified by the PPAT, in other words, it can be said that there has not been a transfer of rights, which results in the following situations: a) the PPAT deeds act as Underhand Deeds; b) Buyers have not had a solid proof which provides legal protection for them; c) Sellers may take default actions; d) The agreements can be cancelled unilaterally; e) The cancellation of the sale and purchase after paying off BPHTB really harms the buyers as the refund of BPHTB which has been paid takes a long time to process, which causes financial, time, and energy loss.

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