

# Curator Authority Related *Gijzeling* By Directorate General Of Tax For Taxpayer Institution In Bankruptcy With The Good Faith

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**Abstract** - In the fourth paragraph of the preamble of the 1945 Constitution, the Government of Indonesia has the objective of protecting the entire Indonesian nation and the blood of Indonesia, promoting the common good, enlightening the life of the nation and participating in a world order based on freedom, eternal peace and social justice. To achieve this goal, the State of the Republic of Indonesia collect tax revenues, the state collects taxes from the public. Financial Capability of Taxpayers in performing tax payment obligations to assist the Government plays an important role. The financial capability possessed by the Taxpayer is not always good in terms of liquidity or solvency. Financial Condition of Taxpayer in making payment of tax or debt other than tax can cause Taxpayer to experience Bankruptcy. One form of government effort in collecting taxes on uncooperative taxpayers is by enforcing the *Gijzeling* policy. *Gijzeling* as mentioned in Article 1 number 18 of Law no. 19 of 1997 is a temporary restraint of the time of the Taxpayer's freedom by placing it in a certain place. *Gijzeling* this as one of the forced tools used by the Directorate General of Taxation to force taxpayers to pay off tax payable that must be paid to the state. *Gijzeling* can only be done to the Tax Insurer who has a tax debt of at least Rp. 100.000.000,00 (One Hundred Million Rupiah) and doubt its good faith in paying off tax debt.

**Index Terms**- Taxpayer Institution, *Gijzeling*, Bankruptcy, Good Faith

## I. INTRODUCTION

In the fourth paragraph of the preamble of the 1945 Constitution, the Government of Indonesia has the objective of protecting the entire Indonesian nation and the blood of Indonesia, promoting the common good, enlightening the life of the nation and participating in a world order based on freedom, eternal peace and social justice. To achieve this goal, the State of the Republic of Indonesia was founded based on Pancasila as the philosophy of life of the Indonesian nation consisting of the Supreme Godhead, Just and Civilized Humanity, Indonesian Unity, Democracy led by the wisdom of wisdom in deliberation/representation, and Social Justice for all Indonesian people.

The ideals of law to realize the promotion of the common prosperity one of them is reflected in the preparation of the State Budget (APBN) which contains State Revenue and Expenditure. In APBN, State Income, Tax Revenue becomes the largest component in the source of state income. In order to collect tax revenues, the state collects taxes from the public. Tax collection is regulated by law in accordance with the provisions of Article 23A of the 1945 Constitution of the State of the Republic of Indonesia which states that "Taxes and other charges that compel the state are regulated by law." Considering the importance of Tax Receipts to carry out national development, it is necessary role of the taxpayer community in fulfilling the tax payment obligation under the provisions of taxation, in fact still found the arrears of taxes as a result of not paying off the tax debt properly. Financial Capability of Taxpayers in performing tax payment obligations to assist the Government in the context of realizing a just and prosperous society based on Pancasila and the 1945 Constitution of the Republic of Indonesia (the 1945 Constitution of the Republic of Indonesia) plays an important role. The financial capability possessed by the Taxpayer is not always good in terms of liquidity or solvency. Financial Condition of Taxpayer in making payment of tax or debt other than tax can cause Taxpayer to experience Bankruptcy. One of the legal means required as a form of legal protection against a Taxpayer declared bankrupt is a regulation concerning bankruptcy including regulations concerning postponement of debt obligation as regulated in Law Number 37 Year 2004 concerning Bankruptcy and Postponement of Debt Payment Obligation. Bankruptcy as part of the civil law in debt settlement is expected to be a solution for the business of both legal entities and individuals to get out of the financial difficulties problems (Exit From Financial Distress) both

in the business and financial activities of individuals in general. As a legal instrument for debt settlement, the implementation of bankruptcy provisions cannot be separated from the values of Pancasila and the 1945 Constitution of the Republic of Indonesia to promote the general welfare based on social justice. Therefore, bankruptcy must be implemented by prioritizing a fair solution for all parties, as well as providing real solutions and able to encourage the realization of welfare for society and justice. One form of government effort in collecting taxes on uncooperative taxpayers is by enforcing the Gijzeling policy. Until the end of January 2016, the government showed its firmness by doing Gijzeling against uncooperative taxpayers paying off their tax debt. Gijzeling has also been done before in 2009 and 2011. Directorate General of Taxes noted per February 2015, there are 49 taxpayers who are threatened will be in Gijzeling for tax arrears total value of 1.38 trillion Rupiahs. A total of 49 taxpayers amounted to 56 people under the tax. About 90% of the taxpayers are corporate / corporate Taxpayers. While the rest are individual taxpayers. Gijzeling as mentioned in Article 1 number 18 of Law no. 19 of 1997 is a temporary restraint of the time of the Taxpayer's freedom by placing it in a certain place. Implementation of Gijzeling in accordance with article 33 paragraph (1) of Law Number 19 Year 1997 as lastly amended by Law Number 19 Year 2000 concerning Tax Collection by Forced War, stating that Hostage can only be conducted against Taxpayers who have a tax debt of at least -lack of 100.000.000,00 Rupiahs (One Hundred Million Rupiah) and doubt its good faith in paying off tax debt. Bankruptcy as a Form of Good Faith to prove that the Taxpayer of the Agency in Bankruptcy is indeed experiencing financial difficulties nature of paying the payment of tax debt and other debts. During the process of Bankruptcy which is fully authorized to all Debtor's assets declared bankrupt is the Curator.

Based on the Introduction mentioned above, it can be formulated problems are:

1. How is the Legal Arrangement of Curator Authority in Gijzeling conducted by the Directorate General of Taxes on Taxpayers of Institution in Bankruptcy ?
2. How Does the Meaning of Good Faith Concept Taxpayer of Institution in Bankruptcy ?

## II. LITERATURE REVIEW

### A. System Theory And Theory Of The Legal System

The term system is most often used to denote the meaning of the method or the way and something the set of elements or components that interconnect one other soma into a unified whole. Actually its use is more than that, but less well known. As a set, the system is also defined variously. The term system derives from the Greek "systema" which has some sense:

1. whole compounded of several parts (William A. Shrode and Don Voich, 1974: 115)
2. an organized, functioning relationship between units or components. (Elias M. Awad, 1979: 4)

The Legal System as the Object of Legal Sciences is a law consisting mainly of a collection of seemingly mixed legal rules which is a chaos: an unacceptable number of laws and regulations issued annually. Legal science does not see the law as a chaos or "mass of rules", but sees it as a "structured whole or system". The law itself is not just a collection or summation of rules that each stand alone. The significance of a rule of law is due to its systematic relationship to other laws. Law is a system means that the law is an order, is a unified whole consisting of parts or elements that are closely related to each other. In other words the legal system is an entity consisting of elements that have interaction with each other and work together to achieve the purpose of unity. The unity is applied to the complex juridical elements such as rule of law, legal principles and legal understanding. Each part must be seen in relation to other parts and with the whole, such as a mosaic image; an image that is cut into small pieces to then be connected again so that it looks whole again like the original picture. Each part is not independently independent of the other, but the hook is related to the other parts. Each part has no meaning beyond unity. Within the unity there is no need for conflict, contradiction or contradiction between the parts. If there is a conflict, it will be resolved by and within the system itself and not allowed to drag on. The legal system is an open system. The legal system is a unity of elements (ie rules, determinations) that are influenced by cultural, social, economic, historical and so on factors. In contrast, the legal system affects factors outside the legal system. The rules of the law are open to different interpretations, therefore always evolving. (Sudikno Mertokusumo, 2005: 162).

### B. Theory of Legal Harmonization

Harmonization within the law includes the adjustment of laws and regulations, government decisions, judges' decisions, legal systems and legal principles with the aim of enhancing legal unity, legal certainty, justice and equality, the utility and legal clarity, without obscuring and sacrificing legal pluralism. The harmonization of law done to overcome and prevent the occurrence of legal disharmony requires techniques of legal discovery in order to reinforce the will of law, the will of society, and moral will. Thus harmonization of the law is an activity of discovery of the will of law, the will of society and moral desire through the activities of interpretation of law and legal reasoning, as well as the rational argumentation of the results of interpretation and reasoning law.

There are several steps in the implementation of Legal Harmonization, namely: (Kusnu Goesniadhie, 2006: 62)

1. Identify the location of legal disharmony in the application of laws and regulations.
2. Identify the cause of law disharmony.
3. Conducting legal discovery by echoing the method of interpretation and method of legal construction to change the legal state of disharmony into harmony.
4. Make legal reasoning efforts so that the results of interpretation and construction of the law makes sense or meet the element of logic.

5. Prepare rational argumentation by using good governance understanding to support and explain the results of legal interpretation, legal construction, and legal reasoning. Legal interpretations, legal constructs, legal reasoning, and rational argumentation are made to discover.
  - a. The will of the law or the law (*rechtidee*), namely legal certainty.
  - b. The will of society, that is justice.
  - c. The moral will, that is truth.

There are several Approaches to Legal Harmonization: (Kusnu Goesniadhie,2006:62)

1. Law Harmonization Referring to Legislation.
2. Law Harmonization Referring to Scope
3. Law Harmonization Referring to Institutional Integrity
4. Law Harmonization Refers to Codification and Unification

### **C. Authority Theory**

There are three categories of authority, the Delegative Attribute and the Mandate, which can be explained as follows: (Nur Basuki, Winanrno,2008:70)

1. Authority of the Attribute  
The authorization of attributes is usually outlined or derived from the division of powers by the laws and regulations. In the exercise of this attributive authority, the execution shall be carried out by the officer or body stipulated in the basic rules. Against the attributive authority of responsibility and accountability lies with the official or entity as set forth in the basic rules.
2. Delegative authority  
Delegative authority comes from the transfer of a governmental organ to another organ under the rule of law. In the case of Delegative authority responsibility and accountability are transferred to those authorized and transferred to the delegate.
3. Mandate Authority  
The Authority of the Mandate is an authority derived from a process or procedure of delegation from a higher official or body to a lower official or entity. The authority of the mandate exists in the routine relations of superiors and subordinates, unless expressly prohibited.

In relation to the concept of Attribution, the delegate, the mandate is expressed by J.G. Brouwer and A.E. Schilder, that: (Nur Basuki, Winanrno,2008:74)

1. With attribution, power is granted to an administrative authority by an independent legislative body. The power is core (original), which is to say that is not derived from a previously existed powers and assigns them to an authority.
2. Delegations is the transfer of an administrative authority to another, so that the delegate (the body that has acquired the power) can exercise power its own name.
3. With mandate, there is no transfer, but the mandate giver (mandate) assigns power to the other body (mandate) to make decisions or take action in its name.

### **D. Theory And Tax Collection Principle**

In the literature of State finance, there are theories that provide the basis of justification or philosophical grounds for the State to levy taxes in a way that can be imposed. The theories are as follows: (Mardiasmo, 2002: 3-4)

1. Theory of Insurance : According to this theory, the State in performing its duties / functions includes also the duty of protection of the soul and personal property.
2. Interest theory : According to this theory, taxes have a relationship with the individual interests derived from the work of the State
3. Power Theory of Bearing : This theory suggests that all persons in tax burdens should be just as heavy, meaning that taxes must be paid in accordance with the powers of each individual
4. Theory of Absolute Liability : This theory is based on the understanding of the organization of the State that the State as an organization has the duty to organize the public interest
5. Buy Power Theory This theory emphasizes that tax payments are made to the State to maintain the people of the State concerned, this theory is universal and applicable throughout the world, since collecting taxes means attracting the purchasing power of the public household to the State.

In addition to Tax Collection Theory there are also several Principles and Principles related to Tax Collection, namely: (Eeng Ahman, and Epi Indriani,2008:31)

1. Equality Tax Principle : collection should be fairly adjusted to the ability of the taxpayer. Large companies are taxed heavily, and small companies are taxed low.
2. The Certainty Principle : In the tax collection should be clear, and certainly so understood taxpayers. Thus, calculation and administration will be easy.
3. The Feasibility Principle : Tax collection should not burden taxpayers. For example, a person who is experiencing a business loss should not be taxed so high that his business can be maintained.

4. Economic Principles (Economic) : The economic principle in carrying out tax collection is to consider that the collection fee does not exceed the tax collection result.

Based on the tax collection principle proposed by Adam Smith, Indonesia adheres to the principle of tax collection as follows:

1. Law (juridical), which is clear and based on rules or applicable Laws;
2. legal philosophy, which is fair in accordance with the theory of power (Ability To Pay) proposed by Adam Smith or adjusted to the ability of the taxpayer;
3. Economical, Which is not burdensome taxpayers;
4. Financial, Which is paying attention to the efficiency that the collection fee is lower than the result of tax collection;
5. Elasticity, that is sensitive to income changes that occur.

### **E. Theory Of Justice**

John Rawls (1921-2002) is a thinker who has an enormous influence in the field of political philosophy and moral philosophy. Through the ideas outlined in *A Theory of Justice* (1971), Rawls makes himself a major foothold for contemporary political philosophy and philosophy debates. The thinkers after Rawls had only two choices: Approve or disapprove of Rawls. There is no option to ignore Rawls at all. This is due to Rawls's vast and deep reach of thought: Efforts to transcend the dominant utilitarianism of the era before Rawls and reconstruct Hobbes, Locke and Kant's legacy of social contract theory as a starting point for formulating a comprehensive and systematic theory of justice. (Daniels, Norman, 1975:15)

Theory of Justice is a work of strong, deep, subtle, systematic, political, philosophical philosophy that has not been seen since John Stuart Mill's work, or before. This thinking is the fountain of ideas, integrated together in a good unity. Political philosophers now have to work in Rawls's theory (Nozick, Robert, 1974: 183)

According to Rawls of Justice as Fairness, this concept allows members of a society to collectively accept and obey the social provisions governing the distribution of rights and duties among them. What can encourage these members of the community to volunteer in various social cooperation is a totalitarian social order, members of the community may be compelled to accept and comply with the social terms laid down by the totalitarian regime, as they may feel scared. On the condition of Fairness, Rawls argues that the volunteering of all members of society to accept and obey the existing social provisions is only possible if the society is well ordered in which justice as Fairness forms the basis for the principles of regulating the institutions it contains. (John Rawls, 1971:4)

Starting from the general principle above, Rawls formulates the two principles of justice as follows: (John Rawls, 1971:66)

1. Everyone shall have equal rights over the broadest basic freedom, equal freedom for all;
2. Socio-economic inequality should be arranged in such a way that (it is expected to benefit the most disadvantaged people, and all positions and positions are open to all.

The conclusions drawn from this discussion of Rawls's theory of justice are as follows:

**First**, Rawls argues that the volunteering of all members of society to accept and obey the existing social provisions is only possible if the society is well ordered in which justice as Fairness forms the basis for the principles of the institutional arrangements it contains.

Rawls's starting point in designing his theory of justice is his conception of the moral person who essentially has two moral abilities:

1) the ability to understand and act on the sense of justice and thereby also be encouraged to seek a social cooperation; and 2) the ability to form, revise, and rationally seek to realize good concepts. Rawls calls these two abilities a Sense of Justice and a Sense of the Good.

**Second**, Rawls considers that a Fair deal can only be achieved by an impartial procedure. Only by an impartial procedure can the principles of fairness be considered Fair. Therefore, for Rawls, fairness as Fairness is "pure procedural justice". In this case, what is needed by those involved in the process of formulating the concept of justice is just a fair (impartial) procedure to ensure a fair outcome as well.

**Third**, Rawls emphasizes the important position of a Fair procedure for the birth of decisions that everyone can accept as fair. The procedure of this Fair can only be met if there is a contract climate that allows the birth of a decision with the ability to guarantee a fair distribution of rights and obligations. Rawls asserted the importance of all parties involved in the process of selecting the principles of justice, in an initial condition which he called the "Original Position". Here, the primal position is a demand for justice in the sense Fairness can be obtained. This primal position also serves as a liaison between the concept of moral person on the one hand, with the principles of justice on the other.

**Fourth**, Rawls believes that the moral persons who conduct deliberations in the primal position will surely choose the principles of justice formulated as follows: 1. Everyone must have equal rights over the broadest basic freedoms, equal freedom for all; 2. Socio-economic inequality should be arranged in such a way that (a) it is expected that the Member benefits for everyone, and (b) all positions and positions are open to all.

## III. DISCUSSION

### **A. Authority Of Curator in The Implementation Of Gijzeling By the Directorate General Of Tax On Taxpayer Of Institution in Bankruptcy**

There is a Gijzeling-related norms conflict between Law Number 19 Year 2000 and Law Number 37 Year 2004, as well as Conflict of Authority between Receiver and Directorate General of Taxes. For the resolution of the above mentioned Normal Conflict, if the Debtor is declared bankrupt then the hostage implementation of the Taxpayer must be released, considering that Bankruptcy is a Private Law which must be applicable Special compared to Tax Collection by Forced Letter. Law which is Public Law. The Principal

Objective of the Bankrupt Debtor must be released in bankruptcy so that the curator can freely to communicate with the debtor, especially in making the bankruptcy property if the Debtor In Insolvency. However, in order to give a sense of Justice to Creditors in this case Preferential Creditors are related to Tax Bills on Debit Bankers, Curators must maintain harmonization related to private interests and Public interests, So long as the Bankruptcy Process Curator has the Absolute Authority of the Bankrupt Debtor, if necessary if the Debtor is not good. Implementation of a Taxpayer Entity that is declared bankrupt must be terminated until the bankruptcy process is terminated. The Government in this case the Directorate General of Taxes shall not be concerned with the payment of the Tax Debt, since the Receiver must verify the Tax Claim verification, so that if the Bankrupt Property of the Debtor (Taxpayer of Bankruptcy) is sufficient to be paid for the tax debt. The ability of the Bankrupt Debtor to make the settlement of the Tax debt is in accordance with the Tax Principle related to the ability to pay. The protection of the creditors and the Debtors in the bankruptcy process must be kept under guard by the Curator, so that all Parties do not feel disadvantaged or benefited to certain parties. Law is a system means that the law is an order, is a unified whole consisting of parts or elements that are closely related to each other. In other words the legal system is an entity consisting of elements that have interaction with each other and work together to achieve the purpose of unity. The unity is applied to the complex juridical elements such as rule of law, legal principles and legal understanding. Each part must be seen in relation to other parts and with the whole, such as a mosaic image of a cut image into small pieces and then reconnected to appear intact again as before. Each part is not independently independent of the other, but the hook is related to the other parts. Each part has no meaning beyond unity. Within the unity there is no need for conflict, contradiction or contradiction between the parts. If there is a conflict, it will be resolved by and within the system itself and not allowed to drag on.

Thus, the essence of the system, including the legal system, is an essential unity and fragmented in sections, in which every problem or issue finds an answer or completion. The answer lies within the system itself. Like the system in general, the legal system also has a consistent or permanent nature It has been argued that within the system is not desired a conflict and if there is a conflict will not be allowed. Because in human society there are many interests, it is possible that there is a conflict between these interests. It is possible that there is a conflict between laws and regulations, between the law and the custom, between the law and the court decision. For that it is necessary to have a general provision that its implementation is fixed or consistent. In the event of a conflict, for example between two laws, it will consistently apply the principles of *lex specialis derogat legi generali*, *lex posteriori derogat legi priori* or *lex superior derogat legi inferiori*. Related to the Authority of Receivers in Law Number 37 Year 2004 concerning Bankruptcy and Suspension of Debt Payment Obligation to Debit Bankers, with the Authority of the Directorate General of Taxes to perform Gijzeling against Taxpayers in Bankruptcy in accordance with Law Number 19 Year 2000 regarding Tax Collection by Letters Forcible, there has been a conflict, for it as a legal system then between the two Laws need to be Harmonized Law, in order to achieve the Legal Objectives of providing certainty, benefit, and justice. Related to the Bankruptcy Procedure, Law Number 37 Year 2004 concerning Bankruptcy and Postponement of Obligation of Debt Payment is a *lex specialist derogat legi generali* against Law Number 19 Year 2000 regarding Tax Collection by Forced Letter.

The Law Harmonization Effort is the best step in solving a Conflict of Legislation in a Legal System. There are several steps and approaches in conducting Legal Harmonization. In general these steps are:

1. Identify the location of legal disharmony in the application of laws and regulations.
2. Identify the cause of the Dis harmonization of the Law
3. Efforts of legal discovery by using methods of interpretation and methods of legal construction to change the legal state of disharmony into harmony.
4. Efforts of legal reasoning for the results of interpretation and construction of the law to make sense or meet the elements of logic.
5. Preparation of rational arguments by using good governance understanding to support and explain the results of legal interpretation, legal construction, and legal reasoning.

The legal harmonization approach that can be used is:

1. Law Harmonization refers to the Laws and Regulations.
2. Harmonization of Law refers to Scope.
3. Law Harmonization refers to Institutional Integrity.
4. Law Harmonization refers to Codification and Unification.
5. Harmonization of Law refers to the laws and regulations of legislation.

In order to harmonize the law relating to the existence of legal dis harmonization in the Authority of Receivers and Directorate General of Taxes to perform Gijzeling and Authority of Receivers During bankruptcy process it can be done Harmonization of Law by referring to the rules of scope legislation, and Institutional Coherence. Harmonization of Laws Related to the Authority of Receivers in Bankruptcy of Corporate Taxpayers against Gijzeling by the Directorate General of Taxation there are some conditions which can be explained as follows:

1. Taxpayer Agency that has been done by Gijzeling Directorate General of Taxes, then there is in a bankrupt position.
2. Taxpayer Agency that has not been done Gijzeling by Directorate General of Taxes, then there is in a bankrupt position.

Each Legal Harmonization for each position / section mentioned above can be explained as follows: In accordance with the Principle of Law in Bankruptcy is to maintain the balance of Rights and Obligations of Debtors and Creditors and to provide Legal protection related to the interests of Debtors and Creditors, then If there is a corporate taxpayer that has been done Gijzeling By Directorate General of Taxes, then the body taxpayer in the position Bankrupt, must be released in accordance with the provisions of Article 31 Paragraph (1) of Law Number 37 Year 2004 concerning Bankruptcy and Postponement of Debt Payment obligations.

During the process of bankruptcy the Receiver Has Absolute Authority in relation to the Borrower, since the Receiver requires a good Communication with the Creditor in order to secure the Debtor's Property which is declared Bankrupt. Gijzeling conducted by the Directorate General of Taxes against the Taxpayer of the Agency in Bankruptcy, may hinder the Main Duty of the Curator during the Bankruptcy Process.

The act of releasing Gijzeling against the taxpayer of the Entities in bankruptcy shall not be deemed to be detrimental to the Directorate General of Taxes, which has a Role to collect the State Revenue, since the Directorate General of Taxes as the Preferred Lender shall not be concerned with the Debtor's Debt Distribution during the Bankruptcy process to pay off all debts -he did. The In-duty Curator will provide a balanced legal protection against the Directorate General of Taxes, as one of the Creditor in bankruptcy. Main Objectives Gijzeling release By the Directorate General of Taxes, during the Bankruptcy Process are:

1. Assist the Curator in performing his duties during the Bankruptcy Process.
2. Make Communication more smoothly between the Receiver and the Taxpayer of the Agency in Bankruptcy, mainly related to the Meeting of Creditors, and Debt Verification.
3. Accelerate the Bankruptcy Process is complete, so that all the interests of creditors to the Lost Debtor Treasures can be protected.
4. Assist the Curator to be able to provide Legal Certainty and Justice against the Creditors in Bankruptcy.

With the action to release Gijzeling conducted by the Directorate General of Taxes, in order to expedite the Bankruptcy Process, it is expected that the Harmonization of Law related to the Authority of Receivers Associated Gijzeling Taxpayer Agency in Bankruptcy by the Directorate General of Taxation, this condition also in accordance with the principle of Legal Preference is lex specialist derogat legi generali, namely Law Number 37 Year 2004 concerning Bankruptcy and Postponement of Debt Payment Obligation is lex specialis derogat legi generali against Law Number 19 Year 2000 concerning Tax Billing with Forced Letter. Associated with the Bankruptcy Conditions of the corporate Taxpayer in bankruptcy that has not been done by Gijzeling Directorate General of Taxes, the Authority of the Receiver is Absolute against the corporate Taxpayer in Bankruptcy. Therefore, the Directorate General of Taxes cannot act directly against the Taxpayer of the entity under the Bankruptcy. All Legal Actions done by the Directorate General of Taxes are not permitted directly against the Taxpayer of the Agency in the bankruptcy, but must be through the Receiver as the person who is fully responsible to the corporate taxpayer in Bankruptcy.

Related to the Law Harmonization in this condition, the Directorate General of Taxes should not worry about the possibility of the existence of tax debt to be paid by the Taxpayer of the Agency in the bankruptcy, because during the bankruptcy process the Curator will conduct Tax Verification to the Directorate General of Taxes and will invite the Directorate General tax as one of the creditors in bankruptcy.

The above actions are expected to avoid any conflict of interest between the Directorate General of Taxes and the Receiver, which may result in a Lawsuit made either by the Directorate General of Taxes or by the Curator. The main objective of the above Law Harmonization is to avoid conflict of norms and all parties will not benefit, and can create simplicity of law, legal certainty and justice.

### ***B. The Meaning Of The Concept Of Good Faith for taxpayer Of Institution in Bankruptcy***

Based on the explanations of History, Concepts, and some cases related to the understanding of the meaning of Good faith, then, in relation to Good Corporate Taxpayer Concept In bankruptcy, will be used some understanding of good faith in the Contract. The main reason for the approach of good faith intentional analysis used is on the contract are:

1. Implementation of Gijzeling by the Directorate General of Taxation against the Taxpayer of the Agency in Bankruptcy is the existence of Tax arrears of at least Rp.100.000.000 (One Hundred Million Rupiah) and doubt the Good Faith.
2. The taxpayer's commitment in the bankruptcy in conducting the payment of its tax debt to the Directorate General of Taxes can be viewed as a consensuality in the Contract between the corporate Taxpayer in Bankruptcy with the Directorate General of Taxes related to the Tax Debt.

Based on the above considerations, the wetting to understand the meaning of the concept of good faith in the consideration to perform Gijzeling can be described as follows: According to Adam Smith (The Origin of The Four Maxim Theory in the book "Wealth of Nations") there are principles in tax collection:

1. Equality Principle: means the principle of equilibrium with the ability or principle of justice and it is defined that the tax collection must be fair, in accordance with the ability and income of the taxpayer (Ability To Pay), impartial and discriminatory.
2. Certainty Principle: Certainty principle is defined as the legal certainty principle in which any tax levies imposed shall be based on the Law and there shall be no deviations.

3. Principle of Convenience of Payment: This principle is also called the principle of collecting tax on time, the tax is levied when the taxpayer is in a good moment and there is a financial ability, for example when receiving new income tax income) or get a prize (gift tax).
4. Efficiency Principle: the cost of tax collection is done as efficiently as possible so that no tax collection fee is greater than the tax revenue itself.

This good faith concept is usually paired with Fair Dealing. Goodwill is also often associated with the meaning of Fairness, Reasonable standard of fair dealing, decency, Reasonableness, A common ethical sense, A spirit of solidarity, and community standards. Given the good faith in the contract is a doctrine or principle derived from Roman law, then to get a better understanding must be learned from Roman law. The doctrine begins the Ex Bona Fides doctrine. The doctrine that requires good faith, in the contract has a long history in the course of Roman law. The development of good faith in Roman contract law can not be separated from the evolution of the contract law itself. Initially the Roman contract law was only related to *Iudicia Stricti Iuris*, a contract arising from legal acts (*Negotium*) that strictly and formally referred to *Ius Civile*. If a judge faces such a contractual case, the judge must decide upon it in accordance with the law. The judge is bound to what is expressly stated in the contract (*Express Term*). Then *Iudicia Bonae Fidei* also developed. The legal act based on *Iudicia Bonae Fidei* is called *Negotia Bonae Fidei*. This *Negotia* comes from *Ius Gentium* which requires the party to make and execute the contract to be in good faith

The good faith in Roman contract law refers to the three forms of behavior of the parties to the contract, namely:

1. The parties shall keep their word or word.
2. The Parties shall not take advantage of any misleading action against either party.
3. The Parties shall comply with their obligations and behave as respectable and honest persons, even if such obligations are not expressly agreed upon.

The Roman legal contract law is the provision of (*maxim*) *Pacta Sunt Servanda*, which serves as the basic provision of good faith. Thus, *fides* mean as belief in a person's words. *Bona fides* are applied to confirm the contents of the contract. The belief in one's words is a prerequisite for a legal relationship, Cicero describes it as the *fundamentum iustitiae*. *Bona fides* demands not only the fulfillment of the contract itself but also requires that the parties act in an honest manner, affecting the course of contract execution. Lombardi and Wieacker believe the teachings of the *fides* as a protection for one's interests so that people keep their promises, so according to Norr in *fides* combined two meanings, namely trust and trustworthiness. The parties shall not take advantage of any misleading action against either party. Anything contrary to good faith should be considered in a sale and purchase agreement, for example, property sales without explanation is subject to a servitude, since the sale and purchase agreement is based on good faith, there should be no fraud there. So a salesperson must be responsible to the buyer if he or she knows about selling someone else's property while he denies that the property belongs to no one else. The medieval law scholars concluded that good faith here means there must be no *dolus* or deceit.

For Roman law, actions contrary to good faith are dishonesty (*dolus malus*). In a narrow sense, such dishonesty only means fraud. In a broader context, it is applied in all acts, all social behavior as opposed to good faith. The third form of goodwill in the Roman contract law means that good faith is an action or behavior expected of an honorable or honest person who is required in any form of transaction. In one text the Roman law states, "nothing is more in agreement with the good faith that the do not want to agree by contracting parties. Roman law recognizes the existence of an informal consensual contract, if there is a dispute between the parties relating to the provision which expressly regulates the rights and obligations of the parties, the judge decides what should be based on good faith, this means that the parties are not only bound to what is expressly stated in the contract, but also to what is believed to be naturally implied in the agreement The latest concept of good faith in the British common law system was discovered by Sir Anthony Mason in a lecture at Cambridge University in 1993 which stated that the concept of good faith includes three doctrines related to: (James Gordley,2000:94)

1. An obligation for parties to cooperate in achieving the objectives of the contract (honesty of the promise itself)
2. Fulfillment of standards of respectable behavior; and
3. the fulfillment of reasonable standards of contract relating to the interests of the parties.

Subjective good faith is associated with the law of things. Here we find the term holder with good intentions or buyers of good faith goods and so on as opposed to bad-tempered people. A good-faith buyer is someone who buys the goods with confidence that the seller is really the owner of the goods he or she sells. He had no idea that he was buying goods from people who were not their owners. He is an honest buyer. In the law of things, good faith is defined as honesty. A good-faith buyer is an honest person who does not know of any defects inherent in the goods he or she buys. It means a defect of its origin. In this case, good faith is a subjective element. This subjective good intentions are related to mental or psychic whether the person is aware of or knows that his or her actions are contradictory or not in good faith.

The good faith of contract implementation refers to the objective good faith. The standard used in good objective Faith is an objective standard that refers to an objective norm. The behavior of the parties to the contract should be tested on the basis of the unwritten objective norms developed within the society. Good faith provisions refer to unwritten norms that have become legal norms as a separate legal source. The norm is said to be objective because the behavior is not based on the contention of the parties themselves, but the behavior must be in accordance with the general assumption about the good faith.

The standard actually refers to the standards applicable in Roman law. In Roman law, good faith is a universal social norm governing social interrelationships, Which is every citizen has an obligation to act in good faith with all citizens. It is an objective concept universally applied to all transactions. This corresponds to what the Roscoe Pound says of a postulate: "Men must be able to

assume that they are dealt with in the general intercourse of society will act in good faith." Thus, if a person acts in good faith according to an objective standard of good faith based on customary social expectation, then the other person will act the same to himself. This is contrary to the concept of good faith adopted by Canon law which places the good faith more as a universal moral norm rather than as a social norm. With such an approach, the contextual meaning of good faith is determined by every individual because, lest one breach a duty to God by fading or refusing to keep's promise, it is important to act in a reasonable or rational way against others. This is a subjective concept of good faith which refers to a subjective moral standard because it is based on individual honesty.

Since the contract is binding on both creditors and debtors, the contractors are creditor and debtor. Creditors and debtors are required to carry out contracts appropriately. Given in reciprocal contracts, both sides are reciprocated either as creditors or debtors, then those who have to execute the contract in good faith are both parties to the contract. What he means here is that the creditor exercises his right to good acts, and does not demand more than what he deserves. The creditor also will not burden the debtor with more costs than the winning required. The debtor must also perform its obligations well, will not make billing becomes difficult and convoluted.

In contract law, good faith has three functions. Good faith in its first function teaches that all contracts must be interpreted in accordance with good faith. The second function is the added function. The third function is the limiting and nullifying function.

Unlike the good faith functions mentioned above, in German contract law, good faith is believed to have three basic functions. First, as legal base on interstitial law-making by judiciary. Second, as the basis of legal defenses in private law suites. Thirdly, Siebert distinguishes the three functions of good faith under Article 242 BGB as in the Netherlands. First, the function change. Second, limiting functions. Third, Wegfall der Gesschaftsgnindlage. In Belgium it is also commonly said that good faith has three functions, namely the function of interpretation (fonction interpretativa), the function of adding (fonction completive) and the restrictive function (fonction restrivtive, limitative, moderattice). Sometimes it is added to the fourth function, which allows the court in certain situations to change the contents of the contract, but this fourth theory is generally not accepted by courts and academics. The implementation of these good faith functions in court practice still creates some problems. (John Klein, 1993:116)

1. Contract for payment Tax Interpretation Must be Based on Good Faith

A contract consists of a series of words. Therefore, to establish the contents of the contract, it is necessary to make an interpretation, so that clearly known intent of the parties in the contract. According to Corbin, interpretation or interpretation of the contract is a process in which a person gives meaning to a symbol of the expression used by others. Commonly used symbols are either one by one or group, oral or written words. An act can also be an interpretable symbol. the interpretation of the contract is the determination of the meaning that must be determined from statements made by the parties to the contract and the legal consequences arising therefrom. If the contract is to be interpreted in accordance with good faith, then each contract must be interpreted in a fair or proper manner.

2. Good Faith's in Payment Tax Adding Function With its second function, good faith can add to the contents of a particular agreement and may also add to the terms of the law regarding the treaty. Such a function may be applied where any rights and obligations arising between the parties are not expressly provided in the contract.

3. Good Function of Restricting and Abolishing Faith In the third good faith function it is a limiting and nullifying function. Some pre-war legal scholars argue that good faith also has this function.

With this doctrine can be reached a legal effort for parties who are not serious in negotiating where the consequences of these conditions can harm other parties. This doctrine may also serve as a basis for legal action against a party that cancels a negotiation in which the cancellation or termination of the negotiation may be detrimental to the other party. Based on the understanding of the Concept of Good faith above can be formulated in relation to the meaning of good faith Taxpayer Agency as a consideration Directorate General of Taxation To perform Gijzeling and related to the tax payments are as follows:

- a. The taxpayer of Institution is willing to provide assurance to the Directorate General of Taxes by making Contract to make Tax payments.
- b. Taxpayer of Institution always responds to the appeal from the Directorate General of Taxes to pay off the tax debt;
- c. The taxpayer of Institution shall explain to the Directorate General of Taxation in relation to the actual financial condition of the nature with the intention that the Directorate General of Taxation may consider the Solution for the Taxpayer of the Agency to be willing to pay off the tax debts even if by installment;
- d. The taxpayer of Institution is willing to submit all his property to pay off the tax debt.
- e. The taxpayer of Institution shall not leave Indonesia forever or shall not intend to do so.
- f. The taxpayer of Institution do not intend to transfer the goods owned or controlled.
- g. The corporate taxpayer does not intend to discontinue or undermine the company's activities, or the work it does in Indonesia;
- h. The taxpayer of Institution shall not dissolve its business entity or merge its business, or divest its business, or transfer the company owned or controlled, or make any other form of change.
- i. The taxpayer of Institution shall not endeavor to use the law in its favor in order not to pay the tax debt.
- j. The taxpayer of Institution shall provide Audit reports audited by the Public Accounting Firm in relation to its financial condition primarily, to prove that it is in an Insolvency, (Balance Sheet and Operational Cash Flows) condition and subject to its continuing constraints (Going Concern).

- k. If The taxpayer of Institution in the bankruptcy entity is indeed in fact a financial hardship (Experiencing Insolvency) in making its payment to its Creditor, not as an intention to avoid the implementation of Gijzeling by the Directorate General of Taxes.
- l. The taxpayer of Institution shall not profit by misleading action against the Directorate General of Taxes.
- m. The taxpayer of Institution shall comply with its obligations and behave as respectable and honest, although such obligations are not expressly agreed upon in the conduct of tax liabilities.
- n. If The taxpayer of Institution is in bankruptcy, if after the bankruptcy terminates, and then attempts again resulting in adequate financial condition, then with full awareness will make payment of the Tax Debt, in accordance with the fulfillment of the agreed contract.

#### IV. CONCLUSION

- 1. During the Bankruptcy Process, the Receiver has the Absolute Authority of the corporate Taxpayer in Bankruptcy, so that all legal actions or acts of Gijzeling made against the Taxpayer of the Agency by the Directorate General of Taxes prior to and during the bankruptcy process shall obtain Permission from the Receiver, including the release of the Gijzeling conducted by the Directorate General of Taxes against Taxpayers who have just been decided by Bankruptcy Commercial Court.
- 2. The Meaning of Good Corporate Tax Object of the Agency as a consideration to be conducted by Gijzeling Directorate General of Taxes is as follows:
  - o. The taxpayer of Institution is willing to provide assurance to the Directorate General of Taxes by making Contract to make Tax payments.
  - p. Taxpayer of Institution always responds to the appeal from the Directorate General of Taxes to pay off the tax debt;
  - q. The taxpayer of Institution shall explain to the Directorate General of Taxation in relation to the actual financial condition of the nature with the intention that the Directorate General of Taxation may consider the Solution for the Taxpayer of the Agency to be willing to pay off the tax debts even if by installment;
  - r. The taxpayer of Institution is willing to submit all his property to pay off the tax debt.
  - s. The taxpayer of Institution shall not leave Indonesia forever or shall not intend to do so.
  - t. The taxpayer of Institution do not intend to transfer the goods owned or controlled.
  - u. The corporate taxpayer does not intend to discontinue or undermine the company's activities, or the work it does in Indonesia;
  - v. The taxpayer of Institution shall not dissolve its business entity or merge its business, or divest its business, or transfer the company owned or controlled, or make any other form of change.
  - w. The taxpayer of Institution shall not endeavor to use the law in its favor in order not to pay the tax debt.
  - x. The taxpayer of Institution shall provide Audit reports audited by the Public Accounting Firm in relation to its financial condition primarily, to prove that it is in an Insolvency, (Balance Sheet and Operational Cash Flows) condition and subject to its continuing constraints (Going Concern).
  - y. If The taxpayer of Institution in the bankruptcy entity is indeed in fact a financial hardship (Experiencing Insolvency) in making its payment to its Creditor, not as an intention to avoid the implementation of Gijzeling by the Directorate General of Taxes.
  - z. The taxpayer of Institution shall not profit by misleading action against the Directorate General of Taxes.
  - aa. The taxpayer of Institution shall comply with its obligations and behave as respectable and honest, although such obligations are not expressly agreed upon in the conduct of tax liabilities.
  - bb. If The taxpayer of Institution is in bankruptcy, if after the bankruptcy terminates, and then attempts again resulting in adequate financial condition, then with full awareness will make payment of the Tax Debt, in accordance with the fulfillment of the agreed contract.

#### REFERENCES

- [1] William A. Shrode dan Don Voich Jr, *Organization and Management: Basic Systems Concept*, Irwin Book Co, Malaysia, 1974, h.115
- [2] Elias M. Awad, *System Analysis and Design*, Richard D. Irwin Homewood, Illinois, 1979, h.4
- [3] Sudikno Mertokusumo, *Mengenal Hukum: Suatu Pengantar*, Universitas Atma Jaya, Yogyakarta, 2005, h.162
- [4] *Kusnu Goesniadhie S.*, Harmonisasi Hukum Dalam Perspektif Perundang-undangan, *Lex Specialis Suatu Masalah*, Surabaya: JPBooks, 2006, h.62
- [5] Nur Basuki, Winanrno, *Penyalahgunaan Wewenang dan Tindak Pidana Korupsi*, laksana mediatama, Yogyakarta, 2008, h. 65.
- [6] Eeng ahman, Epi Indriani, 2008, *Ekonomi dan Akuntansi: Membina Kompetensi Ekonomi*, Bandung: Grafindo Media Pratama, h.31.
- [7] Daniels, Norman, (Ed.), *Reading Rawls: Critical Studies on Rawls' A Theory of Justice* Oxford: Basil Blackwell, 1975, h.15
- [8] Nozick, Robert, *Anarchy, State, and Utopia* Oxford: Blackwell, 1974, h.183
- [9] John Rawls, *A Theory of Justice* London Oxford University Press, 1971, h.4
- [10] James Gordley. "Good Faith in Contract Law in the Medieval *Ius Commune*", Cambndge: Cambridge University Press, 2000, h. 94.
- [11] John Klein, "Good Faith in International Transactions", *The Liverpool Law Review*, Vol XV No. 2, 1993, h.116.
- [12] Undang-Undang Dasar Negara Republik Indonesia Tahun 1945.

- [13] Undang-Undang Republik Indonesia Nomor 19 Tahun 2000 Tentang Penagihan Pajak Dengan Surat paksa.
- [14] Undang-Undang Republik Indonesia Nomor 37 Tahun 2004 Tentang Kepailitan dan Penundaan kewajiban Pembayaran Utang.
- [15] Undang-Undang Republik Indonesia Nomor 28 Tahun 2007 Tentang Ketentuan Umum dan Tata Cara perpajakan.
- [16] Kitab Undang-Undang Hukum Perdata (Burgerlijk Wetboek).

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