

The Notary's Responsibility in Tax Avoidance Related to the Sale and Purchase Binding Agreement and Power of Attorney to Sell

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Abstrak: *This research discusses the responsibility of a notary in drafting a Sale and Purchase Binding Agreement (PPJB) with a Power of Attorney to Sell, which is suspected of involving tax avoidance. The aim of this study is to analyze the notary's responsibility in cases of tax avoidance carried out through the Sale and Purchase Binding Agreement and Power of Attorney to Sell made before a notary. Currently, there are no written regulations that explicitly prohibit or allow notaries to draft such agreements suspected of tax avoidance. However, notaries must act professionally and bear significant responsibility in performing their duties by adhering to the Notary Law (UUJN), the applicable code of ethics, and the prevailing legal regulations. A notary's work must be trustworthy, reliable, and aligned with Standard Operating Procedures (SOP), from the commencement of work to achieving accurate results. In addition to professionalism, a notary is also expected to provide proper and clear legal guidance to the parties involved. This study employs a descriptive-analytical approach with a normative juridical method. The research findings indicate that tax avoidance by a buyer in the drafting of a PPJB with a Power of Attorney to Sell is considered valid if neither the original seller nor the subsequent buyer files for the annulment of the PPJB or the Power of Attorney to Sell. Nevertheless, notaries are urged to exercise greater caution when dealing with clients who intentionally engage in tax avoidance, as such actions could have negative repercussions on the notary's reputation and legal standing.*

Keywords : *Notary, Tax Avoidance, Responsibility*

INTRODUCTION

Every Indonesian citizen is obligated to pay taxes because taxes are mandatory contributions paid by individuals or entities to the state.¹ The primary purpose of tax collection is to gather the funds needed by the government to support development across various sectors.² The secondary purpose is

regulatory, providing legal certainty. In transactions involving the transfer of rights to land and/or buildings, two types of taxes are imposed on the public: the Land and Building Rights Acquisition Duty (BPHTB) and Income Tax (PPH), specifically on the seller and buyer involved in the transaction.³

¹ Yusuf, Y., Anthoni, L., Budi, S., Puspitasari, N. L., & Zendrato, J. E. D. (2023). Mengenalkan Pajak Sejak Dini: Upaya Edukasi Pajak Pada Remaja Di Yayasan Al-Ikhwaniyah, Limo Depok. *Jurnal Abdi Masyarakat Multidisiplin*, 2(3).

² Khairunnisa, P., & Sitabuana, T. H. (2022). Tindakan korupsi oknum Ditjen Pajak

mempengaruhi persepsi wajib pajak atas pemungutan pajak. *Sibatik Journal: Jurnal Ilmiah Bidang Sosial, Ekonomi, Budaya, Teknologi, Dan Pendidikan*, 1(7).

³ Siddiq, H. (2022). *Penegakan Hukum Tindak Pidana Korupsi Dalam Pelaksanaan Program Ptsl (Pendaftaran Tanah Sistematis Lengkap) Di*

The high tax burden creates a tendency for taxpayers to engage in tax avoidance. Legal subjects, particularly individuals, often transfer rights to land and/or buildings due to pressing needs requiring such transfers. This can occur either because of increased financial needs or due to financial difficulties, leading to actions that involve transferring (selling) rights to land and/or buildings to other parties while avoiding tax payments.⁴

The transfer of rights to land and/or buildings in a sale and purchase transaction must be accompanied by the drafting of deeds before an authorized official, namely a notary. The government, through its regulations, has assigned notaries the responsibility to supervise the payment of taxes owed on transactions involving land and/or buildings. Economic activities involved in a sale and purchase transaction not only cover the transaction value of the land but also include land sale taxes and other costs that arise and must be fulfilled by both the buyer and seller in accordance with applicable regulations.⁵

A notary public is an official authorized to create authentic deeds, as stated in Article 1, point 1 of Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 regarding the Notary Position (UUJN).⁶ In drafting a deed, a notary is obliged to provide information and explain to the parties as legal counseling regarding matters that will be

included in the deed. Thus, the parties appearing before the notary are free to decide whether to agree or disagree with the contents of the deed they will sign.

A notary must receive legal protection to ensure legal certainty, as a notary is a profession that provides legal services to the public. This is because, in carrying out their duty of drafting deeds, a notary is responsible for the deeds they create, which represent the intentions of the parties who approach them in the form of an authentic deed. The responsibility held by a notary is closely related to their duties, authority, and morality, both as an individual and as a public official.⁷

A notary may make mistakes or errors in the creation of a deed, which could result in the deed losing its authenticity and being declared void by law or subject to annulment. Additionally, if this causes harm to the interested parties, the notary may face criminal charges or be sued in a civil court.⁸

The transfer of rights over land and/or buildings has become a major issue in society, with various methods of transfer occurring both legally and illegally in practice. One such method is through a power of attorney to sell land rights. In this process, a power of attorney is created to authorize one party to sell the land rights. The power of attorney can be drafted privately by the parties involved or through

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⁴ Aufa Rahman, *Jurnal Hukum dan Kenotariatan*, Efektivitas Pasal 1 Peraturan Direktur Jendral Pajak Nomor PER-18/PJ/2017, 2020, Vol.4 No.(2), 134-145.

⁵ Diakses dari <https://www.online-pajak.com>, pada tanggal 21 November 2024

⁶Indonesia, *Undang-Undang tentang Perubahan atas Undang-Undang Nomor 30 Tahun*

2004 tentang Jabatan Notaris, UU No.2 Tahun 2014, LN 3 Tahun 2014, TLN 5491, Ps. 1 angka 1.

⁷Aribowo, A. N. (2020). *Kepastian Hukum Pengikatan Akta Perjanjian Jual Beli Di Hadapan Notaris Tanpa Dihadiri Para Saksi. Jurnal Surya Kencana Satu: Dinamika Masalah Hukum dan Keadilan*, 11(1), 85.

⁸ Sri Utami, "Perlindungan Hukum Terhadap Notaris Dalam Proses Peradilan Pidana Menurut Undang-Undang Nomor 2 Tahun 2014 tentang Perubahan atas Undang-Undang Nomor 30 Tahun 2004 tentang Jabatan Notaris", *Jurnal Reportarium Edisi 3* (Januari-Juni 2015), hlm.89

a notarial deed.⁹ However, in the process of drafting the power of attorney to sell, the notary assumes a moral responsibility to educate the public who come to them regarding the creation of the power of attorney. This represents one of the notary's roles as a public official in the creation of authentic deeds and other powers. There is a need for supervision of notaries by the government, specifically by the Minister of Law and Human Rights of the Republic of Indonesia, as the notary falls under their jurisdiction.¹⁰

This can be done if the buyer cooperates with the notary who drafts the deed to create a Conditional Sale and Purchase Agreement (PPJB) with a power of attorney to sell, allowing the seller to avoid taxes and wait until the buyer finds another buyer for the land. The notary must act professionally and bear great responsibility in carrying out their duties, always adhering to the Notary Public Act (UUJN) and based on the code of ethics and applicable regulations. Their performance must be trustworthy and reliable, working in accordance with Standard Operating Procedures (SOPs) from the start of the task, executing it, and producing accurate results. In addition to professionalism, the notary must also be able to provide appropriate and accurate legal counseling to the clients.

METHODOLOGY

This research uses a normative juridical research type, which emphasizes the use of written legal norms. These

written norms can include books, theses, laws, court rulings, and literature from libraries.¹¹ From these various sources, an analysis will be conducted on the Notary's Responsibility Regarding Tax Avoidance in Sale and Purchase Agreements and Powers of Attorney to Sell.

Since this writing is a type of normative juridical research, the data used is secondary data obtained from library studies. Secondary data is data acquired through literature research by reading and analyzing various sources such as books, papers, journals, theses, dissertations, and articles related to the Notary's Responsibility Regarding Tax Avoidance in Sale and Purchase Agreements and Powers of Attorney to Sell.

RESULTS AND DISCUSSION

Legal Consequences Of Tax Avoidance In Sale And Purchase Agreements And Powers Of Attorney To Sell Made Before A Notary

The transfer of movable property is regulated in Articles 612 and 613 of the Civil Code, which states that it is sufficient to perform an actual delivery. Meanwhile, the transfer of immovable property is regulated in Article 616 in conjunction with Article 620 of the Civil Code. The transfer of immovable property is not only carried out through actual delivery but also involves a juridical transfer, which is done through the announcement of the relevant deed by recording it in the register.

Immovable property, such as land, holds significant value for human life, both individually and collectively. Therefore, the regulation of land use must be carried

⁹Budiarto, M. T. (2021). Tax Review Aspek Perpajakan atas Pengalihan Hak Tanah dan Bangunan dengan mekanisme Perjanjian Nominee. *Jurnal Pajak dan Bisnis (Journal of Tax and Business)*, 2(2).

¹⁰Emma Yosephine Sinaga, 2019, *Keabsahan Akta Perjanjian Pengikatan Jual Beli (Ppjb)*

Berkaitan Dengan Akta Kuasa Menjual Dalam Jual Beli Tanah (Studi Putusan Pengadilan Negeri Bandung Nomor 387/Pdt.G/2017/Pn.Bdg), Jurnal Hukum Universitas Indonesia, Vol. 1, No.004.

¹¹Soerjono Soekanto dan Sri Mamudji, 2007, *Penelitian Hukum Normatif Suatu Tujuan Singkat*, Cet. 10, Jakarta : Raja Grafindo Persada, hlm.4.

out to enhance the prosperity of all the people of Indonesia. Land is a natural resource that should not be owned by any particular group, but rather belongs to the entire Indonesian nation. This responsibility entails managing land use for the welfare and prosperity of all components of the nation.¹²

With the enactment of the Basic Agrarian Law, all actions regarding land must comply with the land law provisions in Indonesia, including in the context of the transfer of rights. The customary law applicable in Indonesia serves as a conceptual foundation for the Basic Agrarian Law. Juridical transfer does not apply in customary law, as "land sale" is a legal act of transferring rights with a cash payment. The characteristics of a sale under customary law include the fulfillment of the principles of actual, cash, and clear transactions. "Clear" means that the sale transaction is carried out in front of many people or before an authorized official (Land Deed Official). "Cash" means that the payment for the transfer of rights to land and/or buildings is made in full at the same time as the delivery of the object in the sale transaction.¹³

From the perspective of civil law, a sale touches on two legal aspects: property law and contract law. In property law, the sale creates rights for both parties in the form of the transfer of property to one party and payment of the sale price to the other. In terms of contract law, the sale is a form of agreement that creates obligations, including the transfer of property by the

seller and the payment of money by the buyer.¹⁴

With the rise in land prices and the implementation of the Basic Agrarian Law (UUPA) along with its regulations, the transfer of land rights is no longer limited to actual delivery but must be accompanied by the creation of a deed before a Land Deed Official appointed by the Minister of Home Affairs, specifically the Director General of Agrarian Affairs.

The transfer of land and/or building rights may be subject to Income Tax (PPh) and Land and Building Transfer Duty (BPHTB). The transfer of land rights is a common legal act, whether in the form of a sale, exchange, donation, or others. Since land is an immovable object with high economic value, especially in urban areas, sellers who deliberately cooperate with a notary to avoid taxes in a Sale and Purchase Agreement are influenced by the high tax burden.

From the perspective of the ease of land and/or building sale transactions, the imposition of income tax (PPh) on the transfer of land rights bound by a Sale and Purchase Agreement (PPJB) that has been fully paid cannot be considered an obstacle for the seller. This is because of the Ability to Pay Principle, which states that the collection of taxes is perceived as fair when the amount of tax owed is based on the taxpayer's ability to pay.¹⁵

A Sale and Purchase Agreement (PPJB) made before a notary is an authentic deed. According to Article 1870 of the Civil Code, a deed made before a notary has

¹²B.F Sihombing, 2019, *Sistem Hukum PPAT dalam Hukum Tanah Indonesia*, Jakarta: Prenada Media Group, hlm.25.

¹³Shinta Christie, 2012, *Aspek Hukum Perjanjian Pengikatan Jual Beli Sebagai Tahapan Jual Beli Hak Atas Tanah Secara Angsuran*, Tesis Magister Kenotariatan, Jakarta : Universitas Indonesia, hlm.37.

¹⁴Kartini Muljadi dan Gunawan Widjaja, 2003, *Jual Beli*, Jakarta : PT. Raja Grafindo, hlm.7

¹⁵Mustika, N., Sugiharti, D. K., & Trisnamansyah, P. (2020). Pengenaan Pajak Penghasilan Atas Pengalihan Hak Atas Tanah dan/atau Bangunan yang Diikat dalam Perjanjian Pengikatan Jual Beli Dihubungkan dengan Ease of Doing Business (EODB) dalam Perspektif Kepastian Hukum. *Jurnal Poros Hukum Padjadjaran*, 1(2), 172-190.

perfect evidentiary power. The PPJB is made before the sale and purchase deed is executed because there are requirements or conditions that have not yet been fulfilled, such as the payment not being fully settled or the process of clearing encumbrances (roya) still underway.

A power of attorney to sell is one of the categories of an irrevocable power of attorney because, by creating this power of attorney, it includes the element of granting authority with the condition that it cannot be revoked. This power of attorney is used in the Sale and Purchase Agreement and does not contain provisions that are prohibited, as stated in point two of the Minister of Home Affairs Instruction No. 14 of 1982. Essentially, an irrevocable power of attorney represents the transfer of land rights, granting the attorney-in-fact the authority to control and use the land and perform legal acts that can only be done by the holder of the rights, even though the power of attorney cannot be revoked.

It can be understood that both the buyer and the seller have the same responsibility, which is to pay taxes. The tax rates have also been determined and calculated according to the applicable regulations. With the existence of a separate power of attorney to sell, the buyer can subsequently engage in a land sale transaction with another party or a third party without informing the seller that the power of attorney to sell is part of the previously created Sale and Purchase Agreement (PPJB). This makes it appear as though the first party is only granting the second party the authority to sell to another party. The initial land and/or building sale transaction does not incur the Land and Building Transfer Duty (BPHTB) and Income Tax (PPh).

Such a situation, according to the researcher, is a form of tax avoidance, where the buyer takes steps to avoid paying taxes that should be imposed on them. As a

result, it appears that the first party is only granting the second party the authority to sell the land and/or building to another party. With the scheme described above, the second party can avoid paying PPh and BPHTB, as these taxes are imposed on the first seller and the second buyer. This type of practice is commonly carried out by land brokers in society.

Article 23A of the 1945 Constitution states that tax collection in Indonesia must be based on law, meaning that any levies imposed on the public must be carried out in accordance with the law. All forms of tax collection must be based on law and have been approved by the People's Representative Council (DPR). The primary purpose of tax collection is to gather funds needed by the government to finance national expenditures for the benefit of all citizens. The second purpose, related to the regulatory function, is to provide legal certainty. Particularly in the drafting of tax laws, care must be taken to ensure that the provisions are clear and do not lead to differing interpretations between tax authorities and taxpayers.

In positive law, tax avoidance is not considered a violation of legal norms. The Sale and Purchase Agreement (PPJB) for the transfer of rights followed by a power of attorney to sell is given to the buyer by the seller when the buyer has fulfilled their payment obligations. Therefore, the power of attorney should not be granted in a staged PPJB and should not involve conditions for deferral. However, intentional tax avoidance, especially when the deed of transfer of land rights is made before a notary, can reduce the state's revenue from taxation. Taxes are created to collect funds that support development, but when tax

avoidance occurs, it contradicts the purpose of tax law.¹⁶

If the parties involved in the sale transaction (the first seller and the second buyer) are aware of the buyer's intention to avoid taxes and feel disadvantaged or harmed by it, either party may file a claim for annulment of the deed in court. Similarly, if no party files for annulment of the PPJB deed and power of attorney to sell, it is considered valid and enforceable for both parties.

The Limits Of The Notary's Responsibility In Creating A Sale And Purchase Agreement And Power Of Attorney To Sell That Is Indicative Of Tax Avoidance.

The law provides guidelines or limitations on the notary's responsibilities, so not all losses caused to third parties are the responsibility and liability of the notary. This is what is meant by legal protection for notaries as public officials serving the community.¹⁷ According to Law of the Republic of Indonesia No. 2 of 2014 on the Notary Position, a notary, as a public official, obtains authority by attribution, meaning the authority is created and granted by Law No. 2 of 2014 on the Notary Position, and not by any institution or organization.¹⁸

G.H.S. Lumban Tobing states that a notary's authority includes four aspects:

1. A notary must have authority over the specific deeds they create. This means only certain deeds can be made by a notary based on applicable laws

and regulations, and not all deeds can be created by a notary.

2. A notary must have authority concerning the person for whom the deed is made. This means a notary does not have the authority to create a deed for the benefit of just anyone. For example, Article 52 of the Notary Position Law specifies that a notary cannot create deeds for themselves, their spouse, relatives by direct line of descent, and/or their side relatives, without any degree restrictions, or for persons with power of attorney. Violating this provision causes the deed created by the notary to no longer be considered an authentic deed but only a private deed.

3. A notary must have authority concerning the location where the deed is made. This means that each notary has jurisdictional boundaries according to their place of office. Therefore, a notary can only create deeds within their jurisdiction, otherwise, the deed would be considered a private deed.

4. A notary must have authority over the time when the deed is made. This means that a notary cannot create a deed during a leave of absence or if they have been dismissed from their position. Furthermore, a notary cannot create a deed before receiving an Appointment Letter (SK) or taking an oath of office.¹⁹

A notary, as a public official, means that the authority held by the notary will not

¹⁶ Agus Santoso Suryadi, *Asas Kepastian Hukum dan Asas Keadilan dalam Pemungutan Pajak-pajak Atas Pengalihan Hak-Hak Atas Tanah dan/atau Bangunan*, Disertasi Doktor Universitas Indonesia, Depok, 2003, hal 2

¹⁷ Afriana, A. (2020). *Kedudukan Dan Tanggung Jawab Notaris Sebagai Pihak Dalam Penyelesaian Sengketa Perdata Di Indonesia Terkait*

Akta Yang Dibuatnya. Jurnal Poros Hukum Padjadjaran, 1(2), 246-261.

¹⁸ Habib Adjie, 2008, *Hukum Notaris Indonesia Tafsir Tematik Terhadap Undang-Undang Nomor 30 Tahun 2004 Tentang Jbatan Notaris*, Refika Aditama, Bandung, hlm.78.

¹⁹ G.H.S Lumban Tobing, 1992, *Peraturan Jabatan Notaris*, Erlangga, Jakarta, hlm.49-50.

be granted to other officials, as long as it does not fall under the jurisdiction of other officials.²⁰ According to Criminal Law, accountability refers to the ability of a person to be responsible for their mistakes. Every individual is accountable for their actions. The principle of caution should be the guiding rule for a notary when drafting an authentic deed, because neglecting this principle may result in criminal liability for the notary if any actions harmful to the parties involved are discovered.

In carrying out their duties, a notary must prioritize the principle of caution when creating authentic deeds, as regulated in Article 1871 of the Civil Code: "If an authentic deed, in any form, is suspected to be forged, its execution may be suspended according to the provisions of the Civil Procedure Code." Therefore, a notary will encounter obstacles if they fail to apply the principle of caution while performing their duties.

In essence, the notary's accountability for the deeds they create can be divided into four aspects:

1. Civil liability aspect
2. Criminal liability aspect
3. Liability based on the Notary Public Act (UUJN)
4. Liability based on the Notary's Code of Ethics

A notary's actions that intentionally allow their clients to evade taxes do not reflect the notary's adherence to the principle of caution, which must be followed according to the notary's code of ethics. The violated principle concerns responsibility for the power of attorney deed and the Sale and Purchase Agreement

made to avoid taxes, which impacts the state treasury. If a notary engages in prohibited actions, the Honorary Council may impose sanctions based on Article 6 of the Notary Code of Ethics, which may include:

- a. Reprimand
- b. Warning
- c. Suspension (temporary dismissal) from membership
- d. Expulsion
- e. Dismissal with disrespect from membership

Regarding the supervision of the implementation of the Notary Code of Ethics, parties who feel harmed by the notary's actions may proceed as follows:

- a. At the first level, by the Regional Management of the Indonesian Notary Association and the Regional Honorary Council.
- b. At the appeal level, by the Provincial Management of the Indonesian Notary Association and the Provincial Honorary Council.
- c. At the final level, by the Central Management of the Indonesian Notary Association and the Central Honorary Council.

The notary's responsibility as a public official is closely tied to the professional responsibility they bear in drafting deeds. In relation to their authority, a notary may be held accountable for their actions in creating an authentic deed.

A notary, or public official, must strictly adhere to the code of ethics. The code of ethics is a product of applied ethics, derived from the application of ethical thinking to a profession, which may evolve as knowledge and technology progress. The

²⁰ Putra, E. A. M., Kusuma, L. A. N., & Muslimin, M. K. (2024). Posibilitas Kehadiran Artificial Intelligence (Ai) Sebagai Pengganti Profesi Notaris

Di Era Digital. *Jurnal Rechts Vinding: Media Pembinaan Hukum Nasional*, 13(2).

code of ethics embodies moral values that cannot be enforced by force and will only be effective if inspired by the ideals and values within the professional community. It serves as a benchmark for members and a preventive measure against unethical conduct.²¹

In carrying out their duties, a notary is considered to be "outside the parties," meaning that the notary is not a party to or involved in the deed. The unique characteristic that defines a notary is their impartiality and independent position, which provides a strong foundation for public accountability in the event of any errors. As we know, Article 1365 of the Civil Code initially imposed liability for compensation, costs, and interest only for acts that violated the law. This means that an unlawful act is interpreted as an act that violates the law. Such an interpretation implies that a notary is responsible for any mistakes made in their work, not only in relation to laws and regulations but also for actions that are considered to lack due care, as is generally expected in society. Except in cases where the law explicitly states otherwise, a notary must generally compensate for costs, damages, and interest to the concerned parties if the actions were due to fraud or deceit.

Regarding criminal law, a notary may be subject to criminal penalties if the elements of a criminal act under Article 264, paragraph 1 of the Criminal Code are met. These elements include the objective element or the formal unlawful act, and the subjective element or the material unlawful act (fault and accountability).

CONCLUSION

Based on the research and discussion conducted by the researcher, the Sale and Purchase Agreement and the power of

attorney for the sale deed were made by the second buyer to avoid taxes. The first seller and the second buyer are the ones responsible for paying taxes on the transfer of land rights. The actions taken by the first buyer constitute tax avoidance, which is a form of violation of tax law. As a result of the tax avoidance carried out by the land broker through the creation of a Sale and Purchase Agreement and a power of attorney for the sale deed made before a notary, it will impact the reduction of government cash revenue from the tax sector. A deed made with the intention of avoiding taxes can be canceled, and the party who feels aggrieved can file a cancellation claim in court. Conversely, if no cancellation is filed, the deed is considered valid and enforceable. The notary's responsibility regarding tax avoidance through the Sale and Purchase Agreement and power of attorney for the sale deed should prioritize the principle of caution, as the notary's actions in exercising their authority are governed by the Notary Code of Ethics.

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²¹ Weliana Salim, *Tanggung Jawab Pejabat Pembuat Akta Tanah Dalam Peralihan Hak Atas*

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