

Substance Over Form vs Authentic Deed: Liability and Legal Certainty for VAT Transfer of Land

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Abstract

This study analyzes the legal implications of applying the Substance Over Form principle in VAT imposition on land transfer transactions vis-a-vis authentic deeds, aiming to assess the legal liability and legal certainty. The urgency of this research is that the rise of formal transactions that obscure the economic substance of land transfer has challenged the effectiveness of VAT enforcement in Indonesia. The approach used in this research is a normative legal approach, which analyzes related regulations and literature documents. The research results concluded that legal responsibility for authentic deeds that do not fulfill the Substance Over Form principle in the imposition of VAT depends on the condition of who violates the lawful cause clause in making the deed, so that legal responsibility can be borne by the PPAT and/or the parties. The principle of Substance Over Form is only regulated in income tax regulations. In civil law, this principle is not regulated and explained, but with this principle, it can be proven that an authentic deed was made without a lawful cause as per Article 1320 of the Civil Code. Substance Over Form can give rise to new legal consequences for PPAT or parties in the transaction, even though it is not explicitly regulated in VAT regulations. This study is one of the few legal studies that highlights the gap between the practice of imposing VAT and the authenticity of PPAT deeds in the context of the Substance Over Form principle.

Keywords: *Authentic Deed; Liability and Legal Certainty; Substance Over Form; VAT Land Transfer*

1. INTRODUCTION

The wheels of development will always move inseparably from funding sources. The most dominant funding in the APBN structure still comes from the taxation sector. Realized state revenues throughout 2023 reached IDR 2,774.3 trillion, or grew 5.3 percent from 2022.¹ Realized value-added tax (VAT) and luxury goods sales tax (PPnBM) revenues amounted to IDR 764.34 trillion or 40.8% of total tax revenues.² The sustainability of state revenues from the VAT sector is very important. To ensure this happens, maintaining taxpayer compliance is one of the keys, not only through the implementation of various regulations, procedures, and administrative services but also through tax enforcement.³ Tax enforcement can be carried out through the process of supervision, tax audits, and tax investigations if the principle applies to the Self Assessment System, which is not carried out by the taxpayer. In the tax enforcement

¹Reni Saptati D.I, "Kinerja APBN 2023 Luar Biasa, Capai Target Lebih Cepat Dan Sehatkan Ekonomi Nasional." (Media Keuangan 2 Januari 2024), <https://mediakeuangan.kemenkeu.go.id/article/show/kinerja-apbn-2023-luar-biasa-capai-target-lebih-cepat-dan-sehatkan-ekonomi-nasional>.

²Monavia Ayu Rizaty, "Total Penerimaan Pajak Nasional Menurut Sektor Pada 2023," *DataIndonesia.Id* (DataIndonesia.id, 23 Januari, 2024), <https://dataindonesia.id/ekonomi/detail/total-penerimaan-pajak-nasional-menurut-sektor-pada-2023>.

³M Farouq, *Hukum Pajak Di Indonesia*. (Jakarta: Kencana, 2018).

process, the principle of substance over form (SOF) can be used, which is known in accounting science. Simply put, formality or legality should not deny the substance of financial transactions. Naughty taxpayers deliberately modify their financial reports for certain purposes. Even the contents of an agreement, “authentic deed” for an affiliate transaction, are made not in accordance with the facts of the transaction in the field in order to avoid taxes. An authentic deed in the form of a sale and purchase deed is made in such a way as to minimize the value of the tax that will be paid, both Income Tax article 4 paragraph (2), Land and Property Rights Acquisition Fee (BPHTB) and/or Value Added Tax (VAT). This authentic deed was even made with the agreement of the parties and the Land Deed Making Officer (PPAT). The transaction value, supporting documents, and transaction form are arranged in such a way as to minimize the tax value to be paid. A deed of exchange is made into a sale and purchase deed to minimize the value of the tax paid. This creates a gap between *das sollen* (necessity) and *das sein* (reality), namely the hope that tax payments, especially VAT, will be carried out on land and/or building rights transfer transactions through buying and selling or other forms, with practices carried out by the parties and/or PPAT.

The problem in this research is how to regulate responsibility and legal certainty SOF principle compared to authentic deeds in the imposition of VAT. This study analyzes the legal implications of applying the SOF principle in VAT imposition on land transfer transactions vis-a-vis authentic deeds. This research is important to conduct because the increasing number of formal transactions that obscure the economic substance of land rights transfers has become a challenge for the effectiveness of VAT enforcement in Indonesia. Sinafa and Innaka T in 2021, which explores the implementation of SOF as a principle in the field of accounting and has coherence in contracts in Indonesia in terms of implementing the Deed of Sale and Purchase in land sales. In contract law, the principle of SOF cannot be applied because it does not explain the meaning and regulation of this principle. The principle of SOF in contract law refers to the implementation of an agreement. Formally, the parties are subject to contract law, but the formation and implementation of an agreement must also comply with income tax regulations.⁴

Another research was conducted by Hermawati, which examined the responsibilities of Notaries who forged deeds. This research discusses more about the responsibility of notaries for falsifying authentic deeds from a criminal law perspective. A notary can be held accountable if he is proven guilty of making a deed based on his position as a public official. An authentic deed that has been falsified will be null and void by law, and the issuer of the deed must be responsible for the error. This research only focuses on errors made by one party, namely the notary.⁵

⁴ Risma Hasiholan Sinafa and Antari Innaka T, “Analisis Yuridis Prinsip Substance Over Form Dalam Hukum Kontrak Di Indonesia” (Universitas Gajah Mada, 2021), <https://etd.repository.ugm.ac.id/penelitian/detail/206964.ndonesia>” Tesis 2021, Universitas Gajah Mada, <https://etd.repository.ugm.ac.id/penelitian/detail/206964>.

⁵ Risa Hermawati, “Pemalsuan Akta Autentik Yang Dilakukan Oleh Notaris (Studi Kasus Putusan Nomor 1003 K/PID/2015),” *Jurnal Hukum Kenotariatan* 2, no. 2 (2020), <https://journal.univpancasila.ac.id/index.php/otentik/issue/view/162>.

Further research was carried out by Setiawana and Suroto in 2023, which examines the responsibilities of Notaries/PPATs in making Deeds of Sale and Purchase of Rights to Land by non-owners, which should be made with full responsibility and prioritizing the precautionary principle by the Notary/PPAT. The Notary/PPAT can cancel the sale and purchase deed if the deed was made by parties who are not the owners. Notaries/PPATs can be held fully legally responsible as long as the Notary/PPAT does not thoroughly and comprehensively examine the facts or statements from the parties. Additionally, in the study, Setiawana and Suroto stated that authentic deeds made by PPAT illegally will not be legally binding.⁶

However, until now, there has been no research that analyzes the legal implications of the application of the SOF principle in imposing VAT on land rights transfer transactions through authentic deeds. The difference between previous research and this article is that there are additional SOF principles to test the veracity of authentic deeds for tax purposes (VAT), as well as the responsibility of PPAT and the parties for authentic deeds that are not made based on facts. Other urgency of this research lies in the lack of specific legal provisions governing the application of the SOF principle in the context of VAT for land transactions, despite its increasing relevance in preventing tax evasion through formal manipulation of authentic deeds so this research aims to examine and analyze SOF principle in the imposition of VAT for assessing legal responsibility and legal certainty.

2. METHOD

The scientific method is a way of research to leads to knowledge.⁷ Therefore, before conducting research, one should first determine what method to use.⁸ This study uses normative legal research methods with research specifications that are descriptive and analytical. This research uses a normative juridical approach by examining norms or rules formulated in statutory regulations (statue approach) and conceptual approaches (conceptual approach). This research uses primary legal materials and secondary legal materials. Primary legal materials are in the form of statutory regulations, along with notes on making legislative regulations, and secondary legal materials are materials such as books or journals that support providing explanations of primary legal materials. Primary legal materials consist of binding legal sources such as laws and regulations relevant to the topic under study.⁹ Data collection techniques use library research and study analysis uses qualitative analysis. The data obtained in the research is arranged

⁶ Yoga Alfi Setiawan and Suroto, "Pertanggungjawaban Notaris/PPAT Dalam Pembuatan Akta Jual Beli Hak Atas Tanah Oleh Bukan Pemilik," *Jurnal Akta Notaris* 2, no. 1 (2023), <https://doi.org/10.56444/aktanotaris.v2i1.902>.

⁷ Glenn Daniel Basuki and Mia Hadiati, "Keabsahan Akta Jual Beli Letter C Yang Diterbitkan Oleh Pejabat Pembuat Akta Tanah," *Jurnal USM Law Review* 8, no. 2 (2025), <https://doi.org/10.26623/julr.v8i2.11820>.

⁸ Subaidah Ratna Juita, "Rekonstruksi Regulasi Sistem Pertanggungjawaban Pidana Pada Tindak Pidana Prostitusi Berbasis Nilai Keadilan Pancasila," *Disertasi* (Universitas Islam Sultan Agung (Unissula), 2022), https://repository.unissula.ac.id/26744/1/10302000291_fullpdf.pdf.

⁹ Soerjono Soekanto and Sri Mamudji, *Penelitian Hukum Normatif: Suatu Tinjauan Singkat* (Depok: PT Raja Grafindo Persada, 2022).

logically and systematically.¹⁰ Furthermore, a description is carried out referring to the formulation of the problem in the research, which is reviewed in a normative legal manner. The study describes the situation or circumstances that occurred regarding the problems that have been raised, and arguments are given to then find a conclusion.

3. RESULTS AND DISCUSSION

3.1 Principal Legal Liability SOF Compared to Authentic Deeds in The Imposition of VAT

In civil procedure law, an authentic deed is one of the strongest and most complete forms of evidence.¹¹ PPAT is a public official who makes “authentic deeds” such as sale and purchase deeds and land/building exchange deeds. The deed is proof that a legal action has occurred regarding land rights. Land rights in Government Regulation number 18 of 2021 are defined as rights obtained from the legal relationship between the right holder and the land.¹² The sale and purchase deed or exchange deed is issued before the binding agreement is executed. According to article 1320 of the Indonesian Civil Code (ICC), there are four conditions of an agreement said to be valid, namely: First, consent of the individuals who are bound thereby, meaning the parties in making the agreement there is an adjustment of free will regarding the matters regulated in the agreement. The meaning of freedom in this regard includes freedom from error, coercion, and fraud. Second, the capacity to conclude an agreement, meaning there are some people who are categorized as incapable in the agreement, namely, people under guardianship, minor children, and married women in matters determined by law, and in general, all people who are prohibited by law from making certain agreements. Third, a specific subject, meaning an agreement must contain the main points agreed upon by the parties. Fourth, an admissible cause. This means that in an agreement, there are contents and objectives to be achieved by the parties involved. One of the prohibited causes, according to Article 1335 in conjunction with Article 1337 of the ICC, is if the contents of the agreement are contrary to law.

The contents of an authentic deed and its existence as a physical document provide a strong basis to support the validity and certainty of a legal act, so that an authentic deed has high evidentiary power because it is able to prove perfectly, based on the facts contained in the deed. Authentic deeds are regulated by law as a reliable means of proof.¹³ Therefore, authentic deeds are made by PPAT with the principle of prudence.¹⁴ In implementing this principle, the PPAT should conduct a detailed and comprehensive verification of a transfer transaction to distinguish

¹⁰ Subaidah Ratna Juita, Efi Yulistyowati, and Supriyadi, “Menelisis Prinsip Beneficial Ownership Dalam Kebijakan Pembaruan Hukum Pidana,” *Prosiding Seminar Hukum Aktual Fakultas Hukum Universitas Islam Indonesia*, 2024, <https://journal.uui.ac.id/psha/article/view/36168/17152>.

¹¹ Arsiendy Aulia, “Prinsip Kehati-Hatian PPAT Dalam Proses Pengikatan Jual Beli Tanah Sebagai Perwujudan Kepastian Hukum,” *Recital Review* 4, no. 1 (2022): 244–78, <https://doi.org/10.22437/rr.v4i1.13364>.

¹² Peraturan Pemerintah (PP) Nomor 18 Tahun 2021 Tentang Hak Pengelolaan, Hak Atas Tanah, Satuan Rumah Susun, Dan Pendaftaran Tanah Pasal 1 Angka 4.

¹³ Wiharjo and Johan Erwin Isharyanto, “Akibat Hukum Akta Jual Beli Tanah Yang Dibuat Oleh PPAT Dengan Identitas Diri Palsu Para Penghadap,” *Notary Law Research* 3, no. 2 (2022), <https://doi.org/10.56444/nlr.v3i2.3408>.

¹⁴ Hendry Dwicahyo Wanda, “Prinsip Kehati-Hatian Pejabat Pembuat Akta Tanah Dalam Pengurusan Peralihan Tanah “Letter C”,” *Masalah-Masalah Hukum* 46, no. 2 (2017), <https://doi.org/10.14710/mmh.46.2.2017.112-124>.

between a sale and purchase transaction or an exchange transaction. A sale and purchase transaction should have a cash flow, while an exchange transaction does not have a cash flow between the parties so that the economic facts and authentic deeds must be in line. Even from a taxation perspective, an authentic deed made by a PPAT can be defeated by the results of a fuscus audit if the deed cannot describe the facts of the economic transaction in a tax dispute.

Deeds made by PPAT together with the parties regarding legal actions regarding land rights are generally carried out with full responsibility. If there is an intentional violation in making an authentic deed caused by PPAT, then PPAT is responsible for the error.¹⁵ However, the PPAT cannot be held responsible if an error occurs with the party carrying out the transaction. Each party is responsible for the accuracy of the information they provide, and in the event of inconsistencies, the responsibility is borne by the party providing the information.¹⁶ In practice, in making and implementing an agreement that gives rise to a contract, disputes or disputes arise.¹⁷ Disputes do not only arise from parties, but parties with PPAT or with third parties such as the government.

Responsibility for legal actions can result in sanctions against the parties and/or PPAT.¹⁸ The principle of imposing sanctions on individual actions only because they are intended wrongly and have been planned is not fully accepted in modern law.¹⁹ Individuals are legally responsible not only objectively *harmful effects* carried out illegally, but also for the consequences of such actions, even without the individual's intention/meaning/plan. However, the sanctions may differ in different cases.²⁰ Legal responsibility (liability) according to Hans Kelsen relates to legal obligations towards someone who is legally responsible for a certain act, so that they can be subject to certain sanctions if they commit an act that is against the law. It is not only imposed on those who commit violations but also on everyone who is legally related to them.²¹ Hans Kelsen divides responsibility into two types: 1) responsibility based on error (liability based on fault); 2) absolute responsibility.²² Responsibility based on fault is imposed on legal subjects for committing unlawful acts or criminal acts due to negligence. Absolute responsibility does not require any fault. According to Abdul Basir, absolute responsibility (strict liability) occurs when

¹⁵ Harly Irianto Christo Sembung, "Pertanggungjawaban Pejabat Pembuat Akta Tanah Atas Akta Jual Beli Yang Dibatalkan," *Jurnal Ilmiah Nusantara* 1, no. 5 (2024), <https://doi.org/10.61722/jinu.v1i5.2486>.

¹⁶ Meisya Adistia, "Pertanggungjawaban Pejabat Pembuat Akta Tanah Terhadap Keabsahan Akta Jual Beli" 6, no. 3 (2024): 8015–25, <https://doi.org/10.31933/unesrev.v6i3.1704>.

¹⁷ Zainal Arifin et al., "Keabsahan Dan Perlindungan Hukum Perjanjian Kemitraan Jasa Konstruksi," *Jurnal USM Law Review* 6, no. 1 (2023), <https://doi.org/10.26623/julr.v6i1.6095>.

¹⁸ Vincentius Jonathan Wiharjo, Elis Nurhayati, and Efa Laela Fakhriah, "Pertanggungjawaban Hukum Pejabat Pembuat Akta Tanah Yang Membuat Akta Jual Beli Berdasarkan Akta Kuasa Palsu Secara Administratif Dan Perdata," *Acta Diurnal* 7, no. 2 (2024), <https://doi.org/10.23920/acta.v7i2.1712>.

¹⁹ Jimly Asshiddiqie and Ali Safaa'at, *Teori Hans Kelsen Tentang Hukum* (Jakarta: Sekretariat Jenderal & Kepaniteraan Mahkamah Konstitusi RI, 2006).

²⁰ Hans Kelsen, *General Theory of Law and State*. Translated by Anders Wedberg (New York: Russell & Russell, 1961).

²¹ Henry Dianto Pardamean Sinaga, "Pengaturan Pertanggungjawaban Mutlak Wajib Pajak Di Indonesia Dalam Perspektif Keadilan Dan Kemanfaatan Umum," *Jurnal Hukum & Pembangunan* 49, no. 3 (2019), <https://doi.org/10.21143/jhp.vol49.no3.2186>.

²² Salim HS and Erlies Septiana Nurbani, *Penerapan Teori Hukum Pada Penelitian Desertasi Dan Tesis (Buku Kedua)* (Depok: Raja Grafindo Persada, 2019).

an act causes consequences that are considered detrimental to the law, and there is an external relationship between the act and its consequences.²³

Based on certain objectives desired by the parties and/or PPAT, which is illegal, the legal acts stated in the authentic deed are made without reflecting the facts on the ground. This means that the facts that actually occurred in the field were not stated correctly in the deed. The goal that is often achieved is to reduce the value of tax payments to the government in the form of Final Income Tax payments for Land Transfers, BPHTB, and/or Value Added Tax. The transaction value stated in the deed, which will be the basis for tax imposition, is often reduced to minimize tax payments. The type of deed was changed from an exchange deed to a sale and purchase deed to further minimize the amount of tax that should be paid. The parties agreed to carry out a land sale and purchase transaction before the PPAT, which should be an exchange transaction. This transaction was discovered after an inspection by a government agency through a tax audit process by the Directorate General of Taxes. With the fact that there is no cash flow for this transaction, the parties admit that the transaction is actually an exchange which results in a change in the tax base (DPP) in calculating the tax payable. Differences in facts on the ground (*substance*) with deed (*form*) will give rise to responsibility for the parties and/or PPAT. This is known as SOF, which are the principles of accounting science used in taxation in Indonesia. Draft SOF which describes a situation that should be (that should) turns out to be practiced deviantly to become form over substance (explain the situation that occurred (*that be*)).²⁴ This shows that a condition of inequality has occurred, which ultimately creates a problematic situation. This element fulfills the concept that economic essence is more important than the formal form used (substance-over-form principle), where what determines whether income is a tax object is not the juridical form, but the economic nature.²⁵ This is contained in the definition of income in the Income Tax Law, in whatever name and form. This was further confirmed by Government Regulation number 55 of 2022 (PP55), article 32, but the VAT regulations have not been regulated explicitly.

A deed issued by PPAT that does not describe facts in the field known through an audit based on the SOF principle provides legal responsibility to the parties and PPAT. For parties whose transactions are not based on facts in the field, in cases of exchange transactions where a sale and purchase deed is drawn up, individual sanctions will be imposed in accordance with statutory regulations. The first party in the authentic deed as the exchanger of land will bear the Final Income Tax on Land Transfer and VAT (if the VAT subject and object are met), whichever is

²³ Abdul Basir, "Ultimum Remedium Dalam Tindak Pidana Pajak Wajib Pajak Badan Dan Upaya Pengembalian Kerugian Pada Pendapatan Negara," *Disertasi Universitas Jayabaya* (2021), [https://repo.jayabaya.ac.id/2506/3/Disertasi S3 Ilmu Hukum-Abdul Basir.pdf](https://repo.jayabaya.ac.id/2506/3/Disertasi%20S3%20Ilmu%20Hukum-Abdul%20Basir.pdf).Basir.

²⁴ Peter Marshall Kapojos et al., "Penerapan Sebuah Prinsip Dalam Laporan Keuangan Pemerintah: 'Substansi Mengungguli Bentuk Formal' Atau 'Bentuk Formal Mengungguli Substansi' ?," *Jurnal Emba* 10, no. 2 (2022), <https://doi.org/10.35794/emba.v10i2.41385>.

²⁵ Inas Syadza Wafikhoh, "Pengecualian Objek Pajak Penghasilan Wajib Pajak Badan Atas Deviden," *Jurist-Diction Universitas Airlangga* 5, no. 2 (2022), <https://doi.org/10.20473/jd.v5i2.34893>.

greater. There are differences in the basic tax value used in calculating the Final Income Tax on Transfer of Land (PPH Article 4 paragraph (2)). If there is a special relationship using the value that should be received and using the value that is actually received or obtained if the transfer is carried out through a sale and purchase without a special relationship (Article 2 paragraph (2) letters c and d PP 34 of 2016). What is different if a land and/or building exchange transaction takes place is that the value that should be received or obtained based on market prices is used.²⁶ Market price is the fair market price, or based on an assessment carried out by an independent appraiser. This difference in value will result in the tax payable being greater. Mistakes in making authentic deeds that are not based on facts in the field obtained through a tax audit based on principles SOF, resulting in late payment of tax, which will give rise to administrative sanctions for the seller, both for the PPh Article 4 paragraph (2) and VAT. This is different from BPHTB, which is a type of regional tax managed by district/city governments, so the value used is the tax object acquisition value (NPOP), which is calculated based on Law Number 28 of 2009 concerning Regional Taxes and Regional Retributions (PDRD). NPOP for BPHTB, the fair market value for land and/or building exchange transactions, and the DPP VAT value are complementary values, meaning that the largest value of the three values is used as a reference by the officer (fiscus) to determine the tax payable from the three types of tax. Apart from incurring tax obligations with a larger value (tax principal), the parties will also bear administrative sanctions and/or fines due to late payment of the principal tax. This responsibility arises as a result of the system self-assessment, which is not used properly by the parties as Taxpayers.

PPAT's liability for the sale and purchase deed (AJB) issued for exchange transactions can be seen from several conditions. If the cause of the problem arises due to negligence committed by the PPAT, then the deed will only have legal force under the hand and can be canceled due to non-fulfillment of subjective requirements. PPAT makes authentic deeds not based on a cause (*causa*), which is a lawful cause, meaning that the deed issued violates statutory regulations as stated in Article 1335 in conjunction with Article 1337 of the ICC. When the creation of an AJB does not comply with the procedures and requirements set out in statutory regulations, the Deed becomes legally defective, so it must be cancelled/nullified by law.²⁷ Legal and ethical responsibilities must be a consequence that must be accepted by PPAT. Imposing sanctions on PPAT members is based on the extent of the violations in terms of quality and quantity. Here, the National Land Agency has a role as supervisor and supervisor of PPAT in carrying out its duties.²⁸

²⁶ Peraturan Pemerintah (PP) Nomor 24 Tahun 2016 Tentang Perubahan Atas Peraturan Pemerintah Nomor 37 Tahun 1998 Tentang Peraturan Jabatan Pejabat Pembuat Akta Tanah.

²⁷ Yovita Christian Assikin, Lastuti Abubakar, and Nanda Anisa Lubis, "Tanggung Jawab Pejabat Pembuat Akta Tanah Berkaitan Dengan Dibatalkannya Akta Jual Beli Ditinjau Dari Peraturan Perundang-Undangan Yang Berlaku," *Jurnal Ilmu Hukum Kenotariatan Fakultas Hukum Unpad* 3, no. 1 (2019), <http://dx.doi.org/10.24198/acta.v3i1.266>.

²⁸ Adistia, "Pertanggungjawaban Pejabat Pembuat Akta Tanah Terhadap Keabsahan Akta Jual Beli."

However, if the cause of the problem arises due to the client's (the parties') dishonesty in providing administrative information, which makes the deed null and void by law because the objective requirements are not met.²⁹ Here, PPAT cannot be held responsible either ethically, administratively, civilly, or criminally.³⁰ Criminal charges may be brought in cases of fraud or deliberate violation of legal prohibitions.³¹ According to Hans Kelsen's theory, administrative negligence will give rise to responsibility based on error. However, if this causes losses to state finances, it will result in absolute responsibility and could even enter the realm of criminal taxation.

In the taxation system in Indonesia, responsibility is identical to the imposition of sanctions, both administrative sanctions and criminal sanctions. Criminal sanctions are regulated in Articles 38, 39, and 39A of the KUP Law. Article 43 of the KUP Law also emphasizes that the criminal sanctions referred to in Article 39 and Article 39A are not limited to taxpayers, taxpayer representatives, taxpayer attorneys, taxpayer employees, public accountants, tax consultants, or other parties, but also to those who order, participate in, encourage, or assist in committing criminal acts in the field of taxation, including PPAT. The element of negligence contained in Article 38 and the element of deliberate in Articles 39 and 39A indicate that the theory of strict liability is not applied to this article. On the other hand, the intent contained in Article 39 and Article 39A means that the perpetrator knows about the crime he has committed and its legal consequences, for example, tax evasion. There must be a causal relationship between the motive, act, and purpose of tax evasion so that it can be proven that there is an element of intent.

3.2 Principle Legal Certainty Substance Over Form Compared to Authentic Deeds in The Imposition of VAT

In connection with the meaning of "*legal certainty*", Gustav Radbruch stated 4 (four) basic things, namely: First, that law is positive, meaning that positive law is legislation. Second, that law is based on facts/reality. Third, facts must be formulated in a clear way so as to avoid errors in meaning, as well as being easy to implement. Fourth, positive law must not be easily changed.³²

The issuance of an authentic deed in the form of a sale and purchase deed, which should have been issued with an exchange deed, is closely related to the "*das sollen and das sein*" theory. The gap between "*das sollen*" and "*das sein*" is an important concept in legal philosophy and

²⁹ Tasskja Nofeyska Pradistya, "Tanggung Jawab Notaris Secara Hukum Perdata Dan Hukum Administrasi Yang Lalai Karena Membuat Akta Perjanjian Yang Tidak Memenuhi Syarat Sahnya Perjanjian (Studi Putusan Pengadilan Negeri Selong Nomor 87/PDT.G/2019/PNSEL)," *Indonesian Notary* 4, no. 2 (2022), <https://scholarhub.ui.ac.id/cgi/viewcontent.cgi?article=1249&context=notary>.

³⁰ Dimas Dwi Hastomo Putra and Indah Harlina, "Tanggung Jawab PPAT Atas Akta Yang Dibatalkan Oleh Pengadilan," *Jurnal Kemahasiswaan Hukum & Kenotariatan* 3, no. 1 (2023), <https://journal.univpancasila.ac.id/index.php/imanot/article/view/5628>.

³¹ Ida Sumarsih, "Challenging Nominee Agreements in the Mining Industry: Between Constitutional Mandates and Legal Evasion," *Indonesia Law Review* 15, no. 1 (2025), <https://doi.org/10.15742/ilrev.v15n1.5>.

³² Gustav Radbruch, *Tujuan Hukum, Terjemahan Shidarta* (Jakarta: Gramedia Pustaka Utama, 2012): 56.

sociology.³³ "*das sollen*" refers to what should happen according to applicable legal provisions, principles, and doctrines (Astarini, 2021).³⁴ The reality or facts that actually occur are described by "*das sein*". Apart from that, here we can also see how Radbruch views law as something factual.³⁵ In addition, Auguste Comte also emphasized that any knowledge must not go beyond facts, treating reality as something that exists and as an object that must be separated from subjective metaphysical conceptions.³⁶

Based on the theory of Radbruch and Auguste Comte, which emphasizes facts and reality, the SOF principle is a fundamental principle needed in the taxation system. The SOF principle becomes a legal problem, especially in taxation, because this principle emphasizes the economic essence of a transaction or event rather than only looking at its formal legal form, which will indirectly prevent tax avoidance. The application of the SOF principle can protect the taxation system from manipulative practices and complex tax avoidance schemes.

In the Indonesian regulations, the SOF principle is indirectly implied in the definition of income in Income Tax Law number 7 of 1983 (most recently by Law Number 6 of 2023), hereinafter referred to as PPh Law. In the definition of income, there is the phrase "*any name and form*," which means that income is a tax object not in its juridical form, but in its economic nature. This definition functions to prevent tax avoidance in Indonesia. A set of measures to prevent tax avoidance in terms of income tax is contained in Article 18 of the Income Tax Law and is further emphasized by the issuance of PP 55 concerning Adjustments to Regulations in the Tax Sector. Specifically for VAT, there is no specific regulation regarding the SOF principle. However, this principle is often used by tribunals in deciding VAT disputes in tax courts, such as in tax court decision number PUT-111852.16/2013/PP/M.XXA.

Even though the material law has not been clarified, there is a clause in the formal law (Law Number 6 of 1983, most recently by Law Number 6 of 2023 hereinafter referred to as the KUP Law) which states that the obligation to submit notification letters, both periodic and annual, must be carried out correctly, completely and clearly. It is true that the explanation of Article 3 paragraph (1) of the KUP Law states the truth in calculating, applying rules, writing, and describing the actual situation. Describe the actual situation according to this article to show that what the Taxpayer reports must be in accordance with the facts on the ground (substance), even

³³ Andini Yuliani, Panca Joko Yesiko Yassin, and Wiena Septiany, "Tinjauan Pengaruh Teori Positivisme Hukum Terhadap Sistem Peradilan Pidana Di Indonesia," *Jurnal Kajian Kontemporer Hukum Dan Masyarakat* 2, no. 1 (2023), <https://doi.org/10.11111/dassollen>.

³⁴ Puteri Chintami Oktavianti, "Hambatan Regulasi Dan Teknis Terkait Implementasi Cyber Notary Di Indonesia," *Jurnal Pembangunan Hukum Indonesia* 6, no. 2 (2024), <https://doi.org/10.14710/jphi.v6i2.243-259>.

³⁵ E. Fernando M. Manullang, "Misinterpretasi Ide Gustav Radbruch Mengenai Doktrin Filosofis Tentang Validitas Dalam Pembentukan Undang-Undang," *Jurnal Hukum ISSN 2598-7933 (Online)* 5, no. 2 (2022), <https://doi.org/10.22437/ujh.5.2.453-480>.

³⁶ Mario Julyano and Aditya Yuli Sulistyawan, "Pemahaman Terhadap Asas Kepastian Hukum Melalui Konstruksi Penalaran Positivisme Hukum," *Jurnal Mengenai Dasar-Dasar Pemikiran Hukum: Filsafat Dan Ilmu Hukum* 6, no. 1 (2021), <https://doi.org/10.23920/jbmh.v6i1.324>. Julyano and Sulistyawan.

though the juridical form is different. This is in accordance with the theory of Gustav Radbruch that the law must be in accordance with the facts.

The SOF principle contained in the formal provisions (UU KUP) is sufficient to guarantee formal legal certainty in collecting VAT on the transfer of land and/or building rights. The tax authorities can use the principle *lex specialis derogate lex generalis*, which is adhered to by positive law in Indonesia, where the Tax Law, in this case the KUP Law, can override other laws in collecting taxes. However, from a material legal perspective, there is an immediate need for regulations that regulate the SOF principle in terms of VAT, which is used by the Fiscus and Taxpayers in collecting taxes. This needs to be done to close the gaps that cause legal uncertainty in practice, especially in the collection of VAT, which has only been regulated from one side, namely, from the formal legal side. This is the same as what was stated by Philipus M Hadjon, that the principle of “*legal certainty*” has 2 (two) aspects, namely the “*material and formal*” aspects.³⁷ Legal certainty must have formal and material weight.³⁸ These two weights will provide legal certainty regarding the effectiveness of the law in terms of norms that clearly stipulate what is required and what is prohibited.³⁹ The trust aspect is closely related to the material legal aspect. In many circumstances, the principle of legal certainty prevents a government agency from withdrawing a decision or changing it to the detriment of its interests.⁴⁰ The principle of legality is another term for the principle of legal certainty, which requires that all policies or decisions made by the government must be as clear as possible and respect the legal rights of citizens. Even though it has not been strictly regulated in the VAT material law, the panel of judges often uses the SOF principle in deciding tax disputes in the tax court, so that the decision of the Tax Court can be used as jurisprudence if it has permanent legal force.

4. CONCLUSION

SOF, which describes a situation that should be (*das sollen*) turns out to be practiced deviantly to become form over substance in the imposition of VAT on the transfer of land/buildings (*das sein*). The application of the SOF principle in the deed of exchange made into an authentic deed of sale and purchase by the PPAT raises issues of responsibility and legal certainty for the parties and/or the PPAT. Based on the description above, it can be concluded that the legal responsibility borne by the parties as taxpayers is in the form of an obligation to pay a larger tax principal and administrative sanctions as a result of tax regulations being “*lex specialis*” than other regulations. If the cause of the problem arises due to negligence committed by the PPAT, then the deed will only have legal force under the hand and can be canceled. Here, PPAT can be held accountable both ethically, administratively, civilly, and criminally. However, no

³⁷ Cekli Setya Pratiwi et al., *Penjelasan Hukum Asas-Asas Umum Pemerintahan Yang Baik* (Jakarta: Lembaga Kajian dan Advokasi untuk Independensi Peradilan (LeIP), 2016) : 81.

³⁸ Arif Hidayat and Zaenal Arifin, “Politik Hukum Legislasi Sebagai Socio-Equilibrium Di Indonesia,” *Jurnal Ius Constituendum* 4, no. 2 (2019), <https://doi.org/10.26623/jic.v4i2.1654>.

³⁹ Hidayat and Arifin.

⁴⁰ Philipus M Hadjon, *Pengantar Hukum Administrasi Negara* (Yogyakarta: Gadjah Mada University Press, 2019).

responsibility can be held if the cause of the problem arises due to the client's (the parties') dishonesty in providing administrative information in making the deed. The SOF principle in imposing VAT can only provide formal legal certainty, and material legal certainty has not been clearly regulated in the regulations, so it is necessary to improve VAT regulations to provide legal certainty. The novelty of this study is the use of the SOF principle in comparing the economic essence of a transaction with an authentic deed from a VAT perspective.

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