

# CHAPTER I

## INTRODUCTION

### 1.1 Background

In September 2018, the media continuously highlighted the initiation by Indonesia's Minister of Finance, Dr. Sri Mulyani Indrawati, to increase the tax levied on certain imported goods.<sup>1</sup> Specifically, the Indonesian Minister of Finance initiated the increase of income tax for importing goods pursuant to Article 22 of Law Number 7 Year 1983 regarding Income Tax as recently amended by Law Number 36 Year 2008 (hereinafter "Income Tax Law"). *Pajak Penghasilan Pasal 22* (or literally translated as Income Tax Article 22, hereinafter "PPh 22") is implemented by the Regulation of the Minister of Finance Number 110/PMK.010/2018 (hereinafter "PMK 110/2018").<sup>2</sup> Article 22 of Income Tax Law stipulates the allowance for an income tax to be levied on a Taxpayer conducting "import activities".

The Indonesian Minister of Finance has emphasized that the purpose of the increase in tax was to curb the increasing "trade deficit" within Indonesia.<sup>3</sup> Trade deficit is defined to be the condition in which a country's import exceeds its

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<sup>1</sup> Raydion Subiantoro, "PPh 22 dari 500 Barang Konsumsi Impor Naik Jadi 10%", <<https://www.cnbcindonesia.com/news/20180905114130-4-31808/pph-22-dari-500-barang-konsumsi-impor-naik-jadi-10>>, accessed on 14 November 2018; Danang Sugianto, "Pajak Impor Barang Konsumsi Naik Hingga 10%, Kapan Berlaku?", <<https://finance.detik.com/berita-ekonomi-bisnis/d-4199347/pajak-impor-barang-konsumsi-naik-hingga-10-kapan-berlaku>>, accessed on 14 November 2018; Ridwan Aji Pitoko, "Ini Jenis Barang yang Tarif PPh Impornya Naik", <<https://ekonomi.kompas.com/read/2018/09/05/210900126/ini-jenis-barang-yang-tarif-pph-impornya-naik>>, accessed on 14 November 2018; and Annisa Sulisty Rini, "Ini Komentar Pengusaha Soal Kenaikan PPh Impor", <<http://industri.bisnis.com/read/20180905/257/835585/ini-komentar-pengusaha-soal-kenaikan-pph-impor>>, accessed on 14 November 2018.

<sup>2</sup> *Ibid.*

<sup>3</sup> Merdeka.com, "Sri Mulyani Beberkan Alasan Naikkan Tarif 1.147 Barang Impor", <<https://www.liputan6.com/bisnis/read/3637564/sri-mulyani-beberkan-alasan-naikkan-tarif-1147-barang-impor>>, accessed on 14 November 2018.

export.<sup>4</sup> She hopes that the increase in tax will discourage Indonesians from buying imported goods, ultimately decreasing the amount of imported goods and Indonesian's trade deficit.

She further cited a second purpose in connection with the first: to help the growth of local business owners and producers within the country.<sup>5</sup> The Indonesian Minister of Industry, Airlangga Hartarto, expressed a favourable response towards the increased tax. He stated that the law would hopefully result in the increase of utilization of local goods and the Purchasing Managers' Index (PMI)<sup>6</sup> of Indonesian manufacturers.<sup>7</sup> It is projected that the increased tax will result in an increased incentive to purchase cheaper local goods compared to imported goods of the same type. Moreover, during the legislation process of PPh 22, Dudi Wahyudi, Ak., MM who is a Widyaiswara Muda Pusdiklat Pajak, stated that the function of PPh 22 has shifted from the budgeting function to the regulating function.<sup>8</sup>

Indonesian law characterises PPh 22 as a form of income tax that is levied on the act of importing goods. Income tax has been defined as “tax that is levied on a

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<sup>4</sup> Investopedia, “Trade Deficit”, <[https://www.investopedia.com/terms/t/trade\\_deficit.asp](https://www.investopedia.com/terms/t/trade_deficit.asp)>, accessed on 14 November 2018.

<sup>5</sup> Ministry of Industry (*Kementerian Perindustrian*), “Penyesuaian Tarif PPh 22 Bentuk Keberpihakan Kepada Industri Nasional”, <<http://www.kemenperin.go.id/artikel/19636/Penyediaan-Tarif-PPh-22-Bentuk-Keberpihakan-Kepada-Industri-Na>>, accessed on 10 November 2018.

<sup>6</sup> The Purchasing Managers' Index (PMI) is “an indicator of economic health for manufacturing and service sectors with the purpose to provide information about current business conditions to company decision makers, analysts and purchasing managers”. See <https://www.investopedia.com/terms/p/pmi.asp>.

<sup>7</sup> Ministry of Industry (*Kementerian Perindustrian*), “Penyesuaian Tarif PPh 22 Bentuk Keberpihakan Kepada Industri Nasional”, <<http://www.kemenperin.go.id/artikel/19636/Penyediaan-Tarif-PPh-22-Bentuk-Keberpihakan-Kepada-Industri-Na>>, accessed on 10 November 2018.

<sup>8</sup> Dudi Wahyudi, “Badan Pendidikan Dan Pelatihan Keuangan.” *Badan Pendidikan Dan Pelatihan Keuangan*, Kementerian Keuangan, 18 December 2013, [www.bppk.kemenkeu.go.id/id/publikasi/artikel/167-artikel-pajak/12601-peran-baru-pph-pasal-22-impor](http://www.bppk.kemenkeu.go.id/id/publikasi/artikel/167-artikel-pajak/12601-peran-baru-pph-pasal-22-impor).

tax subject for the income that he received or earned within one tax year”.<sup>9</sup> The legal basis for Indonesian Income Tax is Law Number 7 Year 1983. As its name suggests, PPh 22’s legal basis is Article 22 of Income Tax Law. Article 22 was most recently amended by Law Number 36 Year 2008. Article 22(1) point b allows the Minister of Finance to “establish certain entities to withhold tax from Taxpayer conducting business activities in the import sector”. Article 22(2) further stipulates that the determination of the amount of tax and the basis for its collection is to be regulated within an implementing regulation. The recent amendment of PPh 22 was made in the aforementioned implementing regulation, specifically within PMK 110/2018. The Appendix of PMK 110/2018 includes a list of items and its corresponding tariff percentage.<sup>10</sup>

This thesis will focus on whether or not the recent amendment of PPh 22 is consistent with the General Agreement on Tariffs and Trade (hereinafter “GATT 1994”) within the World Trade Organization (hereinafter “WTO”) agreements, specifically with the National Treatment (hereinafter “NT”) principle. As PPh 22 levies higher taxes towards like imported goods compared to like domestic goods, it may not be in line with the NT principle which does not allow the discrimination of a country against imported like products *vis-à-vis* its like domestic products.<sup>11</sup> The Appellate Body in *Japan – Alcoholic Beverages II* (1994) held that the purpose of the NT obligation is to “provide equality of

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<sup>9</sup> Article 1 of Income Tax Law; Rahmat Hidayat Lubis, *Pajak Penghasilan – Teori, Kasus dan Aplikasi*, (Yogyakarta: Penerbit ANDI, 2018) (“**Lubis**”), p. 83.

<sup>10</sup> See Appendix A for the reproduction of the regulation along with the Appendix to PMK 110/2018.

<sup>11</sup> Peter van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization*, Third edition, (United States of America: Cambridge University Press, 2013) (“**Bossche and Zdouc**”), p. 352.

competitive conditions for imported products in relation to domestic products”.<sup>12</sup> While it allows the existence of taxes to be levied on goods, it prohibits the creation of a more favourable condition towards domestic goods.

The NT Principle is contained within Article III of GATT 1994, which is further divided into Article III:2 and Article III:4. Article III:2 concerns itself with the NT obligation on internal taxation or charges, while Article III:4 is regarding the NT obligation on internal regulations.

The WTO originated from the General Agreement on Tariffs and Trade of 1947, of which Indonesia is an original member, becoming its Contracting Party as early as 24 February 1950.<sup>13</sup> Furthermore, Indonesia has ratified the WTO Agreement through Law Number 7 Year 1994 regarding the Ratification of Agreements Establishing the World Trade Organization.

GATT 1947 began with United States calling its wartime allies to negotiate on a multilateral agreement regarding the reduction of tariffs on trade in goods in December 1945.<sup>14</sup> This resulted in the meeting in Geneva from April to November 1947, consisting of three important parts: the drafting of a charter for an ‘International Trade Organization’ (hereinafter “ITO”), the negotiation of a multilateral agreement regarding the reduction of tariffs in trade, and the commencement of drafting the general clauses for obligations in relation to tariff obligations.<sup>15</sup> The discussions for the two latter points progressed well, eventually

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<sup>12</sup> Appellate Body Report, *Japan – Alcoholic Beverages II (1996)*, para. 109; Bossche and Zdouc, *op. cit.*, p. 352.

<sup>13</sup> World Trade Organization, “The 128 countries that had signed GATT by 1994”, <[https://www.wto.org/english/thewto\\_e/gattmem\\_e.htm](https://www.wto.org/english/thewto_e/gattmem_e.htm)>, accessed on 11 November 2018.

<sup>14</sup> Bossche and Zdouc, *op. cit.*, p. 76.

<sup>15</sup> *Ibid.*

resulting in what is now known as GATT 1947.<sup>16</sup> On the other hand, the discussion regarding the establishment of an ITO was not fruitful, and ITO was stillborn even after its completion in 1948.<sup>17</sup>

GATT 1947 was hugely successful in reducing tariff on trade in goods.<sup>18</sup> Its success, along with the realisation of its weaknesses and that GATT 1947 is insufficient to properly cover all the aspects of international trade,<sup>19</sup> resulted in the consensus that another international organization centred around trade is necessary.<sup>20</sup> This led to the Uruguay Round of Multilateral Trade Negotiations.<sup>21</sup> Despite a few oppositions from several countries during the negotiations,<sup>22</sup> the Agreement Establishing the World Trade Organization (hereinafter “WTO Agreement”) was signed in Marrakesh in April 1994 and entered into force on 1 January 1995.<sup>23</sup> Accordingly, GATT 1947 was incorporated by reference within GATT 1994, along with the provisions of GATT 1947 legal instruments, and the Understandings set forth within the Uruguay Round.<sup>24</sup> In short, the WTO Agreement is comprised of more than one legal texts, which are: (1) the Marrakesh Agreement establishing the WTO, (2) Annex 1A regarding Trade in Goods including GATT 1994, (3) Annex 1B regarding Trade in Services, (4) Annex 1C regarding Intellectual Properties, (5) Annex 2 regarding Dispute Settlement, (6) Annex 3 regarding Trade Policy Review, (7) Annex 4 regarding

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<sup>16</sup> *Ibid.*

<sup>17</sup> Bossche and Zdouc, *op. cit.*, p. 78.

<sup>18</sup> World Trade Organization, The GATT years: Havana to Marrakesh, <[https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact4\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm)>. Accessed on 6 January 2019 (“Havana to Marrakesh”)

<sup>19</sup> *Ibid.*; Bossche and Zdouc, *op. cit.*, pp. 78-79.

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*

<sup>24</sup> Havana to Marrakesh, *op. cit.*; Bossche and Zdouc, *op. cit.*, p. 42.

Plurilaterals, and ministerial regulations.

The objectives of the WTO can be summarised into four crucial points: (1) to increase living standards; (2) to attain full employment; (3) to encourage the growth of real income and effective demand; and (4) to expand the production and trade of goods and services.<sup>25</sup> Accordingly, the main instruments of the WTO has the objectives to (1) reduce tariff barriers and other barriers for trade; and (2) eliminate discriminatory treatment in international trade relations.<sup>26</sup>

As Indonesia is a WTO Contracting Party (hereinafter “WTO Member”), it has the obligation to comply with the commitments contained within the WTO Agreement. Moreover, the creation of WTO had the purpose to promote the breaking down of trade barriers between countries, resulting in an increased incentive for a WTO Member to trade with other WTO Members because of the promotion of stability and predictability within international trade. Therefore, the Author believes that it is pertinent that an evaluation of the amendment of PPh 22 in relation to its consistency with the NT principle within GATT 1994 is made.

## 1.2 Research Questions

In relation to the background of this thesis, the Author will be discussing the following research questions:

1. Can PPh 22 be considered to be an internal tax or charges in order for it to fall within the ambit of Article III:2 of GATT 1994?
2. Is the amendment of the implementing regulation of PPh 22 consistent with the Article III:2 and Article III:4 of GATT 1994?

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<sup>25</sup> Bossche and Zdouc, *op. cit.*, p. 83.

<sup>26</sup> *Ibid.*, p. 84.

### **1.3 Research Purpose**

In light of the aforementioned research questions, the purpose of this research is to identify and understand the NT obligation contained within GATT 1994, along with whether or not the amendment to the implementing regulation of PPh 22 is consistent to the NT principle.

### **1.4 Research Benefit**

The benefits of this research will be divided into two, namely the theoretical benefit and the practical benefit.

Regarding the theoretical benefit, the Author believes that this research will provide contribution to the development of legal studies in Indonesia for the GATT 1994 and the NT principle. As the newly amended regulation may result in a debate in relation to its consistency with the NT principle within GATT 1994, the Author hopes to contribute to this debate by providing an in-depth analysis on the regulation and the NT principle within GATT 1994.

In regard to the practical benefit of this research, the Author believes that this thesis will shed light on how GATT 1994 allows but restricts the application of tariff barriers within a country. This thesis aims to delve into the application of the GATT 1994 in practice in order to reflect a more realistic view on how the NT principle within GATT 1994 is applied by Indonesia and other WTO Members alike.

## **1.5 Framework of Writing**

For the convenience of reading this thesis, the Author will summarise the contents of each chapter contained within this thesis as follows.

### **CHAPTER I: INTRODUCTION**

The first chapter will include an introduction that will contain the background of the thesis topic, the research questions, research purpose, research benefits, and the framework of writing.

### **CHAPTER II: LITERATURE REVIEW**

The second chapter will include the statute approach regarding NT according to GATT 1994 and Indonesian income tax law. In writing the statute approach, the Author will utilise the logical deduction method, which is conducted by writing general theories regarding the subject matter and draw specific logical conclusions that is in accordance to the issues in this thesis.

### **CHAPTER III: RESEARCH METHODOLOGY**

In the third chapter, the Author will be discussing the different types of research methods, types of research, procedures for obtaining the research materials and legal materials, along with the most ideal research technique that will be utilised in this thesis.



#### CHAPTER IV: ANALYSIS & DISCUSSION

The fourth chapter will include the analysis of the research problems in accordance with the theoretical analysis, principles of law and relevant regulations. Specifically, this chapter will include:

- a. whether or not PPh 22 be considered to be an internal tax or charges; and
- b. whether or not the amendment of PPh 22 is consistent with Article III:2 and Article III:4 of GATT 1994.

#### CHAPTER V: CONCLUSION AND RECOMMENDATION

Following the analysis of the research question, the Author will draw a conclusion regarding the research questions. Furthermore, the Author will put forward recommendations based on the issues and the analysis conducted in this research.