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**Research Paper**

# Double Tax Avoidance Agreement (Tax Treaty) between Indonesia and Malaysia

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***ABSTRACT***
*The purpose of holding the Tax Treaty or commonly referred to as the Tax Treaty is a tax treaty between two countries that regulates matters relating to the distribution of taxation rights on income earned/received by residents (Individuals or Legal Entities) from one of them. One or both state parties aim to avoid double taxation and attract foreign investment into the country. Tax Treaty is used to determine the allocation of taxation rights of a transaction that occurs between the source country and the country of domicile. The source country is the country where the source of income comes from, and the country of domicile is where the taxpayer lives or resides.*
*The Tax Treaty objectives include preventing tax evasion, providing legal certainty as a means of exchanging information, resolving disputes in Tax Treaty, non-discrimination, and assistance in tax collection.*
*The research was conducted using a descriptive analysis method with a normative juridical approach. The data collection technique is done using a literature study, which is intended to obtain data that supports the research.*
***KEYWORD: Tax Avoidance***

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## I. INTRODUCTION

The tax laws of a country always have an international aspect, both on the subject and the tax object (Rachmanto Surahmat, 2001: 11). International aspects of tax law reflect the extent to which a country determines rights

Taxation outside its territory. Adhering to the rights of each country, the imposition of taxes on an international aspect will have the impact, among others, detrimental to the global business community because the imposition of taxes can be carried out by two or more countries so that the tax imposed on one tax object becomes double.

In international taxation, Tax Treaty Avoidance Agreement is a law source that is always used in every transaction. The taxation aspects also follow the provisions in the Tax Treaty in accordance with the transaction concerned. Therefore, every country involved in the process of making this Tax Treaty must also underlie the existence of an internationally recognized model agreement. For this reason, the agreement model is divided into two types, namely the OECD (Organization for Economic Cooperation and Development) Model and the UN (United Nations) Model.

In this OECD model, the objective is to increase trade between countries that signed the Tax Treaty by eliminating international double taxation, and in this model, more taxation rights are granted to the domicile country. The OECD model members consist of developed countries, which are generally in European countries such as Britain, France, Germany, Japan, Australia, the United States, Canada, and 19 other developed countries.

Meanwhile, the UN Model has a broader objective of the Tax Treaty, which is aimed at increasing foreign investment as a means for economic and social growth of developing countries. Contrary to the OECD Model, the UN model gives more tax rights to source countries or income countries. The UN Model members consist of tax experts from developed countries and representatives from developing countries such as Asia, Latin America, Africa, Indonesia, India, Turkey, and 14 other countries.

These two models are used as a reference for countries that will conduct foreign transactions by involving this agreement. Indonesia itself also forms and develops its own model, which is named the Indonesian Model. Where in the Indonesian model, this is an amalgamation and development of the OECD Model and the UN Model.

The international aspect usually concerns not only the tax object but also the definition of a foreign tax subject (non-resident taxpayer), the definition of a permanent establishment in the form of a foreign company doing business in the country, determining the income from the business, and the types of income earned. Foreign tax subjects from domestic sources which are subject to income tax both in connection with work and services.

Double taxation is basically the result and effect of each country's different international tax principles—this difference in principle results in a jurisdictional conflict between one country and another. Although every country has a unilateral method of avoiding double taxation to prevent the imposition of tax by two or more collecting countries in every international transaction that occurs, this does not fully guarantee the non-imposition of double taxation. This jurisdictional conflict stems from the fact that each country is free to determine its own tax jurisdiction within its territory, as well as for all residents who get income from various sources, either from within or outside the region.

## II. LITERATURE REVIEW

Tax and Tax Law

Taxes are a means of connecting members of society with other communities and with the state as an application of community responsibility towards themselves and other communities, which is coordinated by the government as representatives of the state. Therefore Rochmat Soemitro said that taxes are part of the social phenomenon of society. The social phenomenon can only exist in a society; without a society, it is impossible to have a tax and the society that is meant is a legal community that has rights and obligations.

Many experts define tax, including according to Waluyo; W.B. Ilyas, Taxes are achievements to the government that are indebted through general norms and which can be enforced without any contra-performance shown in individual terms. The intention is to finance government expenditures.

Meanwhile, according to Rocmat Soemitro, taxes are people's contributions to the state treasury based on the law (which can be enforced) without receiving lead services (counter-performance) which can be directly appointed and used to pay for general expenses. The definition of enforceable means that if the tax debt is not paid, it can be collected by force, confiscation, and auction of confiscated goods, even taking hostages (gijzeling). Furthermore, Rochmat Soemitro also gave an understanding that taxes are the transfer of wealth from the people to the State treasury to finance routine expenses, and the surplus is used for public saving, which is the main source of financing investment.

Another definition put forward by S.I. Djajadiningrat is as follows Tax as an obligation to hand over part of the assets to the state treasury due to circumstances, events and actions that give a certain position, but not as a punishment, according to regulations set by the government and can be imposed, but there is no reciprocal service from the state directly, to maintain the general welfare.

Tax Law is a collection of regulations governing the government's relationship as tax collectors and the people as taxpayers. In tax law, it regulates the subject of taxes and taxpayers, what objects are the basis for tax imposition, the obligations of taxpayers to the government, the arising and elimination of tax debts, how to collect taxes, and how to file objections and appeals.

The above definition also shows that there is a legal relationship between the government and the people in tax law. The government acts as a tax collector while the people, as the tax subject. The existence of such a legal relationship, tax law, including public law, is part of state administrative law.

Tax collection arises because of the law as stipulated in Article 1233 Burgelijk Weetbook Indonesia (IBW), which regulates that an engagement arises because of a law or because of an agreement, while Article 1345 Burgelijk Weetbook Indonesia regulates that an agreement arises due to a law can be differentiated between arises because of the law itself and arises because of the law with human actions.

**INCOME CONCEPT**

In everyday use, the terms income and income are interpreted the same. The English translation, which is common and deemed appropriate for revenue is revenue, while income is income, which is commonly used in the taxation literature. The definition of income that has been generally accepted (generally accepted of income) is derived from an expert named Henry Simon as quoted by Parthasarathi Shome, as follows: "Income is ***The algebraic sum of (1) the market value of rights exercised in consumption: and (2) the change in the value of the store of property rights between the beginning and end of the period in question. In other words. It is merely the result obtained by adding consumption during the period to "wealth" at the end of the period and them subtracting "wealth" at the beginning."***

**TYPESOF INTERNATIONAL TAX TREATY**

As part of the countries in the world, Indonesia cannot be separated from the international tax law system, including the presence of foreign investment companies (*Penanaman Modal Asing*) operating in Indonesia. International tax law is a national tax law that contains foreign elements. The foreign element can be regarding the tax subject, tax object, and tax collector.

Sources of international tax law are:

1. National tax law (unilateral), namely unilateral tax regulations that are not addressed to other countries;
2. Treaties (Bilateral), namely tax treaties with other countries that regulate such as:

a. Avoidance of double taxation (double taxation);
b. Regulating the fiscal treatment of foreigners;
c. Regulating the profit of a Permanent Business Entity (BUT);
d. Combating tax smuggling (tax evasion);
e. Determining customs rates.

3. Judges' decisions (national and international).

The general purpose of international tax law is to eliminate the symptoms of double taxation. Double tax avoidance is carried out by:

a. Unilateral, where the country is concerned, includes in its tax laws the provisions to avoid double taxation; there are two methods of unilateral avoidance of double taxation such as exemption and credit method.
b. Bilateral, carried out by entering into a tax agreement between two countries known as a tax treaty or Double Taxation Avoidance Agreement (P3B) or in full, "agreement for the avoidance of double taxation and prevention of tax evasion."
c. Multilateral agreements, agreements agreed upon by several countries, such as the General Agreement on Tariffs and Trade (GATT), regulate multilateral customs tariffs. Usually, tax treaties with multilateral are not merely to avoid double taxation, but have other purposes such as encouraging trade; encourage investment, and prevent tax evasion.

Matters that must be regulated in each tax treaty are regarding which countries are participants and are bound by the agreement and which tax objects are covered by the agreement. In general, tax treaties can be grouped into:

a. State the type of tax but does not state the definition. This can lead to differences in interpretation so that the phrase "if there is doubt, talk about it together" is often added;
b. Include the definition of the tax which it covers along with the names of taxes, which at the time of the agreement was made and supplemented with the provision that at certain times the financial authorities of each country will notify each other which taxes are subject to the agreement.
c. State the tax's name on the condition that the agreement also applies to taxes that will be incurred and essentially has the same basis.

Tax objects in a tax treaty are generally divided into 15 types of income, as follows:

a. Income from immovable property;
b. Business income or business profits;
c. Income from shipping and air transport business;
d. Dividend;
e. Interest (interest);
f. Royalty;
g. Profits from the sale of assets (Capital Gain);
h. Income from independent personal service;
i. Income from work (Income from dependent personal service);
j. Director's salary;
k. The income of artists, artists, athletes (Income earned by entertainers and athletes);
l. Retirement money and social security for workers (Income in respect of government);
m. Income in respect of government;
n. Student or student income (income received by student and apprentices);
o. Other income.

As stated above, since GATT was passed, tax issues have not been specifically regulated because this is the domestic policy of a country related to exclusive jurisdiction in its territory.

In connection with the jurisdiction of collecting taxes by a country, there are two principles used by the state as the basis for collecting taxes, namely:

a. taxpayer status
b. source of income.

Countries that use the taxpayer status as the base usually base their tax collection on the relationship between the taxpayer and the state so that several principles are known, namely:

Domicile Principle (Domicile, Residence Principle)

Based on this principle, the state will impose a tax on income received or obtained by an individual or entity; for tax purposes, the individual is a resident or domiciled in that country or an entity domiciled in that country. In this connection, it does not matter where the income to be taxed comes from. That is why for countries that adhere to this principle, the system of taxing its residents will combine the principle of domicile (population) with the concept of taxation on income both earned in that country. Income earned abroad (worldwide income).

Source Principle

Countries that adhere to the source principle will impose a tax on income received or obtained by an individual or entity only if the income to be taxed is obtained or received by the individual or entity concerned from a country. In this principle, it does not matter who and what the status of the person or entity receives the income because the basis for the imposition of taxes is the tax object that arises or originates from that country. Example: The Indonesian government will tax foreign workers working in Indonesia, then the income earned in Indonesia.

Nationality, Citizenship Principle

In this principle, the basis for the imposition of taxes is the person's citizenship status or entity that earns income. Based on this principle, it does not matter where the income to be taxed comes from. As in the domicile principle, the taxation system based on the national principle is carried out by combining the national principle with the concept of taxation on income earned abroad.

**PRINCIPLESOF TAX IMPOSITION IN INDONESIA**

The Indonesian government adheres to the principle of taxing all income, including income from abroad. For domestic taxpayers, tax imposition is based on the domicile principle. Meanwhile, for foreign citizens who live and earn income in Indonesia, a time limit check is carried out to determine whether an individual or entity is a domestic taxpayer (living in Indonesia for more than 183 days in 12 months) or is a foreign taxpayer (living in Indonesia for more than 183 days in 12 months). in Indonesia a maximum of 183 days in 12 months). For foreign taxpayers, it is only imposed on income earned in Indonesia. Furthermore, as is familiar with taxation practices in various countries, tax treaties between countries are regulated to avoid double taxation.

**TAX TREATIES BETWEEN THE STATE OF INDONESIA AND OTHER COUNTRIES IN THE INDONESIAN LEGAL SYSTEM**

According to Jaja Zakaria in his book entitled Avoidance of Double Tax Agreements, he states that there are 2 (two) essential questions related to the position of the agreement in the Indonesian legal system, what is the position of a taxation agreement in the Indonesian legal system and whether there is a legal conflict between the taxation agreement and the law. National laws and how to solve them. The signing of an agreement has not created a legal bond for the parties. For such an international agreement, a signatory to an international agreement must be ratified by the country's competent body; such ratification is called ratification.

**DOUBLE TAX AVOIDANCE**

As explained in the previous chapter, there are several ways of avoiding double taxation; in this section, we will explain about ways of avoiding double taxation as follows:

1. Unilateral, where the country is concerned includes in its tax legislation on provisions to avoid double taxation. There are two methods of unilateral avoidance of double taxation, such as:

a. Exemption method, this method basically is to exempt any income tax obtained abroad or in other words, that every foreign transaction is not taxed in the country of domicile. There are two ways in this method, first is a full exemption, in the form of avoiding double taxation by ignoring foreign income, secondly progressive exemption, which is different from the full exemption, in that the progressive exemption of income from abroad is used for the purposes of calculating progressive rates. these two ways

You will feel the amount of the tax burden that is the obligation because the tax base is different. This method is an acknowledgment of the payment of taxes payable abroad with exemptions imposed to protect domestic interests, such as in terms of tax revenue and protection of domestic production;

b. Tax credit (tax credit), this method of domicile country allows taxes paid in the source country to be credited. There are two types of treatment in this method; first, full credit, that is, of all tax burdens paid in the source country can be deducted as a tax credit in domicile countries, both ordinary credit, which is almost the same as the full tax credit method, but the tax paid in the source country is limited in crediting it in the domicile country.

2. The unilateral avoidance method of double taxation adopted by the Income Tax Law in Indonesia uses the ordinary credit method. This means that the amount of tax credit paid abroad must not exceed the tax payable calculation domestically. Article 24 paragraphs (1) and (2) of Law Number 7 of 1983, in accordance

with the latest amendments to Law Number 17 of 2000, concerning income tax, confirms that taxes paid or payable abroad on income from abroad received or obtained by domestic taxpayers may be credited against the payable tax in the same tax year. However, the amount of the tax credit may not exceed the calculation of tax payable domestically. 2. Bilateral, this is done by entering into a tax treaty between countries known as tax treaty or Double Taxation Avoidance Agreement (P3B) or the full amount is "agreement for the avoidance of double taxation and prevention of tax evasion."

The problem of double taxation cannot be solved unilaterally. It is necessary to have efforts to avoid double taxation by making an agreement between the two countries concerned. The advantage of avoiding double taxation through the tax treaty mechanism is that all aspects of the subject and tax object can be described in detail. Is that it is not easy to reach a consensus in making the agreement because each country feels that there are an advantage and a loss. To make it easier to settle bilateral taxation agreements, there are several methods of drafting a double tax avoidance agreement, such as the OECD model commonly used by European countries and the UN model commonly used by developing countries. Until now, Indonesia has had bilateral tax treaties with 56 (fifty-six) countries;

Multilateral agreements, agreements agreed upon by several countries, such as the General Agreement on Tariffs and Trade (GATT), regulate customs tariffs multilaterally. Usually, multilateral tax agreements are not solely to prevent double taxation but have other objectives such as encouraging trading; encourage investment, and prevent tax evasion.

**CAPITAL GAINS AS INCOME**

Capital gains are a type of income that can be obtained by an individual or a body, which has assets that were not originally intended to be traded. Many observers and experts in the field of business (especially finance) provide a definition of capital gains, but if viewed from the material or its characteristics in general, it is the same. There are three concepts from Sommerfeld's research in looking at capital gains, namely based on law, economy, and accounting. The three concepts of capital gains can be explained as follows:

a. Legal Concept

The legal concept of capital gains for tax purposes is complicated because the original objective factor of asset ownership determines the amount of tax payments. An item (asset) which at the beginning of its ownership was solely for the purpose of long-term investment (capital goods), but at one time due to specific considerations (for example due to consideration of obtaining a profit) can be decided to be sold so that the goods must be reclassified as ownership of goods for sale (merchandise). If an item is sold and capital gains are made, the question that arises is how long the goods are owned before being sold. To determine which type of capital gains. Thus the legal concept of capital gains can be influenced by the actions of the owner.

b. Economic Concept

There is no problem with capital gains or capital loss from the transfer of assets in classical economic concepts because capital gains or capital losses occur unexpectedly, especially not from the results of the company's main/principal activities. This is done in order to uphold the principle of perfectly healthy competition, which is based on normal conditions.

c. Accounting concept

According to accounting, capital gains or capital loss is probably best described as follows. Profits or losses occur only over a certain period of time due to an imperfect understanding of the market. Oscar, S. Nelson, professor of accounting at The University of Pennsylvania, states the concept of accounting in these words:

“At a meeting of the American Accounting Association, questions were raised about the difference between operating income and capital gains. In theory, there is no difference because of the two

Resulting from a business venture, for example, income from capital, labor, and management of a company with a profit motive, while capital gains or capital loss is obtained only because of a transaction.

**CAPITAL GAINS**

Based on the understanding and concepts above, it shows that capital gains as a Income can be obtained from various sources, such as from assets, stocks, bonds, colors, mutual funds, and index futures, depending on the mechanism for obtaining it from each source. Each capital gain can be explained as follows:

a. Assets

In essence, assets (capital assets) are not for sale but are used to carry out business activities. Generally, assets have a useful life of more than one year so that the expense is not charged all at once but gradually through a depreciation or amortization process. Assets consist of current assets and fixed assets. Fixed assets can be in the form of land, buildings, machinery, equipment, motor vehicles, brands, etc. Because assets are not as merchandise, so if a transfer (sale) is made and the difference between the transfer value and the acquisition or book value is obtained, the excess is capital gains.

b. Common stock investment

When we look at the types of securities traded on the stock exchange, common stock is one of the most well-known products. This stock offering is often found through advertisements in newspapers by companies that are listed on the stock exchange (issuers). Common stock consists of several classifications such as blue-chip-stocks, income stocks, growth stocks, speculative stocks, cyclical stocks, and defensive stocks ( defensive stocks).

The advantage of the common stock lies in its ability to generate unlimited returns (rate of return), such as dividends obtained from the issuing company's profits (issuer). If the issuer is a large and prospective company, the dividends that will be obtained will also be large. Apart from dividends, the gain from investing in shares is capital gains, namely the excess selling price over the purchase price of shares on the secondary market.

In practice, some investors only want capital gains, but there are also those who only want dividends or even want both. Regarding which types of profit will be obtained, of course, it is more influenced by business calculations, namely which ones are profitable.

c. Bond Investments

Bonds (bonds) are included in the long-term investment group. The simple definition of a bond is a contract between the lender and the lender, which is manifested in the form of bonds. With these bonds, the fund owner makes a loan to the company (which is given a loan) through a contract. The lender has the right to be paid back at a particular time and in a certain amount.

**TAXES ON CAPITAL GAINS**

The mechanism and the process are known that capital gains are obtained from the transfer of assets or assets (capital assets). As income that can provide added value or additional economic capacity, it is subject to tax based on the applicable provisions. Glenn P. Jenkins and Gangadhar P Shukla state that the capital gains tax is a tax on the value of the assets transferred. Taxing capital gains would preclude the public's intention to turn business profits into investment gains as a way to avoid paying income tax. For convenience, the tax on capital gains is levied at the time of realization, not at the time of delivery.

According to the definition of income as an object subject to tax, the principle of the imposition of tax on capital gains is basically contained in Article 4 paragraph (1) of Law Number 7 concerning Income Taxes of 1993 as the last amendment Law Number 17 of 2000. Gunadi stated that the principle of tax imposition follows a comprehensive approach, which is also known as the global of income as well as the accretion concept. With this imposition principle, the capital gains obtained and subject to tax are unlimited only from Indonesia but also from outside Indonesia because the acquisition of capital gains, in essence, can provide additional economic capability.

Experts give many views in the field of taxation regarding the imposition of tax on capital gains. According to Ray M Sommerfeld, capital gains income is a type of income in a special category (extraordinary income) so that capital gains as income gets special treatment in income tax regulations. The statement indicates that taxes on income from capital gains may be treated differently from taxes on other income received on a routine basis.

According to the commentary of article 13 of the treaty model for OECD countries, income tax on capital gains is calculated from the difference between the selling price and the cost/cost. From this OECD context, it is implied that income from capital gains is recognized as income, which is a tax object after realization.

The tax formula on Capital Gains is Tariff X net value (net selling price minus acquisition price). If the net shows negative, it means that the capital loss is obtained, and transactions that obtain capital loss are allowed to reduce net income in determining the amount of taxable income. Conversely, if the net value of property transactions' sale shows a positive result, which means that capital gains are obtained, the amount is added as taxable income.

**DOUBLE TAXATION AVOIDANCE ON CAPITAL GAINS UNILATERALLY AND DOUBLE TAXATION AVOIDANCE AGREEMENTS WITH OTHER COUNTRIES**

Income Tax Treatment on Capital Gains in Indonesia

Unilaterally, the Indonesian state has provisions for avoiding double taxation in its statutory provisions, including regarding capital gains. By defining income as a taxable object, the principle of taxation on capital gains is essentially contained in Article 4 paragraph (1) of Law Number 7 concerning Income Taxes of 1993 as the last amendment to Law Number 17 of 2000.

Gunadi's research states that the principle of the imposition of taxes follows a comprehensive approach, which is also known as the global of income and the accretion concept. With this imposition principle, capital gains obtained and subject to tax are not limited to only from Indonesia but also from outside Indonesia. Because the acquisition of capital gains, in essence, can provide the additional economic capability

When examined from a juridical aspect, the imposition of tax on capital gains in Indonesia is quite strong and clear, namely the Income Tax Law, which is most recently regulated by Law Number 17 of 2000. In Article 4 paragraph (1) letter d, it is stipulated that income included as Tax object is a gain due to sale or transfer of property, which is known as capital gains, so that the gain from the sale or transfer of property is income subject to Income Tax.

According to applicable provisions, the sale or transfer of property can generate capital gains but may also suffer capital loss. This gain or loss depends on the value between the purchase value or the book value and the sale or transfer value. Assets are income subject to income tax.

There are five groups of activities that can be carried out in the context of selling or transferring assets for profit, namely:

a. General sale or transfer of assets;

b. Transfer of assets to companies, partnerships, and other entities as a substitute for shares or equity participation;

c. Transfer of assets to shareholders, partners or members of companies, partnerships, and other bodies;

d. Liquidation, merger, consolidation, expansion, splitting, or business takeover

e. Transfer of assets in the form of grants, assistance or donations, except those given to blood relatives in a straight line of one degree and religious bodies or educational bodies or social agencies or small entrepreneurs including cooperatives as stipulated by the Minister of Finance, as long as they have nothing to do with the business, work, ownership or control between the parties concerned.

**INCOME TAX ON CAPITAL GAINS FOR RESIDENTS OF INDONESIA RECEIVED ABROAD**

About the transfer of property transactions that occur abroad by Indonesian residents or entities, unilaterally in accordance with Article 24 of Law Number 7 of 1983 as the latest amendment to Law Number 17 of 2000 concerning Income Tax, confirms

That if it has been done, the overseas payments on the capital gains can be credited against taxes payable in the same year.

The treatment in Article 24 above provides confirmation of minimizing the imposition of double taxation on taxpayers who make transactions on income paid or payable abroad. Taxes paid or payable abroad can be credited against taxes payable in Indonesia but may not exceed the amount taxes owed domestically.

From the affirmation of Article 24 Paragraph (1), it can be concluded that the Indonesian state in avoiding double taxation unilaterally on capital gains adheres to the principle of domicile; this implies that Indonesian residents who receive benefits from the transfer of assets abroad, the right to collect is the country where the assets are located.

Unilaterally, regarding the income from the transfer of assets received by Indonesian residents abroad, there is no detail on the type of assets that will be the transfer object; or in other words, there is no provision whether the property is immovable property or multiple assets. Tax Treatment of Capital Gains in the Double Taxation Avoidance Agreement

As previously explained, the double tax avoidance agreement is a reconciliation of two different tax laws or provisions in two or more countries.

With regard to the transfer of property transactions that occur abroad by Indonesian residents or entities, unilaterally in accordance with Article 24 of Law Number 7 of 1983 as the latest amendment to Law Number 17 of 2000 concerning Income Tax, confirms that if it has been done The overseas payments on the capital gains can be credited against taxes payable in the same year.

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As previously explained, the double tax avoidance agreement is a reconciliation of two different tax laws or provisions in two or more countries.

1. Capital gains from immovable property.

The affirmation in the double taxation treaty that any gain from the alienation of immovable property received by a resident of one of the countries which are bound by a taxation treaty may be taxed in the country where the property is located implies that the need for detailed confirmation regarding capital gains in the law tax laws in each country.

Capital gains from immovable property received or acquired by a resident of a tax treaty partner country in the event that Indonesia has the right to impose the tax is regulated in article 26 paragraph (2) of Law Number 7 of 1983 as the latest amendment to Law Number 17 of 2000, which stipulates that income from the sale of property in Indonesia, except as provided for in Article 4 paragraph (2), is received or obtained must foreign tax other than a permanent establishment in Indonesia, tax is deducted by twenty percent of the estimated net income.

Profits from the transfer of immovable assets received by residents of other countries in the agreement, in this case, the Indonesian state, has the right to impose a tax in accordance with the contents of the agreement in the form of imposition of a tax of twenty percent of the estimated net income.

Especially for profits on the transfer of rights to land and/or buildings, if the land or building is part of the assets of a permanent establishment or permanent place of business in Indonesia, in accordance with the provisions of Article 4 paragraph (2) of Law Number 7 of 1983 as the last amendment with Law Number 17 of 2000, subject to Final tax of five percent of the selling value. and the latest update is based on Government Regulation Number 34 of 2016 concerning the New 2.5% Final Income Tax Rate on the Transfer of Rights to Land and Buildings

2. Capital gains from movable property

Similar to the benefits obtained from the transfer of immovable property, taxation of the profits obtained or received by foreign taxpayers from the transfer of movable property, Indonesia has the right to impose taxes as regulated in article 26 paragraph (2) of Law No. 7 of 1983 as the last amendment with Law number 17 of 2000.

Thus, for the profit from the transfer of movable property in Indonesia which is received or obtained by a resident of another country in the agreement, the Indonesian state has the right to impose the tax in accordance with the taxation agreement in the form of taxation of twenty percent of the estimated net income.

In the case of share transfer transactions carried out on the Indonesian stock exchange, it shall be imposed a final tax of 0.1% of the sale value of shares in the event that the transferred shares are ordinary shares, and an additional 0.5% of the sale value of the shares, in the case that the shares transferred are founder shares as confirmed in Government Regulation No. the imposition of the said tax through deduction by the stock exchange operator. Based on the double tax avoidance agreement contents, profits from the transfer of movable property can only be taxed in the country of domicile, namely the country where the person or entity receiving the benefits is domiciled on condition that they have a certificate of residence from the shareholder.

Shares sales transaction which is not conducted on the stock exchange, the tax imposition is carried out by withholding Income Tax by twenty percent of the estimated net income. Meanwhile, the estimated net income is twenty-five percent of gross sales. Therefore, the net income is twenty percent of the twenty-five percent of gross sales.

**CAPITAL GAINS IN THE DOUBLE TAXATION AVOIDANCE AGREEMENT BETWEEN THE STATE OF INDONESIA AND THE STATE OF MALAYSIA**

Almost all of the double tax avoidance agreements between Indonesia and other countries contain articles regarding capital gains except with Singapore, but all of them do not define capital gains separately; capital gains are equivalent to the alienation of property, which includes in particular gains from the sale or exchange of assets, either partially or partly. Entirely, including the exchange of company assets for shares, sale of rights, and inheritance by the deceased.

Most countries impose a tax on capital gains when realized. In some instances, sales that have not been realized may occur, but it is considered to have been realized for tax purposes. This occurs when the proceeds from the sale are used to buy new assets. The determination of whether the sale has been realized or not depends on the domestic laws of each country.

The formula for capital gains in the double tax avoidance agreement with Malaysia, which has been ratified, is usually contained in Article 13, and it can be concluded in the first paragraph in general that it states, "Gains derived by a resident of a Contracting State from the alienation of immovable property referred to in Article 6 and situated in the other Contracting State may be taxed in that other State ". Or profits obtained by residents of a country from the transfer of immovable property and located in another country may be taxed in that other country. (From article 6 paragraph 1)

The statement in the paragraph above illustrates that the transfer of immovable property is subject to tax in the country where the property is located. This paragraph is consistent with the treatment regulated in other articles regulating the imposition of tax on capital. The definition of “immovable property” refers to the domestic laws in which the property is located. This paragraph only regulates the imposition of tax on profits from the transfer of fixed assets located in one country and obtained by residents of the other country. Therefore, this does not apply to profits from the alienation of assets located in a country by residents of that country or assets located in a third country.

The first paragraph does not regulate the transfer of all or part of the shares of a company with the aim of controlling immovable property as the transfer of the property itself. In some countries, it treats the transfer of all or part of the shares of a company. Therefore, if a country wants such treatment, this must be regulated in an additional paragraph which generally reads “Gains from the alienation of movable property forming part of the business property of a permanent establishment which an enterprise of a Contracting State has in the other Contracting State or of movable property pertaining to a fixed base available to a resident of a Contracting State in the other Contracting State for the purposes of performing independent personal services, including such gains from the alienation of such a permanent establishment (alone or with the whole enterprise) or of such fixed base, may be taxed in that other state ”which explains that the profit from the transfer of movable property which is part of the assets of a permanent establishment owned by a company from one country in another country or from movable property which is part of a permanent place of business available to

Residents of a country to carry out independent work, including profits from the transfer of the permanent establishment separately or with the whole company or permanent place of business, may be taxed in that other country.

The agreement contained in the paragraph above regulates the tax treatment of capital gains from the transfer of movable property that is part of a permanent establishment used to carry out business activities. What is meant by "movable property" in all types of assets or assets except immovable assets as previously stipulated in this definition are intangible assets such as goodwill, licenses, and so on. Profits due to handling of these assets are taxable in the country where the permanent establishment or place of business is keeping it in. Treatment of capital gains from the transfer of the permanent establishment or permanent place of business, in this case in the form of shares, either together with the company as a whole or separately. If the entire company is transferred, the treatment applies to profits resulting from the transfer of movable property, which is part of the permanent establishment.

The agreement in the double tax avoidance agreement between the state of Indonesia and several countries even expressly contains provisions in the form of a paragraph regarding the transfer of shares. Consists of immovable property in one of the countries subject to tax in that country (from article 13 paragraph 3)

Almost all double taxation avoidance agreements containing the capital gains clause are terminated by a paragraph which states that if the gains from the transfer of other assets which are not regulated in the previous paragraph are taxed in the country party to the agreement where the person or entity transferring the assets is a resident. This paragraph accommodates the imposition of tax on profits from the transfer of assets other than those already regulated in paragraphs 1 to 5.

## III. CONCLUSION

Based on the previous description, the following conclusions can be drawn:

1. Indonesian statutory provisions have a fundamental meaning regarding capital gains as stated in Article 4 paragraph (1) letter d of Law Number 17 of 2000 concerning Income Tax, which states that gains due to sales or transfer of assets are subject to tax. Income but does not confirm the grouping of capital gains according to the group of assets based on the length of ownership, namely as short-term capital assets and long-term capital assets because each asset sold has a different useful life, usefulness, and value, and also has provisions for the avoidance of double taxation. Unilaterally on capital gains income tax as stated in Articles 24 and 26, in Article 26 paragraph (2) which confirms that the income from the sale of assets in Indonesia received or obtained by a foreign taxpayer other than a Permanent Establishment in Indonesia is tax-deductible. Twenty percent of estimated income net; however, Article 24 does not explicitly explain the provisions if the Domestic Taxpayer receives or obtains income from the sale of assets abroad.
2. Almost all double tax avoidance agreements between Indonesia and other countries contain articles regarding capital gains. However, capital gains are not clearly and clearly defined, in the form of types and values affecting assets, so that they are affected by the domestic laws of each country. Respectively, and the contents of the double taxation avoidance agreement in the article regarding capital gains confirms that the gain on the transfer of property is taxed in the country where the property is located except for assets that are used operationally across several parts of the country, such as ships and aircraft, and other movable assets. However, it does not take into account changes in exchange rates so that there will be differences in recognition of gains or losses on the transfer of assets in each country.
3. Double Tax Avoidance Agreement (P3B) or Tax Treaty in International Transactions is used to avoid double taxation. There are two P3B models that are made as a reference for countries in negotiating tax avoidance

Multiple, namely the OECD model and the UN model. The UN's P3B model is made to meet the needs of developing countries as source countries or countries receiving capital. Indonesia is a developing country, so that is used as a reference for conducting double tax avoidance negotiations is the P3B UN model like P3B between Indonesia and Malaysia.

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