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### RESEARCH ARTICLE

#### THE PRINCIPLE OF RESTORATIVE JUSTICE IN TAX DISPUTE SETTLEMENT BY THE TAX COURT

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#### Abstract

Tax dispute resolution has a number of uniqueness. Its judiciary system takes a procedure starting from filing objections in the executive realm, appeals and filing lawsuits as well as judicial review in the judicial realm. All of these legal remedies do not delay the obligation of the tax payers to pay taxes and the task of Fiscus to collect taxes. Dispute settlement using administrative power has weaknesses as the resolver is one of the parties in the dispute (the Fiscus). Judicial branch of power come to play to settle tax disputes through the Tax Court. No cassation in the settlement of tax disputes as judicial remedies. All settlements of tax disputes are aim at obtaining justice. When there is a tax dispute between Fiscus and the Taxpayers the path of mediation is advised. This normative legal research has found that mediation in the settlement of tax disputes by the Tax Court is a form of Dignified Restorative Justice in the form of Dignified Mediation as it is in line with the Pancasila values and virtues. The diversion from conventional processes through mediation is also humanistic in nature, namely the effort to humanize humans, the manifestation of the Pancasila Legal System.

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#### Introduction:-

The Institution of the Law which functions to resolve tax disputes in Indonesia is the judiciary. By the judiciary it is meant the implementation of law in concrete terms where there are claim of rights. The function which signifies the judiciary is carried out by an independent body and is held by the state, also free from any influence or anyone by giving binding decisions aimed at preventing vigilante actions or what is known as *eigenrichting*. The existence of the institution of the law called the Tax Court in Indonesia is originated with the Tax Advisory Council (MPP), the Tax Dispute Resolution Agency (BPSP) and eventually became the Tax Court.

The Tax Court has been recognised by the Indonesiaan laws. These laws have become legal basis for the existence of a Tax Court. This indicates a good progress in the enforcement of the rule of law, as defined and desirable in the Legal System of Pancasila and stated in the Article 1 paragraph (3) of the Constitution of the Republic of Indonesia Year 1945. The ontology or the nature of the Tax Court is in line with the Dignified Justice theory. It has become part of the spirit of the nation (*Volksgeist*) Indonesia. Precisely, it is formulated in the Article 2 of the Act No. 14 of

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2002 concerning the Tax Court. It has been stipulated there that the Tax Court is a judicial body exercising judicial power for Taxpayers or the people seeking justice in tax disputes in Indonesia.

#### **The Nature of the Tax Court; -**

The definition of a tax tribunal according to the aforementioned applicable laws contained a number of legal principles. If it must be defined, then the first principle in the limitation of the Tax Court indicates the essence, or the distinctive trait of the Tax Court. Tax Court is a special judicial body. According to the theory of authority<sup>1</sup> in the perspective of the theory of Dignified Justice, the distinctive trait of the Tax Court is manifested within the area of jurisdiction of the Tax Court, which is exclusively set up merely for settling and make decisions on tax disputes alone.

As a judicial body, the Tax Court is also an executor of judicial power. As the holder of judicial power, the Tax Court is a judicial body that carries out its functions and authorities in order to enforce law or deliver justice. Judging from the principle of the rule of law according to the theory of Dignified Justice, the uniqueness of the authority of the Tax Court has obtained justification in the spirit of the nation (*Volksgeist*), as stated in the Article 24 Paragraph (1) of the 1945 Constitution (the Third Amendment).

As a judicial body, the Tax Court must be understood to be on par with other judicial bodies that have prescribed laws. Although, the Tax Court has a specialty in the fiscal field. For this reason, even though the Tax Court holds judicial power, the Tax Court is not a judicial body that exercises pure judicial power. These impurities are marked by executive duties carried out by the Tax Court. In the perspective of Dignified Justice theory, this characteristic pursues legal objectives that pay attention to the benefit of the public having a public policy dimension, that must not neglect justice and legal certainty.

The nature of the style, and the special characteristics of the Tax Court was also marked by the aspect that the Tax Court is within the scope of the State Administrative Court (Administrative Court or abbreviated as PTUN). Similar to the PTUN, which is the umbrella institution of the Tax Court, it is also a judicial institution that is under the supervision or in a special court cluster under the Supreme Court of the Republic of Indonesia. In accordance with the formulation of Article 5 of the Law No. 14 of 2002, judicial technical guidance of the Tax Court is controlled by the Supreme Court of the Republic of Indonesia (the judicial branch). Meanwhile, the Department or currently the Ministry of Finance of the Republic of Indonesia (the executive branch) is in charge of the organizational, administrative, and financial dimensions of the Tax Court.

Tax Court tends to be placed within the State Administrative Court or PTUN, since its nature of the disputes and the nature of their parties involve in the disputes. The subjects of disputes of the Tax Court and PTUN are the elements of the government versus the elements of the society as individuals. The Government's position as the defendant/appealed since its decision was questioned before the Tax Court. Objects of judicial disputes of the Tax Court and PTUN are the concrete decisions (*beschikking*) from government institutions aimed at individuals deemed to be detrimental.

The Tax Court has the authority to handle tax returns. Intended to tax disputes are disputes arising from the interpretation and interests between Fiscus with Taxpayers. In other words, tax dispute is also defined by the legislation in force as disputes arising in taxation between Taxpayers or person in taxes with the competent authorities as a result of the issuance of a decision that can be appealed or a lawsuit against Tax Courts by laws tax invitations, including lawsuits on the implementation of collection based on the law on tax collection by compulsory letter<sup>2</sup>. While the Decision is a written determination in the field of taxation issued by competent authorities based on the tax legislation and in the framework of the implementation of the Tax Collection Act forced letter.<sup>3</sup>

Tax disputes are disputes within the scope of the Administration Law. Therefore, it is the scope of public law. Brotodihardjo<sup>4</sup> even have the view that tax law is a child of Administrative Law. In relation to that, administrative justice in Indonesia is divided into two, namely pure administrative justice and impure administrative justice. Tax

<sup>1</sup> Phillipus M. Hadjon, *Tentang Wewenang*, Yuridika, No. 5 & 6 Tahun XII, Sep-Des 1997.

<sup>2</sup> Article 1 point (5) the Act No. 14 of the Republic of Indonesia, Year 2002 on *Tax Court*.

<sup>3</sup> *Ibid.*, Article 1 point (4).

<sup>4</sup> R. Santoso Brotodihardjo, *Pengantar Ilmu hukum Pajak*, Bandung: Refika Aditama, Jakarta, 2010, h. 10.

Courts in Indonesia could be considered as the pure judicial administration of justice and could also be an impure administration of justice. Examples of the pure justice administration is the settlement of a tax dispute that at the time conducted by the Tax Advisory council (1915-1997) and the Tax Dispute Settlement Body (1997-2001). Today, by the Tax Court (2002). The example of impurely administrative justice, such as rectification or cancellation of tax assessment carried out by the executive branch of power, namely Tax Director General.

Tax Court is a judicial body that runs the function to find the law or the what so called judge made law. It is said so, since it is the solid legal principle that in finding the law (*rechtsvinding*), there is no statutory regulation that is regarded as complete and perfect, and clear or certain. With regard to the functions of the Tax Court, all the tax regulations, in the eyes of *rechtsvinding*, must be deemed unclear (vague), less firm and tend to have multiple interpretations. Therefore legal findings by judges or judge made law are important to determine definite interpretations and meanings of any regulations, including tax regulations.

As a result of the vagueness of legislation, as well as legislation in the field of taxation, a tax provisions can be interpreted differently by both parties, in accordance with the interests of each party. The interests of Fiscus, for example, are the interests of an extension of the government. Fiscus has the objective and interest of finding and collecting the state revenue funds from the tax sectors as much and optimally as possible. Meanwhile, the interest of the Taxpayer is to minimize their cost, which aims to obtain business profits as much as possible, as well as take a very good case to improve their welfare.

#### **Brief Overview of Tax Court Procedure Law; -**

Formulated in the Article 3 of Law No. 14 Year 2002 a formal dimension of the law governing the tax court. That, "This law establishing the Tax Court in the state capital." Therefore, there is only one Indonesian Tax Court, and it is domicile in Jakarta. Comparative law research<sup>5</sup> conducted by this legal research on the jurisdiction of the Tax Court in a number of countries found a common principle. Similar to the *Tax Court* in the United States which only exists in Washington DC as the state's capital, the existence of tax courts in Indonesia and tax court institutions in other countries also domicile in the nations' capital.

An aspect of formal law that regulates the Tax Court, can be seen in Law No. 14 of 2002 concerning the Tax Court. The uniqueness that arises is that the Tax Court does not have to be *in person* or must be attended by parties. The Tax Court only examines documents, namely in the form of financial reports, bank accounts, transaction data regarding turnover, ect.

Procedural law of the Tax Court also dictates that the method of holding tax dispute trials requires special judges who have expertise in the field of taxation and have a degree in Law or other graduate degrees. The decision of the tax tribunal contains the determination of the amount of tax owed by the tax payers (WP). In it, there is a technical calculation of taxation.

Another formal characteristic of the Tax Court is that the Taxpayers as a party to tax disputes will immediately receive its legal certainty. Through the decision of the Tax Court, taxpayers can be ascertained about the amount of the tax imposed. The types of decisions of the Tax Court are the same as the types of decisions generally applied to general courts; it will be stated in the *dicta*: the form of granting partially, granting in full, or increasing the amount of tax that is still to be paid.

After the amendment to Law No. 17 of 1997 with the Law No. 14 of 2002 concerning the Tax Court, the nature of the decision of the tax court is a final decision which has a permanent legal force. There is no legal remedy for cassation, but it can immediately seek Judicial Review (*Peninjauan Kembali*) to the Supreme Court. Judicial Review is conducted for a reconsideration of the previous courts decisions by the Supreme Court of the Republic of Indonesia. This is an extraordinary legal effort in the Pancasila Legal System. In addition to reducing the level of vertical reexamination, the Supreme Court may conduct an assessment of the facts that underlie the occurrence of tax disputes.

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<sup>5</sup> Endang Prasetyawati, *Metode Penelitian Hukum*, Cetakan Pertama, Fakultas Hukum Universitas 17 Agustus 1945, Surabaya, Untag Press, Surabaya, 2010.

**A brief Description of the Uniqueness of The Tax Court; -**

The process at the Tax Court begins when the taxpayer who is not satisfied with a tax assessment that contains tax assessments can file a legal remedy. The legal remedy for this is called an objection (administrative appeal). Submission of objections must be made in an objection letter. Objections must meet the requirements as stated in the Article 25 of the KUP Act. It is an important principle, or a formal law, namely that the objection filed by the Taxpayer does not delay the obligation to pay taxes and the implementation of tax collection.

The objection is regarded as the right of the Taxpayers. It is the legal remedy within the executive branch, which is known as the Directorate General of Taxes. Settlement of tax disputes at this stage is referred to as administrative settlement. The dispute resolution institution between Taxpayers and Fiscus is the same institution (Fiscus). In the eye of the Indonesian Jurisprudence, the Dignified Justice Theory, such a dispute resolution is referred to, as mentioned above, the impure Administrative Court (*Peradilan Doleansi*).

The Director General of Taxes, within a maximum period of twelve months from the date of receiving the objection letter, must deliver a decision on the objections submitted. If the time limit has been exceeded and the Director General of Taxation failed to issue a decree, it will be meant no objection, the objection raised by the taxpayer must be deemed as granted in the taxpayer's favour and the Director General of Taxes shall issue a Decree in accordance with the objections. It is regulated in Article 26 paragraph (3) of the KUP Act that there are four possible decisions that can be issued by the Director General of Taxes. The four decisions are: rejected; partially accepted; fully accepted; add to the tax assessment.

The next process in tax disputes is the appeal process for objection of decisions. In accordance with Article 16 of the Law No. 14 of 2002 on Tax Court, Appeal is interpreted as a remedy that can be filed by taxpayers to the personnel of Taxes upon a decision. The tax payers may be able to submit appeal based legislation of the applicable tax. It is the principle, that even if the appeal is brought against large an amount of tax stated, tax dispute resolution through trials still requires taxpayers to pay 50% of tax obligations in advance. This means that the tax dispute settlement process in the Tax Court does not hinder the tax collection process.

The legal consequence if the appeal is rejected or partially granted is that the taxpayer will be subject to administrative sanctions in the form of a fine of 100% of the total tax based on Appeal's decision to be deducted with the tax payment that has been paid prior to filing an objection. There are a sense of legal certainty as a result of this objection efforts. Any taxpayers will not feel disturbed and no longer fear to be visited by officers bailiff who will do confiscation. The appeal process is still not obtained legal certainty. Unless there is an appeal to the decision by the taxpayer, the WP still does not pay the tax debt, the tax bailiff will collect it once the tax assessment by the Tax Court has obtained legal certainty.

Following the legal remedies for objections and appeals, a lawsuit could also be made in the tax court. Even though the elucidation of the law does not explain what the object of the lawsuit is, it can be stated that the object of the lawsuit is a Tax Collection Letter. This is regulated in Article 23 paragraph (2) letter (b) of the Tax Court Law. It is stated there that the taxpayers can file a lawsuit on decisions relating to the implementation of the tax decision, other than those specified in Article 25 paragraph (1) and Article 26.

Appart from the aforementioned rule, attention has to be paid on the formulation of Article 25 paragraph (1) and Article 26. On the second article it asserted problems related to the existence of legal remedies. Objections must be made to a tax assessment (SKPKB, SKPKBT, SKPLB, SKPN, and withholding or collection by third parties). The problem is that decisions relating to the implementation of tax decisions other than the provisions of Article 25 paragraph (1) and Article 26 are unclear. It is difficult for taxpayers to know what objects the lawsuit can actually file.

Article 23 letter (c) of the KUP Law contains the possibility of a lawsuit over the correction decision as referred to in Article 16, and relating to the Coercive Bill (STP). Thus, if there is an STP, then it is found out that the STP is not correct due to a misspelled or miscalculated or there is an error in the application of the provisions of the law, a Correction Decision will be issued on the STP. The decision to rectify the STP is the object that can be filed for a lawsuit.

The process of claim set as the procedural law stipulates that if the examination carried out by assembly (*Majelis*), then the chairman appoints one judge as chief judge who leads the investigation or examinations of tax disputes. In the case of a lawsuit, the single panel/judge must have started the trial within a period of three months from the date the lawsuit is received.

The trial in Tax Courts to check tax disputes both at the level of appeal as well as at the level of lawsuit can be divided in two. First, the inspection process is carried out with the usual procedures. Second inspection process with quick trial. Common law suit are able to proceed when the appeal letter has met the formal conditions. For example, the letter of appeal is filed in Indonesian Language (*Bahasa Indonesia*). The appeal letter must be submitted is still within a grace period of three months from the time the decision being compared is received. A decision to put forward an appeal if the tax owed has been paid by 50%, to attach proof of payment.

Verdict settlement of a tax disputes referred to as a decision by the Tax Court. There are six possibilities for the decision, namely: rejecting; granting partially or completely; adding tax to be paid; unaccepting; correcting writing errors and/or miscalculations; canceling.

After the decision of the Tax Court is signed by the judges or a single judge, the decision can be immediately implemented and no longer requires the competent authority's decision, unless the legislation takes another set. Decision made by the Tax Court is the final decision and has permanent legal force (Article 77). In other words, the decision can no longer be appealed or cassation; but can immediately apply for a Judicial Review (*Peninjauan Kembali*).

Stipulated in Article 89 paragraph (2) of the Law of the Tax Court that the petition of the Judicial Review does not suspend or stop the implementation of the tax court decision. In this case the Tax Court Law did not explain the legal consequences that would happen if the Supreme Court issued a decision that differs from the decision of Tax Court.

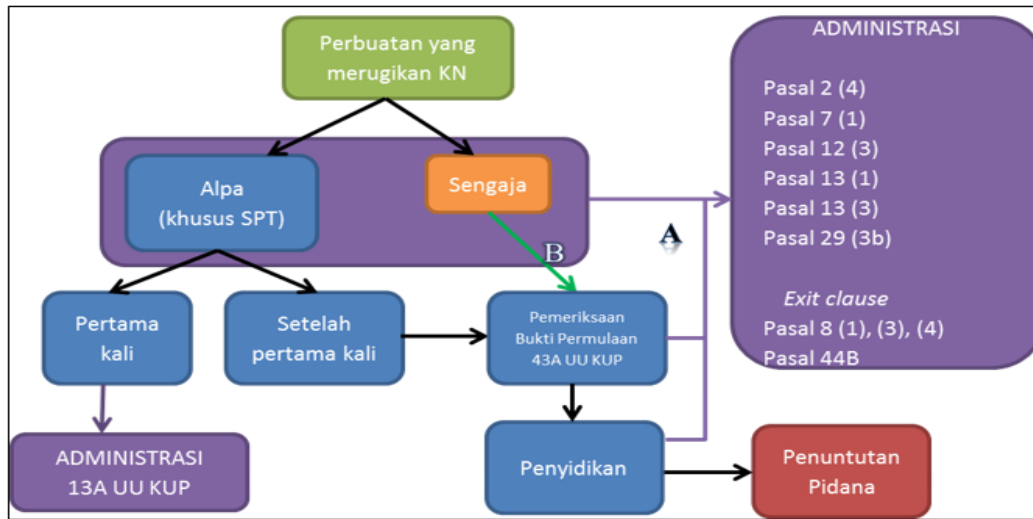
It is regulated in the Tax Court Law, Article 77 Paragraph (3) that disputing parties can submit a review of the Tax Court's decision to the Supreme Court. In Article 91 of the Law of the Tax Court, an application for reconsideration can only be filed: if the Tax Court's decision is based on a lie or trickery of the opposing party which is discovered after the case is decided or is based on evidence which is later declared false by the criminal judge; if there is new written evidence (*Novum*) which is important and decisive in nature which if it is known at the trial stage at the Tax Court it will result in a different decision; if a matter that has not been charged or more than what is being charged has been granted, except for those decided under Article 80 (1) (b) and (c) of the Tax Court Law; if regarding a part of the claim has not been decided without considering the reasons; and if there is a verdict which is clearly not in accordance with the provisions of laws and regulations.

A request for Judicial Review can only be submitted once to the Supreme Court through the Tax Court. If there is no Tax Court at the residence or domicile of the applicant, then the application is submitted to PTUN where the applicant resides or at the place of domicile of the applicant. If there is also no PTUN, the application can be submitted to the District Court where the applicant resides or at the place of domicile.

The request for Judicial Review can be withdrawn before it is decided. In the event that the application has been withdrawn, the application for Judicial Review cannot be resubmitted. In processing the request for Judicial Review, the Supreme Court will use the procedural law on the examination based on Law No. 14 of 1985 concerning the Supreme Court.

The brief description of the Tax Court above reinforces the results of this study or legal research that the tax dispute resolution in Indonesia taxpayers could be filed via a means of objection, appeal, lawsuit and judicial review. This study also found that in all the means to seek the resolution of tax disputes (Objection, Appeal, Lawsuit and Judicial Review) it appears as if there is absolutely no opportunity or possibility for Taxpayers and Fiscus to resolve tax problems between the two by using any form of legal institution of the Pancasila Legal System called *Keadilan Restoratif* (Restorative Justice). The visualization of resolving tax disputes through the Tax Court in Indonesia can be seen in **Figure 1**.

Figure 1:- Tax Violation Settlement Pathways.



Source:- Processed from UU KUP No. 28 of 2007 .

#### Analysis of Restorative Tax Dispute Resolution in Indonesia; -

As stated by Teguh Prasetyo<sup>6</sup> that: “one can say that the purpose of law is justice alone. But it must be understood that in that concept of “justice alone” there have to be included in it the legal certainty and it is always be a benefits.”<sup>7</sup> In the perspective of the Dignified Justice theory, the illustrious Indonesian Jurisprudence, there is a persuasive command for legal experts (*jurists*) to stay in the middle and maintain a balance between attachment and freedom. Thus, order, as part of the benefit, can be maintained in a balanced manner as well as other legal objectives, namely along with the legal certainty.

The achievement of the objectives of the trinity purpose of the law as stated above, must also always existing in the settlement of tax disputes by taking various legal remedies, ranging from administrative efforts in the form of internal objections and through Tax Court in the form of appeals and lawsuits, it is even possible to submit extraordinary legal remedies to the Supreme Court, namely Judicial Review. All of these legal pathways provided for the taxpayers are directed at achieving legal objectives, namely Dignified Justice, which does not recognize the *antinomie* between justice itself and legal benefit and certainty.

The final purpose of the examination of tax disputes through the Tax Court is not a violation of tax law and even benefits from the aspect of tax law enforcement because the purpose of law enforcement is to resolve tax disputes without violating tax law and providing legal protection for taxpayers. This normative legal research has found that all the legal paths are in line with the understanding that legal protection can be pursued through the existing dispute resolution channels in the Legal System which places Pancasila as the first and foremost sources of laws.<sup>8</sup> Within this legal framework any legal remedies outside the Tax Court can be carried out through mediation.

For Taxpayers and Fiscus mediation, as a norm, for example for a tax objections can be formulated with the assistance of a mediator (both from tax consultants, lawyers and public accountants) to be able to formulate objections on the amount of tax owed by taxpayers. If the mediation decision has been reached, the tax authorities can collect the amount of tax that has been formulated together in the mediation process.

<sup>6</sup> Teguh Prasetyo, ( 2015), *Op. Cit.*, h. 133.

<sup>7</sup> Teguh Prasetyo, *Hukum & Teori Hukum: Perspektif Teori Keadilan Bermartabat*, Cetakan I, Nusa Media, Bandung, h. 228.

<sup>8</sup> Kameo Jeferson & Teguh Prasetyo, *Pancasila as the First and Foremost Sources of Laws (A Dignified Justice Perspective)*, Journal of Legal, Ethical and Regulatory Issues, Vol., 24, Special Issue, 2021, pp., 1-8.

In this connection, it has fulfilled the postulate in the Dignified Justice theory whose teaches that if people want to seek the law, then the law must be sought in the soul of the nation (*Volksgeist*). The soul of the Nation manifests itself in the prevailing laws and regulations, also in the judge decision or even in the judge made law (*adat*). The original philosophy of law of the Indonesian nation or the Indonesian Jurisprudence which has navigated this research found that the process of settling tax disputes can take mediation. That could be said, as this study found that the Supreme Court, which is the top court of the Tax Court, has made its own regulation namely PERMA Number 1 of 2016 concerning Mediation Procedures in Courts. Arranged in the PERMA points (a) that the Mediation is a way of peaceful resolution of disputes that are appropriate, effective, and can open wider access to the parties to obtain a satisfactory settlement and justice. With this, mediation in tax dispute resolution process is basically proven as an implementation of the principle of restorative justice.

If the theory of Dignified Justice has to be used to navigate this, as stated above, as a science of law that prioritizes the sources of legal material in the spirit of the Indonesian nation (*Volksgeist*), and which understands the meaning and nature of restorative justice seen from the meaning put forward by Indonesian legal experts, then the meaning of Keadilan Restoratif (restorative justice) is an effort to resolve cases, including tax cases or disputes involving the community, victims and perpetrators of crimes and legal violations.

The objective of settlement in the philosophy of Dignified restorative justice is intended to achieve justice, as well as, or simultaneously benefit and legal certainty for all parties. Therefore, is expected to create the same state as before the occurrence of a crime or offense (restoration) and prevent the crimes or violations more.

The Indonesian understanding or in the legal science of the Dignified Justice theory, the restorative justice is in line with Bagir Manan's view. According to Manan, in general, the definition of restorative justice is a rearrangement of a more just system, both for perpetrators, victims and society<sup>9</sup>. Mediation, including any forms of mediation in the tax dispute resolution have become part of the Dignified projects for structuring the system in the context of make human as human beings in the society.

### Conclusion:-

When there is a tax dispute between the Fiskus and Taxpayers, the tax dispute settlement mechanism can be reached through mediation. This route can be seen as a form of dignified restorative justice approach. Such mediation is in line with the values and virtues contained in the Pancasila. The diversion from conventional processes through mediation is humanist in nature, which is also known as the effort to humanize humans, in accordance with the manifestation of the implementation of Pancasila. Protective laws against the taxpayer can be done by setting a tax dispute which reflects the principle of restorative justice that put the balance of rights and obligations between the tax authorities to the taxpayer. The principle of dispute resolution should not only be oriented towards taxing the state treasury but must also provide protection for the rights of taxpayers.

The existence of Act No. 14 Year 2002 regarding the Tax Court should at least be reviewed or reformed, by including clauses related to mediation in tax dispute resolution, or specify laws containing a mediation procedure in the Tax Court on the basis of Dignified philosophical values which are the principles of the Indonesian rule of law contained in Pancasila as stipulated in the Preamble and follow along with the articles of the 1945 Constitution of the Republic of Indonesia.

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