

LEGAL EFFORTS TO INTEREST IN LAND FOR INDONESIAN CITIZENS THE NOMINEE AS TAXPAYERS

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Abstract

Indonesian citizen is included as a taxpayer. In relation to the nominee agreement, the land of the guarantee object is included in the assets obtained from the government's tax amnesty program. In this paper, the purpose of the analysis is to know and examine how the legal consequences for Indonesia citizens who become nominee on the interest in land with the *tax amnesty* program and how the legal efforts that can be done by the citizen if the foreigners violate the nominee agreement related to the payment of tax on the rights soil. Type of research used in this paper is normative law research. The results of this study indicate that (1) the legal consequences for Indonesian citizens who become nominee to the right to land with the existence of tax amnesty program that is criminal law, civil law and criminal law of taxation. (2) legal protection to the holder of the land title certificate as a legal remedy which can be done by the citizen if the foreigner violates the nominee agreement related to the payment of tax on the right of land is able to take a non-litigation path through mediation. If the settlement cannot be conducted through mediation, it can be done through a court of law with the judicial discovery made by the judge in resolving the dispute.

Keywords: *Efforts, Indonesia Citizens, Nominee, Tax amnesty*

I. INTRODUCTION

Land is a natural resource controlled by the state, whose sustainability needs to be maintained and utilized as much as possible for the welfare of the people, both for present and future generations. The so-called earth surface can be used and utilized by people by giving rights which have been regulated in the Law called Interest in Land. Interest in Land is the right of ownership, right of building, right of use and right of use.¹

The existence of land in Indonesia is regulated in Law Number 5 of 1960 on Basic Regulation of Agrarian Principles (hereinafter referred to as BAL). The land as a gift of God Almighty is inseparable to human life. Land has a very strategic function, both as a natural resource and as a space for development. The State of Indonesia has certain powers over land owned by persons or legal entities, including property rights.

To provide a legal certainty of ownership of land rights, a certificate as a proof of title to the land is issued. The land title certificate is generally a proof of ownership of land rights as stipulated in the provisions of Article 1 point 20 of Government Regulation Number 24 of 1997 concerning Land Registration stating "Certificate is a proof of right as referred to in Article 19 paragraph (2) letter c of BAL for land rights, management rights, wakaf land, property rights of apartment units and respective rights have been recorded in the relevant land books".

Agricultural smuggling is common in Indonesia, for example foreigners wishing to buy a plot of land, it does not buy it directly but uses the name of an Indonesian citizen who is then bound by a debt agreement amounting to the price of the land pledged as debt

1. Boedi Harsono, 2008, *Hukum Agraria Indonesia, Sejarah Pembentukan Undang-Undang Pokok Agraria, Isi dan Pelaksanaannya*, Djambatan, Jakarta, p. 18

security. If this is known by the agrarian agency, it was decided to declare that the sale was canceled because the law and land fell to the state so it was prohibited by Article 26 paragraph (2) of BAL.² The *nominee* agreement is valid if it is seen as not violating the prevailing laws and regulations because it is not in the form of transfer of rights through the sale and purchase. However, if the contents of the agreement are reviewed, it is indirectly intended to transfer or transfer interest in land (in the form of property rights) to foreigners. This illegal practice can continue to occur that is certain because it gives the same benefits, both for the borrower and the creditor:

- A. Foreigners can control assets (resources) in Bali, and often lead to tax avoidance; while
- B. The local person obtains certain rewards in the form of material or non-material.³

For any existing interest in land in Indonesia, the liability shall be borne by the party in possession of the interest in land to pay taxes to the state. Tax as a source of financial income for the state is a form of direct contribution from the community for the purpose of development which is the most important part in increasing foreign exchange finance of Indonesia. One of the tax sources is the transfer of land rights. Tax is a public fee to the state treasury under the law (which can be enforced) by not receiving a reciprocal service (kontraprestasi) that can be directly addressed and used to pay public expenditure.⁴

Currently the government has set rules on tax amnesty or known as tax amnesty. The regulation on tax amnesty is set in the Law of the Republic of Indonesia Number 11 of 2016 on Tax Amnesty (hereinafter referred to as Tax Amnesty Law). In Article 1 point 1 of the Tax Amnesty Law, it is said that "Tax Amnesty shall be the abolition of tax which should be payable, not subject to sanction of tax administration and criminal sanction in the field of taxation by disclosing property and paying the Ransom as regulated in this law."

The *nominee* issue related to the imposition of this amnesty tax can also cause problems for the Indonesian citizen who is the *nominee* recipient if the foreign national concerned does not want to make payment on the taxes imposed related to the possessed property through the *nominee* agreement, so that this can be detrimental the Indonesian citizen. Taxpayers are Indonesian citizens with interest in land. As the land owner, the relevant name is listed in the certificate, so the taxpayer is the person whose name is listed as the land owner in the certificate. Fiscal (tax inspection) in charge of collecting taxes on a regular basis to the taxpayer for not paying off the debt is payable without coercion will collect taxes to the citizens of Indonesia as the owner of interest in land whose name is listed in the certificate.⁵

Based on the background that has been mentioned above, the phenomenon that has been illustrated is interesting to be discussed further in this paper with the title: "Legal Efforts to Interest in Land for Indonesian Citizens the Nominee as Taxpayers."

The formulation of problems that are discussed in this research are (1) the legal effect for Indonesian citizens who are the *nominee* for interest in land with the tax amnesty program and (2) what are the legal efforts that can be done by Indonesian citizens if foreigners violate the nominee agreement related to payment of interest in land tax.

Generally, this study aims at developing a theory of jurisprudence related the paradigm of *science as a process*. With this paradigm, legal science will not stagnate in extracting the truth, especially related to the matter of Legal Efforts for Indonesian Citizens Being Nominee as Taxpayers of the interest in land. While the specific purposes are: (1) to find out the legal consequences for the arga of Indonesia that nominee the interest in land with the tax amnesty program and (2) to describe and conduct an analysis of legal efforts that

2. Bachtiar Mustafa, 2002, *Hukum Agraria Dan Perspektif*, Remaja Karya, Bandung, p. 78

3. Gusti Putra, "Apakah Aman Meminjamkan Nama Kepada Orang Asing" <http://popbali.com/apakah-aman-meminjamkan-nama-kepada-orang-asing/>, accessed on 05 December 2016

4. Mardiasmo, 2005, *Perpajakan (Edisi Revisi)*, Andi Offset, Yogyakarta, p. 1

5. Muhammad Djafar Saidi, 2014, *Pembaruan Hukum Pajak*, Rajagrafindo Persada, Jakarta, p.197

can be done by Indonesian citizens if foreigners violate the nominee agreement related to payment of tax of the interest in land.

II. METHOD

Research is basically a search effort and not merely observing an object that is easily understood by the community. The word research is derived from the word *re* (back) and *search* (search). Thus literally the word 'research' means "looking back".⁶ The type of research used in this study is normative legal research because there is a void of norms by examining the materials of various laws and other materials from various literatures related to the problem.⁷

In this study, to obtain scientific and scientifically sustainable results, the problems that are the focus of the study in this study will be discussed using the statute approach and conceptual approach. This is based on the basic mindset that researchers use the legislation as the basis for early analysis. With the application of this type of conceptual approach, concepts in legal science can be used as a starting point or approach for analysis of legal research because it will trigger the emergence of many concepts for a legal fact. This type of analytical approach has been used to find meaning in the legal terms contained in the legislation, so that researchers gain a new meaning or meaning from legal terms and test their practical application by analyzing legal decisions and case approach types. The application of a case approach in legal research aims to study the legal norms or norms practiced in legal practice.⁸

Sources of legal materials or data used in this study are primary legal materials derived from legal materials in the form of legislation; secondary law material consisting of literature, books, papers, documents relating to the issues discussed; secondary legal materials in the form of books of this law should be relevant to the research topic.⁹ Tertiary legal material is a material that can provide clues and explanations of primary and secondary legal materials, such as dictionaries, encyclopedias and so on.¹⁰ The dictionaries are meant as Indonesian Dictionary, Legal Dictionary, and the encyclopedia of related law fields.

Techniques of collecting legal materials or data used in this study is a document study technique through bibliography that is used by analyzing the legal material that comes from primary legal materials and secondary legal materials in the form of books, writings and opinions of legal experts, and legal materials tertiary in the form of dictionaries and encyclopedias.

III. DISCUSSION

A. Legal Consequences for Indonesian Citizens who Become Nominee Against the Interest in Land with the Amnesty Tax Program

Tax compliance can be defined as a condition in which the Taxpayer fulfills all tax obligations and exercises its taxation rights. Taxpayer Compliance is the fulfillment of tax obligations undertaken by taxpayers in order to contribute to the development of which the present fulfillment is expected to be voluntary. Taxpayer compliance becomes an important aspect because considering the Indonesian taxation system adopts Self Assessment System, which in the process, absolutely gives trust to Taxpayers to calculate, pay, and

6. Bambang Sunggono, 1997, *Metodologi Penelitian Hukum*, RajaGrafindo Persada, Jakarta, p. 28

7. Soerjono Soekanto dan Sri Mamudji, 2007, *Penelitian Hukum Normatif : Suatu Tinjauan Singkat*, PT. Raja Grafindo Persada, Jakarta, p. 13.

8. Mukti Fajar, dan Yulianto Achmad, 2010, *Dualisme Penelitian Hukum Normatif & Empiris*, Pustaka Pelajar, Yogyakarta, p. 185-190

9. Soekanto, Soerjono dan Sri Mamudji, *op.cit*, h. 13-14.

10. Bambang Waluyo, 2002, *Penelitian Hukum Dalam Praktek*, Sinar Grafika, Jakarta, p. 23

report their obligation. The tax amnesty program, as determined by the government, aims to accelerate economic growth and restructuring through the transfer of assets that will impact on improving domestic liquidity, improving the rupiah exchange rate, reducing interest rates and increasing investment, which is part of tax reform to a taxation system. more equitable and a more valid, comprehensive and integrated tax database extension and increased tax revenue to be used for development financing to pursue state revenues for development purposes in Indonesia.¹¹

Tax amnesty is a government-mandated amnesty program for taxpayers which includes the abolition of taxes that ought to be owed, the abolition of tax administration sanctions and the abolition of criminal sanctions in the field of taxation of assets acquired in 2015 and earlier which have not been reported in the Notification Letter by way of paying off all tax arrears and pay ransom. This tax amnesty program is run under Law Number 11 of 2016 on Tax Amnesty. In essence, a tax forgiveness program, such as this tax sanction removal policy, can increase the taxpayer's willingness to pay taxes. Elimination of sanctions is expected to stimulate taxpayers to pay taxes, either on the shortage of taxes in the past and for further tax payments. Willingness to pay taxes by this Taxpayer can be interpreted as taxpayer compliance in carrying out its tax obligations.

As a good taxpayer, the public must know the risks and consequences as a result of the law obtained when deciding to participate or not participate in this program. According to tax observers, Yustinus Prastowo, if the taxpayer chooses to take tax amnesty but not honest, the caretaker must be careful. The reason is that the unspecified property of the program and found by the tax office until July 1, 2019 will be considered as additional income and taxed according to the terms and sanctions 200 percent of tax payable.¹² If the taxpayer decides not to participate in the tax amnesty and there are assets obtained from 1 January 1985 to 31 December 2015 and not yet reported in the Annual Notification Letter of Income Tax, shall be deemed to be additional income and subject to tax and sanction in accordance with the Act applied.

Based on the above description, it can be seen that Indonesian citizen as a nominee is a taxpayer who should be obedient and participate in the success of the tax amnesty program. The purchase of land which is then registered in the land title certificate under the name Indonesian citizen as the nominee, of course brings legal consequences that the land is a property owned by the Indonesian citizen nominee because the name is stated in the title certificate of the land and not the name Foreigners as the nominee recipient. Problems can occur if a foreigner who receives a nominee does not want to pay taxes on the tax amnesty program. This certainly makes Indonesian citizen as a taxpayer has an obligation to participate in the success of tax amnesty program held by the government. As a result of the law if an Indonesian citizen who nominates does not participate in this tax amnesty program, any property not revealed during the program and found by the tax office until July 1, 2019 will be considered as additional income and taxed according to the terms and sanctions 200 percent of the tax which is owed. Surely this will cause harm to Indonesian citizen who provided the nominee.

When viewed from the aspect of civil law, the consequences of the nominee treaty law referring to the provisions of Article 1320 of the Civil Code violate the objective conditions so that any agreement made between Indonesian citizens and foreigners with nominee Indonesian citizens is invalid and null and void. The consequence is that the parties do not have to make a cancellation claim. Although the parties are competent to enter into an agreement, the terms of the agreement are contrary to Article 26 paragraph (2) of the BAL.

11. Alwesius, *Peranan Notaris Dan PPAT Di Dalam Mensukseskan Program Pemerintah Mengenai Tax Amnesty, Dalam Menyiapkan Dokumen Dan Atau Akta-Akta Sesuai Ketentuan Peraturan Perundang-Undangan Yang Berlaku, Tanpa Jebakan Dan Tidak Dijebak*, <http://in.ikatannotarisindonesia.or.id/dokumen/artikel/BAGIAN%201%20PERANAN%20NOTARIS%20DI%20DALAM%20TAC%20AMNESTY.pdf>, accessed on March 10, 2017

12. Septian Deny, 29 Agustus 2016, *Tak Ikut Tax Amnesty Kena Sanksi 200%? Begini Penjelasannya*, <http://bisnis.liputan6.com/read/2588455/tak-ikut-tax-amnesty-kena-sanksi-200-begini-penjelasannya>, accessed on March 15, 2017

In addition, in view of the provisions of Article 1335 of the Civil Code, a covenant without cause or that has been made for a cause, which is false or forbidden, has no power. This Article reinforces one of the objective conditions of the validity of the covenant, which is the lawful cause.

With respect to nominee land ownership, this also has a negative impact on tax evasion, not only stipulated in the provisions of Articles 38 and 39 of the Law of *KUP* (The Book of the General Provisions and the Tax Code) but also intentionally and unintentionally or negligence or unlawful violations as provided for in Article 174 of Law Number 28 of 2009 concerning Regional Taxes.

Based on the above explanation, it can be seen that in nominee agreement when connected with tax crime, it is seen that dependency experienced by Indonesian citizen will continue to lose money, because if the nominee agreement will incur tax obligation for Indonesian citizen on behalf of Land Owner Rights, then, Foreign national if doing business or private dwelling on the land of proprietary rights under the nominee agreement, the tax burden of the object shall be borne by the Indonesian citizen. This has the potential for tax evasion and tax criminal elements to occur. The above taxation penalty sanction shall be a maximum of three months or a maximum of a year imprisonment or a fine of at least one time the amount of unpaid taxes payable and at most twice the amount of tax payable that is not or less paid.

B. Legal Solutions for Indonesian Citizens if A Foreign Citizen Violates the Nominee Agreement with Respect to Tax Payment of Interest in Land

If further explored, the nominee agreement is a legal smuggling because it indirectly grants the power to foreigners as the owner of the land in Indonesia. This is certainly contrary to the law applicable in Indonesia. However, in practice there are many people who still use nominee agreements aimed at making a profit. Problems can occur with the existence of tax amnesty program that obliges the public to report their property and pay taxes on his property but in nominee agreement the foreigners do not want to give money to the citizens of Indonesia to succeed the program. The Indonesian citizen who nominates must suffer a loss and demand the foreign national as the nominee recipient of the loss.

Efforts to resolve disputes that occur in society, in general, can be reached through several ways namely:

1. Through Court Settlement

a. By filing a criminal suit

Criminal law can be divided into two parts, namely general criminal and special criminal. The general criminal law is regulated in the Criminal Code because its provisions apply to all persons, whereas special criminal law can be seen outside the Criminal Code, the scope of special criminal acts is not permanent but changes depending on whether there is a deviation or specifies the specific provisions of the Act Criminal regulating certain substances that can be seen from:

- 1) Economic Criminal Law (*UU Drt* No. 7 of 1955)
- 2) Corruption
- 3) Criminal Acts of Narcotics and Psychotropic
- 4) Criminal Acts of Taxation
- 5) Customs Crime
- 6) Crime of Money Laundering
- 7) Child Crime

b. By filing a civil suit

The Indonesian Civil Procedure Code has not been regulated in the codified law yet. Civil law rules are still regulated in various legal rules that become legal sources for civil procedure law in Indonesia, which can be used as legal sources for judges in examining cases, namely:

- 1) HIR (*Het herziene Indonesich Reglement*) for Java and Madura and RBG (*Rechtsreglement voor de Buitengewesten* 'Reglement to the opposite area')
- 2) (*Rechtsreglement Buitengewesten*) for areas outside Java and Madura
- 3) Book IV Civil Code or about proof and expiration.
- 4) Law Number 4 of 2004 on Judicial Power.
- 5) Law Number 20 of 1947 which regulates the Appeal issue for Java and Madura region, while for outside Java and Madura using RBG.
- 6) Marriage Law and Government Regulation No. 9 on the Implementation of Law Number 1 of 1974.
- 7) Law Number 7 of 1989 on Religious Courts.
- 8) Law Number 14 of 1985 in conjunction with Law Number 5 of 2004 regarding the Supreme Court regulating the composition of the Supreme Court, Supreme Court, Supreme Court Procedural Law including Cassation, examination of dispute over judicial authority.
- 9) The jurisprudence of the Judges' Judgment of cases which have had permanent legal force (*in kracht*).
- 10) Doctrine or science.

2. Outside the court (alternative dispute resolution)

Dispute resolution outside the court can be seen from Law Number 30 of 1999 on Alternative Dispute Resolution. An out-of-court dispute resolution can be done through:

a. Negotiation

According to Article 6 paragraph (2) of Law no. 30 of 1999 that "the settlement of penalties or disagreements through alternative dispute settlement as referred to in paragraph (1) shall be settled by a direct meeting by the parties within a period of no later than 14 (fourteen) days and the results shall be set forth in a written agreement."

b. Mediation

Provisions on mediation as referred to in Article 6 paragraph (3) of Law no. 30 of 1999 that "mediation is a process of activity as a continuation of the failure of negotiations undertaken by the parties under Article 6 paragraph (2). On the written agreement of the parties, disputes or disagreements are resolved through the assistance of one or more expert advisors as well as through a mediator. "The mediator as an outsider has the authority to compel, which is obliged to bring together the parties to the dispute to seek input on the subject matter which is disputed by the parties. Based on the information obtained then the mediator can determine the sitting of the case, the shortcomings and the advantages of each party concerned, then the mediator prepare a proposal to settle which then communicated to the parties directly.¹³ Procedure of mediation in court becomes part of the civil law proceedings can strengthen and optimize the functioning of the judiciary in the settlement of disputes. The Supreme Court Regulation No. 1 of 2008

13. Gunawan Widjaja dan Ahmad Yani, 2000, *Hukum Arbitrase*, Raja Grafinso Persada, Jakarta, p. 34

on Mediation Procedures in Courts has not been optimal in meeting the need for a more efficient Mediation implementation and was able to improve the success of mediation in the courts so that the government then enacted Supreme Court Regulation Number 1 of 2016 on Mediation Procedures in Courts (hereinafter referred to as " *Perma* (Supreme Court Regulation) No. 1 of 2016). Mediation according to the provisions of Article 1 point 1 *Perma* No. 1 of 2016 is "dispute settlement through negotiation process to obtain agreement of Parties assisted by Mediator." According to the provisions set forth in Article 27 paragraph (1) of *Perma* no. 1 of 2016 that "if the mediation reaches an agreement, the parties with the assistance of the mediator shall formulate a written agreement in the Peace Agreement signed by the Parties and Mediators." Further in Article 27 paragraph (2) states "In helping to formulate the Peace Agreement, the mediator shall ensure that the Peace Agreement does not contain provisions which: a. contrary to law, public order, and/or decency; b. harming third parties; or c. can not be implemented."

c. Conciliation

Conciliation is necessary if the parties to the dispute are unable to settle the dispute. Conciliation is not the same as mediation because conciliation settlement refers more to the way of dispute resolution through consensus or agreement of the parties, while the third party is neutral.¹⁴ Article 6 paragraph (7) and paragraph (8) of Law no. 30 of 1999 it can be seen that the written agreement of the conciliation result must be registered to the District Court within 30 days from the date of signing and executed within 30 days from the date of registration at the District Court. The written agreement of the conciliation result is final and binding for the parties.

d. Arbitration

Article 1 number 1 of Law no. 30 of 1999 provides that: "arbitration is the means of settling a dispute outside a public court based on an arbitration agreement made in writing by the party to the dispute." Arbitration by Subekti is the settlement or dismissal of a dispute by a judge or judges on the basis of the consent of the parties subject to or complies with the decisions given by the judges they choose.¹⁵

Based on the description of the dispute resolution efforts as mentioned above, if related to the issues in this paper related to the nominee agreement, where the Indonesian citizen objected to the tax amnesty program because the foreigners do not want to give money to join the government program, whereas Indonesian citizen as a taxpayer has an obligation to participate in the success of tax amnesty program. The nominee agreement is referred to as legal smuggling although under the provisions of Article 1338 the Civil Code embraces the principle of freedom of contract, but the contents of the nominee agreement are made to give the opportunity/loophole to foreigners to own and own the plots of property rights in Indonesia. Foreigner purchases a plot of property rights under the name of Indonesian citizen, which is the land of property which is actually bought (paid) by the foreigner but is registered to/on behalf of the Indonesian citizen, meanwhile for the legal certainty of the interest in land it buys between an Indonesian citizen and an Indonesian citizen is made in one or more agreements and even in a deed of the statement that the Indonesian citizen is a person who is borrowed only by name in proof of title (certificate) while the real owner is the foreigner. This is certainly not justifiable under Indonesian law.

The nominee agreement is a treaty whose contents concerning the denial of ownership of the land of ownership of an Indonesian citizen person who has been granted/designated by the state to its citizen as written in its land certificate by stating that the de facto owner of the land is not him but a foreigner who does give money and subsequently controlled the land for its purposes and benefits. However, in reality, the ownership of the land of such

14. H. Sudiarto dan Zaeni Asyhadie, 2004, *Mengenal Arbitrase*, Raja Grafindo Persada, Jakarta, p. 11

15. Subekti, 1992, *Arbitrase Perdagangan*, Bina Cipta, Bandung, p. 1

property is a foreign national, while in the name is Indonesian citizen so that the tax arising from the ownership of the land is charged to the Indonesian citizen as a taxpayer. This is where problems can occur, especially in relation to tax amnesties that incur taxes to be paid by the Indonesian citizen but the foreigners who under the agreement in the nominee agreement as the *de facto* (owner) of the land do not want to give money on can occur according to the amount that should be paid due ownership of the land.

In relation to the dispute arising from foreigners refusing to give money as tax payments on the land, the judicial consideration of the judge in court by referring to the provisions of Article 26 of the BAL is any engagement or agreement made between the Indonesian citizen and the foreign national who intends to transfer the right of property the land is declared null and void. Thus, according to the author with the cancellation of the nominee agreement, the Indonesian citizen, as his name is listed as the rightful owner of land rights, can legally retain his/her right to the land concerned. However, the Indonesian citizen is obliged to return the amount of money previously issued by foreigners related to the need to purchase the land in question. Thus, in the future, the tax arising from the ownership of the land related to the tax amnesty program is the responsibility of Indonesian citizen. Litigation settlement also adheres to the principles of justice that exist in the community by referring to the formal provisions in the applicable laws and regulations.

IV. CONCLUSIONS

A. Conclusion

The legal consequences for Indonesian citizens who are nominee for interest in land with the tax amnesty program are if the Indonesian citizen does not participate in the tax amnesty program but found that the property obtained from January 01, 1985 to December 31, 2015 and not yet reported in the Annual Notification Letter Tax, shall be regarded as additional income and subject to taxes and sanctions in accordance with applicable Law, i.e., sanctions 200% of the tax payable. Land tenure by foreigners from nominee agreements may also result in legal, whether from the civil law aspect, criminal law aspect or tax criminal aspects.

Legal efforts that can be made by the Indonesian citizen if a foreign national commits a breach of a nominee agreement related to the payment of tax of interest in land that is to take a non-litigation path through mediation which the final result of the negotiation is reached according to mutual agreement without pressure or coercion assisted by the mediator in order to obtain the winning result win solution. If the settlement can not be done through mediation then it can be through court line with the judicial discovery made by the judge in resolving the dispute.

B. Suggestions

To the public, it is suggested not to be involved with the nominee agreement with foreign parties because in the event of a dispute in the future it can cause harm, especially for the Indonesian citizen because it is included in the smuggling law.

To the court deciding the dispute over the nominee agreement in a litigation manner, it is desirable not to immediately cause the disputed land to fall into the State, so the advice for the judge in order to punish the land of nominee disputed object fall into State land, in order to give a deterrent effect both to Indonesian citizen and foreigners involved in it.

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