



ISSN : 1410-0614
E-ISSN : 2684-9941

SIMBUR CAHAYA

Fakultas Hukum Universitas Sriwijaya

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Legal Certainty of Income Tax Imposition on Sale and Purchase Transactions of Uncertified Land

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Informasi Artikel

Histori Artikel:

Diterima: 24-10-2024
Direvisi : 11-12-2024
Disetujui : 27-12-2024
Diterbitkan: 31-12-2024

Kata Kunci:

Pajak Penghasilan Final;
Pengalihan Hak atas Tanah
dan Bangunan; Sertifikat;
Pendaftaran Tanah

DOI:

10.28946/sc.v31i2.4230

Abstrak

Pada proses pendaftaran tanah terdapat kewajiban pembayaran pajak yang harus dijalankan oleh para pihak baik itu penjual ataupun pembeli sebelum memperoleh sertifikat yang dikeluarkan oleh Kantor Pertanahan. Pajak Penghasilan Final atas Pengalihan Hak Atas Tanah dan Bangunan (PPh F PHTB) merupakan kewajiban yang harus dibayarkan oleh pemilik tanah. Pada kasus tanah yang belum bersertifikat, PPh F PHTB dikenakan kepada pemilik tanah sebanyak dua kali. Selain itu, pemilik tanah juga dibebankan Bea Perolehan Hak Atas Tanah dan Bangunan (BPHTB) sebanyak satu kali. Beban pajak yang tercantum itu belum termasuk biaya-biaya lainnya seperti biaya pembebanan Penerimaan Negara Bukan Pajak (PNBP) serta biaya-biaya lainnya yang terkait dengan pengalihan hak tersebut yang jika diakumulasikan cenderung memberatkan pemilik tanah. Rumusan Masalah yang dibahas pada penelitian ini adalah bagaimana kepastian hukum pembebanan pajak penghasilan atas transaksi jual beli tanah yang belum bersertifikat di Indonesia dengan menggunakan metode pendekatan yuridis normatif untuk memecahkan permasalahan dengan cara meneliti data sekunder berupa peraturan perundang-undangan, buku-buku serta dokumen-dokumen terkait. Hasil dari penelitian menyatakan bahwa Pembebanan pajak penghasilan final atas pengalihan hak atas tanah dan bangunan (PPh F PHTB) yang belum bersertifikat atau pendaftaran sertifikat untuk pertama kali dinilai belum memenuhi aspek kepastian hukum dan keadilan. Hal ini karena akan terjadi pengenaan Pajak Penghasilan Final Atas Pengalihan Hak Atas Tanah dan Bangunan (PPh F PHTB) berlapis-lapis atas suatu objek dan subjek pajak yang sama.

Article Info

Article History:

Received : 24-10-2024
Revised : 11-12-2024
Accepted : 27-12-2024
Published : 31-12-2024

Abstract

In the land registration process, there are tax payment obligations that must be carried out by the parties, both sellers and buyers, before obtaining a certificate issued by the Land Office. Final Income Tax on Transfer of Land and Building Rights (PPh F PHTB) is an obligation that must be paid by the landowner. In the case of uncertified land, PPh F

Keywords:

Final Income Tax; Transfer of Land and Building; Sertificate; The land registration process

PHTB is imposed on the landowner twice. In addition, the landowner is also charged a one-time Land and Building Acquisition Fee (BPHTB). The tax burden listed does not include other costs such as the cost of charging Non-Tax State Revenue (PNBP) and other costs associated with the transfer of rights which, when accumulated, tend to burden the landowner. The formulation of the problem discussed in this study is how the legal certainty of income tax imposition on sale and purchase transactions of uncertified land in Indonesia uses a normative juridical approach method to solve problems by examining secondary data in the form of laws and regulations, books, and related documents. The results of the study state that the imposition of final income tax on the transfer of rights to land and buildings (PPh F PHTB) that have not been certified or registration of certificates for the first time is considered not to fulfill aspects of legal certainty and justice. This is because there will be the imposition of Final Income Tax on the Transfer of Rights on Land and Building (PPh F PHTB) in layers on the same object and tax subject.

INTRODUCTION

The land is a basic human need that must be fulfilled in carrying out life, either as a place to live or as land that can be cultivated to obtain economic benefits. However, as time goes by, the need for land increases with the increase in human population. From this increase, land buying and selling activities are rampant, which is typical of humans as economic beings who always want to fulfill their needs.¹ From these buying and selling activities, payments arise in which there is a reciprocal process in the form of acceptance and delivery according to the agreed price. Not only limited to the agreed price but there are costs in the form of taxes that must be paid to the government, as in Article 23A of the 1945 Constitution which reads "Taxes and other levies that are compelling for state purposes are regulated by law" that making tax payments becomes a state obligation borne entirely by the components of the nation. In terms of the party that collects it, taxes are classified into 2 types, namely:²

- a. The Directorate General of Taxation oversees the central government's collection of taxes, which are known as central taxes and are meant to fund state households. Value Added Tax (PPN), Sales Tax on Luxury Goods (PPnBM), and Income Tax (PPh) are a few types of central taxes.

¹ Rahajeng Maherdikka, 'Legal Certainty in the Imposition of Income Tax on the Sale and Purchase of Unregistered Land', 202.

² Sotarduga Sihombing, *Taxation Theory and Application* (Widina Bhakti Persada 2020).[7].

- b. Local taxes are a type of tax levied by the Regency / City and provincial governments to finance their respective regional households. Examples of local taxes are hotel tax, recreation tax, and others.

Income tax (PPh) and fees for the acquisition of land and building rights (BPHTB) are two requirements that must be fulfilled by the parties in every land title transfer transaction. While the Fees on Acquisition of Land and Building Rights (BPHTB) are part of local taxes submitted to the Regional Revenue Office (Dispenda) and are the buyer's responsibility, income tax is a central tax whose acquisition is reported to the Primary Tax Service Office.³ Income tax (PPh) is a tax that the government levies on money received by people or organizations throughout the tax year, whether that money comes from gifts, honoraria, business earnings, salaries, or other domestic and foreign sources. There are two categories of income tax: Non-Final Income Tax (PPh Non-Final) and Final Income Tax (PPh Final).⁴

Article 1 of Law Number 36 of 2008 concerning the Fourth Amendment to Law Number 7 of 1983 concerning Income Tax, defines Non-Final Income Tax (PPh Non-Final), which is a tax imposed on taxpayers on income received by them or obtained during the tax year. Meanwhile, Final Income Tax (PPh Final) is an income tax that is directly imposed on the tax object, namely certain sources of income, and calculated at a predetermined rate on related objects.⁵ As for Chapter III Income Tax of Law Number 7 of 2021 concerning Harmonization of Tax Regulations, it is stated that objects subject to final income tax withholding are applied to certain income such as construction services, land and or building leases, transfer of rights to land or buildings, lottery prizes, and income from derivative transactions traded on the stock exchange whether received by individuals or entities from various sources that have been mentioned.⁶

Government Regulation Number 34 of 2016 concerning Income Tax on Income from the Transfer of Rights on Land and/or Building and Sale and Purchase Agreement on Land and/or

³ Rahman Aulia, 'Imposition of Income Tax on the Sale and Purchase of Uncertified Land in Padang City'. Thesis (Faculty of Law, University of Andalas 2007). [3]

⁴ *Ibid.*

⁵ Law Number 36 of 2008 concerning the Fourth Amendment to Law Number 7 of 1983 concerning Income Taxes

⁶ Law Number 7 of 2021 on Harmonization of Tax Regulations

Building and its Amendments is an implementing regulation that the Indonesian government has presented in order to regulate the implementation of the aforementioned law. In the meantime, Final Income Tax (PPh Final) is being imposed in order to simplify and expedite the process of determining the imposition of Income Tax (PPh), give taxpayers legal certainty, and lessen the burden on both the Directorate General of Taxation and taxpayers themselves.

In Indonesia, there is a correlation between the application for land and/or building rights for the process of buying and selling land that has not been certified with income tax payments. In the process, the party transferring land rights, in this case, the seller, is charged with Income Tax that must be paid on the profits obtained from the sale and purchase of land and/or buildings and Fees for the Acquisition of Rights on Land and Buildings (BPHTB) which must be paid by the Buyer. From this, if the registered land and or building wants to be issued a certificate, the applicant in this case the landowner (seller) and the buyer must carry out their obligations to make tax payments first as a condition before the issuance of a certificate in the name of the applicant for a new right. From the above, it can be seen that the application for registration of rights to land and or buildings carried out for the first time aims to enable landowners to obtain a certificate as proof that the land they own has been registered at the Land Office and has strong legality. With this legality, it is expected to be able to provide protection and legal certainty to landowners by the objectives and principles of land registration, as contained in Article 19 of Law Number 5 of 1960 concerning Basic Regulations on Agrarian Principles which explains that to ensure legal certainty, the government conducts land registration throughout the territory of the Republic of Indonesia by taking into account the provisions stipulated in Government Regulations.⁷

The aforementioned explanation leads to the conclusion that the landowner will be subject to income tax if he wishes to proceed with the process of transferring rights or applying for new rights to uncertified land and buildings. This is also regulated in Government Regulation Number 34 of 2016 concerning Income Tax on Income from Transfer of Rights on Land and/or Building and Sale and Purchase Binding Agreement on Land and/or Building, wherein Article

⁷ Law Number 5 of 1960 on the Basic Regulation of Agrarian Principles

1 Paragraph 1 makes clear that:⁸ "On Income received or obtained by an individual or entity from :

1. Transfer of Land and Building Rights
2. Agreement of Sale and Purchase of Land and/or Building and its amendments"

This is because the party transferring the land rights will receive revenue or profit from the sale of the land and/or buildings. Significant tax payments for the owners are associated with the transfer of rights to uncertified property and/or buildings. The owner will incur two charges for Final Income Tax on Transfer of Rights on Land and Building if they transfer the right with the understanding that it will be transferred after the certificate is issued. Initially, throughout the application process for a certificate, and subsequently, throughout the actual sale and purchase transaction. Additionally, a one-time Land and Building Acquisition Fee (BPHTB) is assessed to the landowner. Other expenses, such as the cost of charging Non-Tax State Revenue (PNBP) and other expenses related to the transfer of rights, are not included in the tax burden indicated. The seller's or landowner's tax burden, when aggregated, clearly indicates the direction of the burdensome scales. In light of this, the study will go over how the income tax burden's legal certainty affects Indonesia's uncertified land sales and purchases.

METHODS

This research is included in the type of normative juridical legal research, namely a study using secondary data sourced from literature, laws and regulations, legal theories, and opinions of experts related to the issues being studied.⁹ The approach used in this research is in the form of statutory, conceptual and case approaches with descriptive-analytical research specifications where data from the problems studied will be collected and then compiled, processed, and analyzed to provide conclusions related to the problems being discussed. A literature study is a method of collecting data by reading laws and regulations, literature, and other documents related to the problem being studied.¹⁰

⁸ Government Regulation Number 34 Year 2016 on the Implementation of Income Tax on Income from Transfer of Rights on Land and/or Building and Sale and Purchase Agreement on Land and/or Building and its amendments.

⁹ Johnny Ibrahim, *Theory and Methodology of Normative Legal Research* (Bayumedia 2013). [57] .

¹⁰ Abdulkadir Muhammad, *Law and Legal Research* (Citra Aditya Bakti 2004).[81].

DISCUSSION AND ANALYSIS

Basis of Income Tax Expenditure on Sale and Purchase Transaction of Land and/or Building

Article 19 of the Basic Agrarian Law stipulates that land registration as a government task is organized to ensure legal certainty in the land sector (as a *rechtskadaster* or legal cadaster). The implementation of land registration or issuance of certificates goes through several stages, including the signing of a Sale and Purchase Deed made before a PPAT (Land Deed Official) and the payment of Income Tax which is the responsibility of the seller, and the Fees for Acquisition of Land and Building Rights (BPHTB) which is the responsibility of the buyer. Before these two things are done, the land registration process and or the issuance of certificates cannot be carried out.

The following paperwork must be completed by the parties, particularly the seller in this instance, at the stage of the land sale and purchase transaction:¹¹

- 1) Photocopy of identity / Identity Card (KTP) of the parties (if married then it is required to attach a photocopy of KTP).
- 2) Photocopy of Family Card (KK).
- 3) Taxpayer Identification Number (NPWP).
- 4) Original certificate of title to the land to be sold .
- 5) Proof of Payment of Land and Building Tax (PBB) for the last 5 years followed by last year's Notice of Tax Payable for Land and Building Tax (SPPT-PBB).
- 6) Certificate of Indonesian Citizen (WNI) or change of name, if the seller is a descendant of WNI.
- 7) Consent letter from spouse.
- 8) If one of the husband/wife is deceased, a death certificate must be attached.

As mentioned in the introduction, there are two types of income tax, namely Final Income Tax (PPH Final) and Non-Final Income Tax (PPH Non-Final). The regulation of Income Tax is compiled in one legal regulation, namely the Taxation Harmonization Law Number 7 of 2021. As a perfection of the previous rule of law, namely Law Number 36 of 2008 concerning Income Tax. Income Tax as contained in Article 1 of Law Number 36 of 2008 concerning Income Tax is defined

¹¹ I Gusti Ngurah Bagus Maha Iswara, 'Legal Certainty of Income Tax Imposition on Sale and Purchase Transactions of Land and/or Building', (2019) 6 Prasada Law Journal. [42-51].

as a tax imposed on a tax subject on an income received in the tax year. It is stated in the Law that the tax subject in the scope of income tax is called a taxpayer.¹²

Article 4 Paragraph (1) Chapter III regarding Income Tax of Law Number 7 of 2021 concerning Harmonization of Tax Regulations states that "The object of the tax is income, which is any additional economic capacity received or obtained by the taxpayer, whether originating from Indonesia or from outside Indonesia, which can be used for consumption or to increase the wealth of the taxpayer concerned, by name and in any form"¹³ Final income tax (PPh Final) is no longer included in the annual income tax calculation program.¹⁴ In Law Number 7 Year 2021, Final Income Tax (PPh Final) is categorized into several articles, namely Article 4 paragraph (2), Article 15, Article 17 paragraph (2) letter d, Article 19, Article 21, Article 22 and Article 26. Income tax from land and building transfer transactions (PPh PHTB) is regulated in Article 4 paragraph (2) letter d of Law Number 7 of 2021, which explains that "The following income can be subject to final tax income from property transfer transactions in the form of land and/or buildings, construction services business, real estate business and rental of land and/or buildings."

Then, it is further regulated in Government Regulation No. 34/2016, which states that "Income from the transfer of rights to land and/or buildings is income received or obtained by the party transferring rights to land and/or buildings through sale, exchange, relinquishment of rights, surrender of rights, auction, grant, inheritance, or other means agreed upon by the parties." The Government Regulation's provisions have made the Transfer of Land and Building Rights (PHTB) a tax object that affects both persons and legal entities. This indicates that the subjectivity and objectivity of tax imposition have been satisfied since the Income Tax on the Transfer of Land and Building Rights (PPh PHTB) is based on legal acts between the two connected parties. Consequently, only during the period of the sale and buy transaction may the Income Tax on Transfer of Land and Building Rights (PPh PHTB) be applied.

The gross amount specified in the sale and purchase agreement or agreement to bind the sale and purchase, which has been signed by the Land Deed Official (PPAT), serves as the foundation for the imposition of income tax on the Transfer of Land and Building Rights (PPh

¹² Law Number 36 of 2008 on Income Tax

¹³ Law Number 7 of 2021 on Harmonization of Tax Regulations

¹⁴ Adrian Sutedi, Implementation of Public Interest Principles in Land Acquisition for Development, (Sinar Grafika 2020). [51].

PHTB) through sale and purchase transactions. This amount is calculated using the following formula:

Table 1: Calculation of PHTB Final Income Tax¹⁵

$\text{Income Tax} = \text{Actual/expected value received} \times 2.5\%$
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The process of imposing income tax on the seller is as follows:

- 1) The seller is obliged to pay the income tax payable of 2.5% of the gross sales value using the electronic tax payment letter. The payment includes information on the Taxpayer Identification Number (NPWP), tax code and type, tax period payable, and payment value. The procedure can be carried out by the taxpayer himself using the NPWP by first creating a billing code as a means of payment to the Perception Bank or Post Office or can be assisted by PPAT office employees.
- 2) Before signing the deed of sale and purchase or the agreement to bind the sale and buy before the Notary or PPAT, the seller must self-remit the income tax that is due. The income tax that is due as planned must be paid in full or in part at the time the income is received, and it must be lodged by the fifteenth of the subsequent month. The requirement that payment be made prior to the signing of the sale and purchase deed is emphasized by the legal certainty of the income tax imposition on land and/or building sale and purchase transactions.
- 3) The payment billing code is displayed when making a payment at a perception bank or post office. A Tax Payment Slip with a State Revenue Transaction Number, Bank Transaction Number, Post Transaction Number, or Receipt Number of Deductions, or other administrative means equivalent to a Tax Payment Slip, will be given to the seller following the payment process.
- 4) The Tax Payment Slip that has been stamped with the State Revenue Transaction Number is then researched by applying research on proof of fulfillment of income tax payment obligations either manually or electronically to the Primary Tax Service
- 5) Office where the location of the tax object is registered.

¹⁵ I Gusti Ngurah Bagus Maha Iswara, *Op.Cit.*[45].

Legal Certainty of Income Tax Imposition on Sale and Purchase Transactions of Uncertified Land

It is crucial that taxpayers have the assurance of legal clarity when fulfilling their tax-payment responsibilities. As per Adam Smith's viewpoint in his book *An Inquiry Into the Nature and Causes of the Wealth of Nations*, which introduced the concept of "The Four Maxims" in tax collection, the Principle of Certainty is one of the principles in tax collection. According to the principle of certainty, tax collection must be predicated on certainty for all taxpayers, tax officers, and the community at large.¹⁶ The scope of the principle of certainty in the context of taxation includes several aspects, such as who should be taxed, what is determined as a tax object, how much the amount of tax must be paid by the taxpayer, and the steps that must be taken in making tax payments and reporting. From this, it means that legal certainty in the context of taxes does not only include details such as tax subjects, tax objects, tax bases, and tax rates, but also includes relevant procedures such as payment, reporting, and implementation of taxation rights.¹⁷ With clear procedures, taxpayers will easily carry out their obligations and exercise their rights making it easier for the tax authorities to monitor the implementation of tax obligations by taxpayers.

Based on the opinion expressed by Sommerfeld, to increase legal certainty, it is necessary to provide detailed tax collection guidelines, advanced rules (advanced rulings), and other legal interpretations. The principle of legal certainty is fundamental in the tax system because uncertainty will increase the possibility of disputes or differences of opinion between taxpayers and tax authorities. In practice, it often happens that the Circular Letter issued by the Directorate General of Taxes appears more powerful than the law itself. If this condition is allowed to continue, it will create a bad example. If the Circular Letter is made without the approval of the House of Representatives (DPR), the DPR's approval is very important considering that tax is a form of public money collection. Therefore, the regulation of taxes must be drafted and discussed together between the Government and the DPR. Therefore, taxes should not be set unilaterally by the government alone.¹⁸

¹⁶ Syamsul Arifin, *Introduction to Indonesian Law*, (Cita Pustaka 1996).[8].

¹⁷ Bangkit Cahyono, 'Tax Collection Principles in Income Tax on Stock Transactions on the Stock Exchange', (2021) *Journal of the Indonesian College of Taxation*. [77].

¹⁸ Haula Rosdiana, *Introduction to Tax Science*, (Rajawali Press 2014).[159].

When requesting a certificate for the first time at the Land Office, applicants for new rights to uncertified land and/or buildings will be subject to fees for the acquisition of rights on land and buildings (BPHTB) and Final Income Tax for Transfer of Rights on Land and Buildings (PPh F PHTB). The landowner, acting as the applicant, must pay PPh F PHTB and BPHTB as a prerequisite before a certificate is issued on the applicant's (right holder/owner) behalf. The transfer of land rights is also subject to PPh F PHTB and BPHTB if the recently registered land and/or building has a certificate issued and is sold to another party. The party who transfers the rights to land and/or buildings (PHTB) must be subject to PPh F PHTB (the seller), and the party who accepts the transfer is subject to BPHTB (the buyer), according to the law of sale and purchase. It is possible to draw the conclusion that the owner of uncertified land and/or buildings will transfer their rights under the established conditions if the land has received a certificate. As a result, the owner of the land and/or building will pay BPHTB once, at the time of the certificate application, and PPh F PHTB twice, at the time of the transfer resulting from a sale and purchase. The tax charged does not include the cost of imposing PNPB (Non-Tax State Revenue) rates and other related costs, so if the entire tax burden is accumulated, the tax borne by the landowner (seller) is considered burdensome.¹⁹

Looking at the facts, requests for new rights (first-time land registration) are subject to the Final Income Tax on Transfer of Land and Building Rights (PPh F PHTB) and the Fees on Acquisition of Land and Building Rights (BPHTB). After the land has been certified, if there is a sale transaction, the PHTB and BPHTB are also charged. This means that the imposition of PHTB Income Tax has a double meaning, i.e. the same tax subject, the land owner, is subject to PHTB Income Tax twice. Logically, since it is impossible for someone to sell their land more than once, they cannot be subject to PHTB Income Tax more than once. The application for land registration for the first time aims to obtain a certificate, therefore the tax paid is not an income tax object. Because based on Article 4 Paragraph (1) of Law Number 7 of 2021 concerning Harmonization of Tax Regulations jo. Article 4 Paragraph (1) of Government Regulation Number 34 of 2016, which is classified as an income tax object is income obtained from the sale and purchase transactions of land and/or buildings. Therefore, the existing provisions are considered contradictory if PHTB

¹⁹ Efendi, 'Legal Analysis of the Imposition of Tax on the First Land Rights Application', (2018) Journal of Law Faculty of Law USU Medan.[9].

Income Tax is charged on the first time land registration.²⁰ In addition, in the process, the applicant does not benefit economically as in the transfer of rights, where the transferring party will get the money from the sale of the land.

According to the law's rules pertaining to the transfer of land and/or building rights, a taxpayer is an individual or organization that has legally transferred rights to land and buildings (PHTB), and the PHTB is now a tax object. This means that as the object of PPh F PHTB and BPHTB, based on legal actions there are two parties, namely, the party who transfers and the party who receives/obtains from what is transferred by the transferring party so that the subjective and objective conditions of tax imposition are fulfilled. In other words, Income Tax F PHTB can only be imposed on the object of income derived from the transfer of rights between the seller and the buyer from the sale and purchase transaction.²¹

Implicitly, because it does not satisfy the material requirements (objective and subjective) of tax imposition, the Final Income Tax on Transfer of Land and Building Rights (PPh F PHTB) on the application of new rights to untitled land and/or buildings lacks legal certainty. The purpose of law is to provide legal certainty, and legal certainty can be achieved through clear legal rules. However, based on legal certainty related to the provisions of the imposition of PPh F PHTB, the application for new rights is not considered a tax object because PPh F PHTB cannot be imposed. The granting of a land certificate to the applicant in the land registration process for the first time is a grant of rights made by the State by Article 2 paragraph (1) of the Basic Agrarian Law (UUPA). In applying for a new right to land and/or buildings that have not yet been titled, the State provides evidence of the land registration, known as a Certificate of Ownership (SHM). The granting of this right includes the acquisition of the property rights listed in the land certificate. Thus, the acquisition of rights from the State evidenced through a certificate of ownership can be understood as the control of land rights owned by the State, given that the highest land rights are controlled by the State, as stipulated in Article 2 paragraph (1) of the UUPA.²²

²⁰ Irma Erviana, 'The Imposition of Income Tax on Land Registration for the First Time'.(2021) 24 Al-Ishlah: Scientific Journal of Law.[10].

²¹ Efendi, *Op.Cit.*[20].

²² Made Wahyu Arthadana, 'Legal Certainty of Income Tax Imposition on Agreement for Sale and Purchase of Untitled Land' (2021) 7 Journal of Legal Communication [1009].

CONCLUSIONS

Based on the description of the discussion above, the imposition of Income Tax on the Transfer of Land and Building Rights (PPh PHTB) through sale and purchase transactions is based on the gross amount stated in the deed of sale and purchase or sale and purchase binding agreement made before a Notary / PPAT by following the provisions in Government Regulation Number 34 of 2016 with a predetermined rate of 2.5%. In addition, the imposition of income tax on sale and purchase transactions of uncertified land or registration of certificates for the first time is considered not to fulfill the aspects of legal certainty and justice. This is because there will be multiple impositions of Final Income Tax on Transfer of Land and Building Rights (PPh F PHTB) on the same object and tax subject.

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