THE FULFILLMENT OF TAXATION AND LABOR RIGHTS AS THE PREFERRED CREDITORS IN BANKRUPTCY CASES

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Ikramina Larasati Hazrati Havidz

MOTTO

“Four things to remind yourself daily: I am amazing, I can do anything, Positivity is a choice, I am prepared to suceed.” (English Quotes)

“Life is short, Time is past, No replay, No rewind, So enjoy your moment as it comes.” (English Quotes)

“Mistakes are proof that you are trying.” (English Quotes)

“Studying is taqwa. Delivering knowledge is worship. Science is the repeated recitation. Seeking for knowledge is jihad. (Imam Al-Ghazali)

I Dedicated this thesis to My Beloved Parents Prof. H. M.Havidz Aima, Ms. Ph.D. and Hj. Hernawati Wibawati Retno Wiratih, MSc who always love and support me and never stop praying to God for my future.

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15. All of my friend in class for great moments during our class. I will never forget our class moment.
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It is unbelievable for having all of you that have been inspiring in my life. It is amazing how complete my life with the beauty and goodness for having all of you. This Thesis is written as the requirement that must be fulfills for the award of the Degree of Bachelor of Law. I hope this Thesis brings positive contribution for me and to the society.

Best Regards,

Ikramina Larasati Hazrati Havidz

ABSTRACT

The aims of this Thesis is to determine the legal seat taxation and laborer as preferred creditor in Bankruptcy. The problem statement which is proposed in this Thesis are: How special is the legal seat of taxation compare to the laborer as preferred creditor in bankruptcy?; How is the settlement of the rights of laborer and taxation as preferred creditor?. The writer apply the normative method in relation to the research as the approach method.

The method of analyzing legal material used the descriptive qualitative and comparative method. U.S is taken as the comparative study due to it arise some interesting topic to be discuss concerning the legal seat of taxation and laborer as preferred creditor. The obtained data were descriptively presented and try to corelate according to the convention, legal theories, and scholars' opinion.

The result of this research are: Taxation are entitle to receive precedence rather than the laborer even though both of them is categorized as preferred creditor; when we compare the U.S Bankruptcy Law against the settlement concerning to Batavia Air case its arise some distinction which is in U.S Bankruptcy Law the legal seat of laborer is higher than the taxation while in Batavia Air case laborer and taxation is having the same legal seat in the field of Indonesia Bankruptcy Law.

The research which have been conduct by the writer in accordance to the normative method showed us that Indonesia Bankruptcy Law need to explain the regulation in more detail to decrease any doubtness that will arise. It is better for Indonesia to create the Bankruptcy Law such the U.S Bankruptcy Law which it not arise any doubtness concerning the legal seat of the creditor in terms of a company is declared bankruptcy.

Key Word: bankruptcy, preferred creditor, taxation, laborer, priority.

Table of Content

Page of Title..... i

Approval Page..... ii

Statement of Originality..... v

Motto..... vi

Dedicated Page..... vii

Acknowledgement..... vii

Abstract..... xi

Table of Content..... xii

Chapter I. Introduction

A. Context of Study..... 1

B. Problem Statements..... 9

C. Objectives..... 9

D. Theoretical Framework..... 9

E. Research Method..... 14

Chapter II. General Review on Bankruptcy, Labor, and Taxation

A. General Review on Bankruptcy

1. Definition of Bankruptcy..... 18

2. Legal Principles in Bankruptcy..... 23

3. The Condition for a Bankruptcy..... 33

4. Legal Consequences of Bankruptcy Declaration..... 37

B. General Review on Labor Law

1. Definition of Labor Law..... 40

2. Regulation on Labor Law..... 41

3. Industrial Relationship..... 51

4. Termination of Labor..... 57

C. General Review on Taxation Law

1. Taxation Definition..... 58

2. Regulation on Taxation..... 62

3. Benefit of Taxation..... 66

4. Types of Taxation..... 68

Chapter III. Taxation and Laborer in Bankruptcy

A. The Legal Posititon of Taxation and Laborer as Preferred Creditor... 70

B. The Fullfillment of Taxatiion and Labor Rights in Bankruptcy Settlement..... 83

Chapter IV. Conclusion and Recommendation

A. Conclusion..... 93

B. Recommendation..... 94

CHAPTER I

INTRODUCTION

A. Context of Study

The essential purpose of law is to protect the interests of human beings because in every life and legal relation each party concerns with each own interests. Such interest is possible to be same, different, or even contradictory to each other. If there is no provision regulating it, the conflict of interests is likely to interfere or harm the stability of the legal relationship since each party will defend its interests. In this aspect, law has a role to protect the interests of the parties to create fairness among them, so there will be no parties that will get loss[1].

According to Syamsudin M. Sinaga, the basic concept of bankruptcy is regulated in the Article 1131 and 1132 of Indonesian Civil Code. The meaning of this Articles state that all of the debtor's existing assets or the ones which will exist in the future is considered as the debtor's collateral for the debt acquittances to the creditors. The debtor will be declared bankrupt if he fails to perform the debt acquittances to the creditors. Then, the court will appoint a receiver as long as the debtor is in the state of bankruptcy[2].

The Article 1131 of Indonesian Civil Code determines that the debtor's asset is not only to pay off the creditors appeared from the debt agreement but

[1] S Man, Sastrawidjaja. *Hukum Kepailitan dan Penundaan Kewajiban Pembayaran Utang*. P.T. Alumni. Bandung. 2010. Page 71.

[2] Syamsudin M, Sinaga. *Hukum Kepailitan Indonesia*. PT Tatanusa. Jakarta 2012. Page 82-83.

also to secure the debtor's obligation. In other words, the Article explains that the debtor's assets serve as the collateral for all liabilities, either those arising from the engagement, laws, or other treaties that arises in regard with the legal relationship between the debtor and the other parties[3]. This Article also specifies that all assets of the debtor function as collateral for the performance of its obligations not only to certain creditors, but also to all the creditors. Consequently, there should be rules on how to distribute the assets of the debtor[4].

It is regulated in the Article 1132 of Indonesian Civil Code that every creditor has the same position as other creditors, except if it is not explicitly specified otherwise by the law. The phrase of "if there is a valid reason to take a precedence toward one creditor over the other creditors" written in the Article 1132 of Indonesian Civil Code explains that there are particular creditors who are entitled to have higher legal position than the other creditors[5], namely secured creditor and preferred creditor.

The Article 1132 of Indonesian Civil Code determines that the bankruptcy estate is possible to be applied to all of the creditors. As a result, the debtor's assets will be sold if the debtor can not perform its obligation. In this aspect the obligation of the debtor is to pay off the due and payable debt. When the debtor fails to perform its obligation, the debtor's assets will be

[3] Remy Sutan, Sjayhdeini. *Hukum Kepailitan Memahami Undang-Undang No.37 Tahun 2004 Tentang Kpailitan*. Grafiti. Jakarta. 2010. Page 4.
[4] *Ibid.*
[5] *Ibid.* Page 5.

distributed to all of the creditors except if there is a creditor who must receive privilege namely secured and preferred creditor[6].

Another type of creditor is unsecured creditor defined as creditor which is the claim have no any security, they are not entitles to take precedence before the secured and preferred creditor. The unsecured creditor has the same legal position with another unsecurred creditor. The unsecured creditor is entitled to the sales result of the debtor's estate, either existing one or the one which will exist in the future. The unsecured creditor shall receive the debt acquittances after the secured and the preferred creditors receive their payment[7].

The regulation written in Indonesian Civil Code on creditors structured in receiving the debt acquittances is not yet adequate. It needs another complementary regulation to regulate the creditor structure in receiving the debt acquittances. Besides, the regulation must also regulate who is the person or which legal body that is entitled by the law to manage and settle the bankruptcy estate settlement. The recent applicable law is Law No.37 of 2004 on Bankruptcy Law and Suspension of Payment[8].

According to Article 1 paragraph 1 of Bankruptcy Law and Suspension of Payment, bankruptcy is a general seizure of the debtor's assets followed by the receiver as the people who are entitled to manage and settle the debtor's estate. The creditor will receive the debt acquittances of the debtor's estate in accordance with the debts amount based on the reasonable percentage. The

[6] S Man, Sastrawidjaja. *op. cit.* Page 75.
[7] Remy Sutan, Sjayhdeini. *op.cit.* Page 7-8
[8] *Ibid.* Page 8

meaning of reasonable percentage is according to the debt that is owned by each creditor and will be paid off from the debtor's assets. The receiver is obliged to collect the estate to secure the creditors to receive the debt acquittances from the sales result of the estate. According to Article 1 point 5 of Bankruptcy Law and Suspension of Payment receiver is a person appointed by the court to manage and settle the debtor's estate under the supervision of judge supervisor concerning to the law[9]. A receiver is possible to apply general seizure method in conducting the tasks and collecting the bankruptcy property[10].

The debt acquittances that are paid off by the receiver as the Heritage Agency inheritance office must be based on the debt amount of each creditor. If among the creditors there is a creditor that has privilege to be entitled to take the precedence by the law, the debt acquittances of such creditor must be paid off first before the other creditors. This creditor is categorized as preferred creditor. Then, the unsecured creditors will be paid if there is remaining estate sales result[11]. In this case, unsecured creditors are the creditors that have no security right.

Secured creditor is a creditor who has security right based on the agreement, and it has its full right on the collateral. When a debtor is declared bankrupt, the secured creditor has the right to sell the collateral to receive the debtt acquittances of the debtor. The collateral which is held by the secured

[9] Act No. 37 0f 2004 Bankruptcy Law and Suspension of Payment Article 1

[10] Anisah, Siti. *Perlindungan Kepentingan Kreditor dan Debitor dalam Hukum Kepailitan di Indonesia.* Total Media. Yogyakarta. 2008. Page 265.

[11] Syamsudin M, Sinaga. *loc. cit.* Page 82-83.

creditor is separated from that of the other creditors. It means that the legal position of the secured creditor is separated from that of the other creditors[12].

According to the Article 55 paragraph 1 of Bankruptcy Law, secured creditors will not get the impact of the debtor's bankruptcy. It means that the secured creditor will not be affected by the debtor's bankruptcy declaration because the secured creditor may still execute the debtor's estate as if the bankruptcy against the debtor never exists. The secured creditor may sell and take the collateral from the sales result that is separated from the general estate.

A creditor is entitled to receive the preceding position against other creditors as long as the bills of the creditor concerning bill in form of privilege, pledge right, and mortgage right. It is stipulated in Article 1133 of Indonesian Civil Code[13] as follows:

> "Right to precedence among creditors arise because of special right such as pledge, and mortgage right written in the twenty chapter and the twenty first chapter of these book."

Article 1134 of Indonesian Civil Code mentions that secured creditor receives the advance payment after the preferred creditors if it is not explicitly specified otherwise by the law[14]. However, based on Article 60 paragraph 2 of the Bankruptcy Law and Suspension of Payment, a receiver and preferred creditors can ask for the secured creditors to give the result of

[12] Nating, Imran. *Peranan dan Tanggung Jawab Kurator dalam Pengurusan dan Pemberesan Harta Pailit*. 2005. PT. Raja Grafindo Persada. Page 47

[13] See the Indonesian Indonesian Civil Code Article 1133

[14] Indonesian Civil Code article 1134

the the estate sales back to the receiver or preferred creditors. The result of the sales of the estate is requested according to the debts value[15].

The Article 1136 of Indonesian Civil Code states that a creditor with preferred right who has the same legal position is paid in a balance[16]. It means a seizing action which is conducted by preferred creditor will not occur in receiving the payment. The aim of this Article is to create a balanced legal position against the preferred creditor. It is also to convince the creditor that he will receive the payment without being advanced by the other creditors in the same class (preferred creditor).

Bankruptcy of debtor will give legal consequences not only to the debtor and his assets, but also will give legal consequences to the creditors. One of the debtor's creditor which will arise in bankruptcy are labors and taxation.

The Article 1137 paragraph 1 of Indonesian Civil Code states that privileges which by law must take precedence over the security rights are taxation, auction institution, and other public institutions that are established by the government[17]. It means that according to this Article, taxation, auction institution, and other public instituitons that are established by government have privilege over the secured creditors to receive the acquittance. The secured creditor does not reserve the right toward the security right of the estate.

[15] Fuady, Munir. *Hukum Pailit dalam Teori dan Praktek*. PT Citra Aditya Bakti. 2010. Page 98.

[16] Indonesia Civil Code Article 1136

[17] Indonesia Civil Code article 1137

The Article 1149 point 4 of Indonesian Civil Code stipulates that the past and accrued wages of the labors is classify into the specialized credits on all movable and immovable property[18].

Article 1 paragraph 30 of Law No. 13 of 2003 concerning labors states that wage is the right of labors that is received and expressed in form of money as a reward from the employer to the labors. The wage is paid according to the employment agreement and regulations, including the allowances for the labor and their families for a job and or service that has been or will be conducted by the labors[19].

The settlement of tax in a bankruptcy case is based on the Indonesian Civil Code, Bankruptcy Law, and Taxation Law if a legal relationship of a debtor is related to the tax debt toward the state. According to this regulation, tax has the privilege to receive be advanced in the payment before the other creditors. The Law No. 6 of 1983 concerning General Provisions and Procedures of Taxation as amended by Law No. 16 of 2009 Article 1 point 1, states that state has a right to get the advance acquittances in form of tax debt and the receiver is forbidden to distribute the taxpayer (debtor) assets in bankruptcy before paying off the taxpayers (debtor) tax debt. It means that in addition to labors, tax payment is also considered as preferred creditor.

The writer has interest in relation with this topic to find out the fulfillment of taxation and labor rights in the Bankruptcy Law and Suspension of Payment based on the above explanation. In this aspect, the

[18] Indonesian Civil Code Article 1149

[19] Syahrizal, Darda. et,.al,. *Undang-Undang Ketenagakerjaan dan Aplikasinya*. Dunia Cerdas. Jakarta. 2013. Page 207.

writer's point of view raises from the case regarding the bankruptcy of Batavia Air which is known as PT Metro Batavia as one of the Indonesia's airlines. The Commercial Court of Central Jakarta finally decided to grant the aircraft leasing company request as the representative of International Lease Finance Corporation (ILFC) that sued PT Metro Batavia to be declared as bankruptcy before the commercial court. In his statement, Agus Iskandar, the Chairman of the judge panel, stated that Batavia Air was eligible to be declared bankrupt in accordance with Act No. 37 of 2004 concerning Bankruptcy Law and Suspension of Payment[20].

Who should take the precedence if the company was declared bankrupt, whether the labor wage or the taxation payment? These issues were raised in the case of bankruptcy of PT Metro Batavia after 150 company labors demonstrated in front of the Commercial Court of Central Jakarta on March 14, 2013. The labors required the receiver and judge to prioritize their wage over the tax debt. The labors argued that their rights were protected by two laws, namely Law No. 13 of 2003 regarding Labor Law and Law No. 37 of 2004 regarding Bankruptcy Law and Suspension of Payment, while the the tax debt is only set on in the Bankruptcy Law. Referring to the above mentioned reason, the labors asked to get priority on the payment of their wage over the tax payment. In addition, the labors also felt threatened over the amount of bill submitted by the taxation office to the PT Metro Batavia as much as Rp309,000,000,000 (three hundred nine billion rupiahs). The amount

[20] http://www.merdeka.com/uang/batavia-air-dinyatakan-bangkrut.html. *Batavia Air Dinyatakan Bangkrut.* Last viewed on 7 December 2013.

of the bill that was submitted by the taxation office had not been paid since 2010. This raised a suspicion of the labors to the taxation office due to the fact why the tax which had not been paid since 2010 was just requested to be settled in 2013[21].

B. Problem Statements

In this research the problem statements consist of:

1. How special is the legal position of taxation compared to the labors as the preferred creditor in bankruptcy?
2. How is the settlement of the labor and taxation rights as the preferred creditors in bankruptcy?

C. Objectives

In this research, the writer's objectives are:

1. To determine the privilege that is owned by both labors and taxation as the preferred creditors in bankruptcy.
2. To determine how far the settlement of taxation and labor rights as the preferred creditors in bankruptcy has been implemented.

D. Theoretical Framework

In relation with the regulation of Bankruptcy Law, the purpose of regulation is to protect the interests of the parties, such as creditors, debtor,

[21] http://www.hukumonline.com/berita/baca/lt514ee167707bb/buruh-minta-didahulukan-dari-pajak-dalam-kepailitan. *Buruh Minta Didahulukan Dari Pajak Dalam Kepailitan.* Last viewed on 7 December 2013

and the society[22]. The aims of Bankruptcy Law itself is to solve the debts between the debtor and the creditor in a fair, fast, open, and effective way in order to support the development of the national economy[23].

Harold F. Lusk describes the bankruptcy function as to protect the creditors from one another, to protect from their debtor, and to protect the honest debtor from his creditors. To acomplish these objectives, the debtor is required to make full disclosure of all his property and to surrender it to the trustee. Provisions are made for examination of the debtor and for punishment of the debtor who refuses to make an honest disclosure and surrender of his property. The trustee of the bankrupt's estate administers, liquidates, and distributes the proceeds of the estate to the creditors. Provisions are made for determination of creditor's rights, the recovery of preferrential payments, and the disallowance of preferrential liens and encumbrances. If the debtor has been honest in his business transactions and in his bankcruptcy proceedings, he is granted a discharge[24].

The Bankruptcy Law states that the purpose of bankruptcy in more detailed are[25]:

1. To avoid the seizure of the debtor's assets if there are some creditors who collect debts from debtors at' the same time,

[22] Syamsudin M, Sinaga. *op. cit.* Page 41.
[23] *Ibid.* Page 84.
[24] Shubhan, Hadi. *Hukum Kepailitan: Prinsip, Norma, dan Praktek di Peradilan*. Kencana. Jakarta. 2008. page 3
[25] Syamsudin M, Sinaga. *op. cit.* Page 85

2. To avoid the willingness of the creditors who have security rights to sell the debtor's assets without considering the debtor's or the other creditors' interests,
3. To avoid the existence of fraud that is conducted by both creditor and debtor,
4. To ensure the company's growth in the development of the national economy,
5. To provide the creditors and debtors an opportunity to negotiate their debt peacefully,
6. To give a juridical solution to the debtors and creditors over the debt problems in order to be much easier, cheaper, and faster,
7. To restore and foster the public confidence and foreign investors to develop the national economy.

Levinthal describes that the main purpose of all Bankruptcy Law, no matter when or where devised and enacted, is at least two general objects in view. First is to secure and to ensure equitable division of the insolvent debtor's property among all his creditors, and second is to prevent on the part of the insolvent debtor conducts detrimental to the interest of his creditors. In other words, Bankruptcy Law seeks to protect the creditors, first, from, one another and, secondly, from their debtor. A third object, the protection of the honest debtor from his creditors, by means of the discharge, is sought to be

attained in some of the systems of bankruptcy, but this is by no means a fundamental feature of the law[26].

According to Prof. Radin, in this book entitled The Nature of Bankruptcy, the purpose of the Bankruptcy Law is to provide a collective forum to sort out the rights of the various creditors toward the debtor's assets in case the assets value is not adequate. On the other hand, Prof. Warren states that in bankruptcy, with an inadequate pie to divide and the looming discharge of unpaid debts, the disputes center on who is entitled to shares of the debtor's assets and how these shares are to be divided. Distribution among creditors is no incidental to other concerns; it is the center of the bankruptcy scheme[27].

Based on *Faillissementsverordening*, the bankruptcy purpose is to protect the unsecured creditor to receive their rights associated with the implementation of the principle to secure the rights of the creditor toward the debtor's assets. This bankruptcy purpose is concluded from the bankruptcy definition in *Memorie van Toelichting* explaining that bankruptcy is a general seizure based on the total assets of the debtor for the creditor's benefit[28].

Some purposes of bankruptcy can be enforced based on some principles, namely: *Paritas creditorium*, *paripassu prorate parte*, and *structured creditor* as the main principles in bankruptcy. *Paritas creditorium*

[26] Remy Sutan, Sjayhdeini. *op.cit.* Page 28
[27] *Ibid.* Page 28-29
[28] Anisah, Siti. *op. cit.* Page 2

principle specifies that all creditors have the same right toward the debtor's assets. The debtor's asstes will be the creditors' target if the debtor cannot pay off his debt. *Paritas creditorium* principle states that all of the existing moveable or immovable goods or those which will exist in the future is bound to the settlement related to the debtor's liabilities[29]. *Paritas creditorium* principle is adopted in Indonesian Civil Code that is stipulated in the Article 1131[30].

Paritas creditorium principle has weaknessess because this principle does not distinguish the creditor from one another. *Paritas creditorium* principle does not distinguish the creditor based on the debt amount, secured creditor, or unsecured creditor. All creditors are considered as equal based on this principle. This principle in the implementation needs to be supported with *pari passu prorata parte* and *structured creditors* principles[31].

Pari passu prorata parte states that all debtor's assets is secured for all creditors and distributed in according proportion, except among the creditors there is one to receive privilege[32]. These principles provide a fair distribution to all creditors proportionally. Each creditor receives the payment based on the undue debt amount taken from the debtor's assets. This principle is regulated in the Article 1132 of Indonesian Civil Code[33].

[29] Shubhan, Hadi. *op. cit.* page 27
[30] *Ibid.* page 3
[31] *Ibid.* page 27-28
[32] *Ibid.* page 3
[33] Syamsudin M, Sinaga. *op. cit.* Page 43

Structured creditors principle is the complementary of the *paritas creditorium* and *pari passu prorata parte* principles. Injustice is possible to arise if the legal position of the creditor is not regulated by the law. Bankruptcy settlement will not find its justice if the settlement only focuses on the debt amount and the right of creditor to receive debt acquittances. *Structured creditors* principle is a principle that classifies the creditors upon their class, namely secured creditor, preferred creditor, and unsecured creditor[34].

E. Research Method

1. Legal Material
   a) Primary legal material
      1) Indonesian Civil Code
      2) Law No. 37 of 2004 concerning Bankruptcy Law and Suspension of Payment
      3) Law No. 13 of 2003 concerning Labors
      4) Law No. 2 of 2004 concerning The Settlement of Industrial Dispute
      5) ILO Convention No. 87 which has been ratified and becomes Law No. 81 of 1998 on Freedom of Association and Protection of the Right to Organize

[34] Shubhan, Hadi. op. cit. Page 31-32

6) ILO Convention No. 81 concerning Labor Inspection in Industry and Commerce which has been ratified and becomes Law No. 21 of 2003
7) Law No. 19 of 2000 concerning Tax Collection using Distress Warrant
8) Law No. 16 of 2009 concerning General Review and Tax Retribution

b) Secondary legal material

The books related with the material concerning the fulfillment of taxation and labor rights as preferred creditors in bankruptcy.

2. Data Collection Methodology

The method in collecting the data was conducted using literature study in which the writer to some extent shall seek the information in regard with the work from other books and similar sources.

3. Approach Method

This thesis uses normative method which means the use the existing data and documented data sources, such as legal theories and the scholars' opinion.

4. Legal Material Analysis Method

The method of analyzing legal material used is the descriptive qualitative and comparative methods. In this matter, the obtained data are descriptively presented and correlated according to the convention, legal theories, and scholars' opinion related with the fulfillment of taxation and labor rights as preferred creditors in bankruptcy. Comparative method is used to analyze the settlement of the labor and taxation rights in bankruptcy since Indonesia still has no clear regulation regarding with this matter. The United States of America employs the comparative study because in the U.S Bankruptcy Law labors have higher legal position.

5. Structure of Writing

Chapter one is Introduction. This chapter consists of context of study, problem statements, objectives of study, and theorestical framework.

Chapter two is a general review. This chapter consist of general review concerning the bankruptcy, labors, and taxes.

Chapter three is the research analysis. This chapter concerns with the answer of the problem statements. In this chapter the writer will discuss the privilege to determine the legal positions of taxation and labors since both of them are categorized in the same class of creditors, namely preferred creditor. Besides, the writer will compare the Indonesian Bankruptcy Law to U.S Bankruptcy Law as the reference to review the Bankruptcy Law implementation in Indonesia.

Chapter four is conclusion and recommendation. This chapter will conclude the discussed matter based on the analysis made by the writer. The recommendation, if any, will be presented toward the the fulfilment of labor and taxation rights as preferred creditors in bankruptcy.

CHAPTER II

GENERAL REVIEW ON BANKRUPTCY, LABOR, AND TAXATION

A. General Review on Bankruptcy

1. Definition of Bankruptcy

Syamsudin M. Sinaga argues that debt is the keyword of bankruptcy. Debt is a due and payable and shall be paid. Bankruptcy terms derive from Dutch Language of *faiyit* which has a dual meaning as a noun and as an adjective. The term *faiyit* itself derives from French of *faillite* which means walkout or congested payment. The one who is unable to pay and conduct walkout in French is called as *Le Faili*[35].

According to Subekti and R. Tjitrosoedibio, bankruptcy is a circumstance where a debtor has ceased to pay its debts. Thus, by the request of the creditors or by the request on the behalf of itself, it can be declared bankruptcy before the court. The estate of bankruptcy will be managed by the Property and Heritage Agency inheritance office in the bankruptcy matters for the benefit of all creditors. Abdurrachman says that bankruptcy is a condition in which person is declared bankrupt before the court and the estate is destinied to pay off his debt[36].

Bankruptcy is a condition where a debtor is unable to make payments on his debts to the creditors. In addition, bankruptcy can also be defined as a condition of a debtor who is unable to pay off debts due to the financial

[35] Syamsudin M, Sinaga. *op. cit.* Page 4
[36] *Ibid.*

distress of the debtor's business that faces setbacks. Generally the bankruptcy court decision will result in general seizure towards all of the debtor's assets, either existing or will exist in the future[37]. The bankruptcy declaration will legally affect the debtor's loss of right to control and manage its estate[38].

The term of bankruptcy comes from two Latin words meaning "bench" and "break"; thus, its literal meaning is "broken bench". Under the Roman law, after collecting and dividing up the assets of a delinquent debtor, the creditors would break the debtor's workbench as a punishment and a warning to other indebted debtors. Bankrupt individuals are regarded as thieves who deserve severe penalty. Romans deprived such persons of their civil rights, and many other societies stigmatized them by requiring them to dress in a particular identifying garb[39].

Algra defines bankruptcy as *faillissementis een gerechtelijk beslag op het gehele vermogen van een schuldenaar ten behoeve van zijn gezamenlijke schuldeiser* which means a general seizure towards all of debtor's assets to pay off the creditor's debt acquittances. Henry Campbell Black states in Black's Law Dictionary that bankrupt is the state or condition of one who is unable to pay his debts as they are, or become, due. Another scholar, Jerry Hoff describes bankruptcy as a general statutory attachment encompassing all the assets of the debtor. The bankruptcy only covers the assets. The

[37] Shubhan, Hadi. *op. cit* page 1.
[38] Nating, Imran. *op. cit*. Page 2
[39] http://www.thebalmingilead.org/forms/Economic%20Empowerment/Bankruptcy.pdf. *Bankruptcy*. Last viewed on 19th December 2013.

personal status of an individual will not be affected by the bankruptcy; he is not placed under guardianship. A company also continues to exist after his declaration of bankruptcy. During the bankruptcy proceedings, act with regard to the bankruptcy estate can only be performed by the receiver, but other acts remain part of the domain of the debtor's corporate organs[40].

Black's Law Dictionary indicates that bankruptcy is the statutory procedure trigered by insolvency by which a person is relieved from most debts and undergoes a judicially supervised reorganization or liquidation for the benefit of that person's creditor. Bankruptcy is also the fact of being financially unable to meet one's obligation which is called as insolvency[41]. Insolvency is a very general term that refers to the financial status of a person. Insolvency contains the inability for any reason to meet one's obligation as they fall due, or ceasing to pay one's current obligations in the ordinary course of business as they generally become due. Insolvency has close relationship to the fair market value of one's property which is not sufficient to pay all one's obligation due and accruing due.[42] Black's Law Dictionary also mentions that bankruptcy is the status of a party who has declared bankrupt under the Bankruptcy Law. Bankruptcy is also the fact of having declared bankrupt under a Bankruptcy Law. Bankruptcy has

[40] Shubhan, Hadi. *op. cit*. page 1-2

[41] Anisah, Siti. *Bankruptcy Law.* PPT Slide No. 3 page 1. Course material presented on April 2013.

[42] Watson, Joel. et.,al. *Bankruptcy and Insolvency : Priorities, Trust Provisions and Migitating Risk.* http://www.bennetjones.com/uploadedFiles/Publications/Articles/Update554.pdf. Last viewed on 19th December 2013

relationship with the field of law dealing with the rights and entitlements of debtors and creditors in bankruptcy[43].

The previous Bankruptcy Law (Fv S. 1905 No. 217 in conjunction with S. 1906 No. 348, Article 1 paragraph 1) states that bankruptcy is a condition where any debtor stops paying, either in its own report or in the report of one or more creditors, and is declared bankrupt by the judges verdict[44]. According to the new regulation of Article 1 paragraph 1 of Bankruptcy Law No. 37 of 2004 regarding Bankruptcy Law and Suspension of Payment, bankruptcy is a general seizure of the debtor's assets followed by the receiver as the person who is entitled to manage and settle the debtor's estate[45].

Henry Campbell Black argues that bankruptcy is a state where a trader hides or performs certain actions which are likely to deceive the creditors. Abdurrachman says that it has been signified in the trade financial economic encyclopedia that bankruptcy is intended to someone who is declared bankrupt by a court, and its assets or legacy has been earmarked to pa debt. Bankruptcy is a general seizure over the entire assets of the debtor in order to accomplish peace between the debtor and the creditor or to distributed the debt to the creditors in a juctified way[46].

Bankruptcy is a generalized term for a federal court procedure that helps consumers and businesses to get rid of their debts and repay their

[43] Anisah, Siti. *loc. cit.*

[44] Hartini, Rahayu. *Penyelesaian Sengketa Kepailitan di Indonesia*. Kencana. Jakarta. 2009. Page 72.

[45] Act No. 37/2004 concerning Bankruptcy Law and Suspension of Payment Article 1 (1)

[46] Fuady, Munir. *op. cit.* Page 7- 8.

creditors. If the debtor can prove that the debtor is entitled to it, the bankruptcy court will protect the debtor during its bankruptcy proceeding[47]. Bankruptcy means that the debtor's assets are sold, and the money is used to pay its creditors as much as possible. If the debtor is declared bankrupt, the debtor is not able to use its bank account or credit card, to trade in any business under any other name, to manage a limited company, and to be the trustee of a charity of pension fund[48].

According to Aghion, Hart, and Moore, Bankruptcy Law as it exists in most countries can also be understood as a device to increase the efficiency of commercial relationships. In any contract, the parties could introduce clauses regulating what should happen in case of default and how the assets of the bankrupt company should be managed. However, the transaction costs of writing and implementing such contract would be very high. Since a firm's balance sheet is something dynamic that changes every day, creditors would be forced to renegotiate their contracts every time the debtor acquires new assets or pays his previous debts. Therefore, it may be considered efficient to have standard procedures regulating the possible outcomes of a firm's default[49].

According to Jackson in more general terms, Bankruptcy Law can be defined as a set of rules that institutionalizes collective action in debt

[47]Bankruptcy.findlaw.com/what-is-bankruptcy/bankruptcy-definition-what-exactly-is-it.html. *Bankruptcy Definition: What Exactly Is It?*. last viewed on 18th December 2013.

[48] http.//www.hmrc.gov.uk/factsheets/ef5.pdf. *Bankruptcy- What You Must Do.* Last viewed on 19th December 2013

[49] Cabrillo, Francisco. et.,al. *Bankruptcy Proceeding.* http://encyclo.findlaw.com/7800book.pdf. page 2. last viewed on 19th December 2013.

collection. When collecting their credits out of a bankruptcy procedure, creditors play a non-cooperative game, in which each individual maximizing strategy produces an inefficient outcome. Social costs will increase when each creditor tries to get the highest possible percentage of his credit. These individual strategies cannot raise the value of the debtor's estate. On the contrary, they reduce the net value of the assets to be distributed among the creditors. However, the principle of collective action seems to conflict with another generally accepted principle of Bankruptcy Law, the existence of secured credit, and the principle according to which Bankruptcy Law should not change the previous structure of the debtor's liabilities[50]. Sri Rejeki Hartono argues that basically bankruptcy constitutes an institution that offers a solution against any party whenever a debtor in a certain condition stops payment or is unable to pay. The bankruptcy institutions prevents from or avoid those two above mentioned things which are unjust actions which can disadvantage all parties. The two things are to avoid mass execution by debtor or creditor, to prevent from ooccurrence of dishonesty by the debtor.[51]

2. Legal Principles in Bankruptcy

Bankruptcy is designed to provide basic information to debtors, creditors, court, personnel, the media, and the general public on different aspects of the Indonesian Bankruptcy Law. It also provides the individuals

[50] *Ibid.*
[51] Shubhan, Hadi. *op. cit*. page 68

who may be considered bankrupt with a basic explanation of the different chapters under which a bankruptcy case may be filed and answers to some of the most commonly asked questions about the bankruptcy process[52]. According to Black, legal principle is defined as a fundamental truth or doctrine, as of law; a comprehensive rule or doctrine which furnishes a basis or origin for others. According to Satjipto Rahardjo, legal principle is considered as a basic concept of a regulation and is the most extensive foundation for the birth of a rule of law. The principles of law in the Bankruptcy Law are needed as a basis for the establishment of the rule of law as well as the basic principle to solve the legal issues that arise which cannot be accommodated by existing laws. The following description will put forward some principles in the Bankruptcy Law in which its presence is used as a basis to make a decsion, namely:[53]

a. *Paritas Creditorium* Principle

Paritas Creditorium principle is regarding the equal position of the creditors. The principle of *paritas creditorium* refers to the Article 1131 of Indonesian Civil Code. *Paritas creditorium* determines that the creditor has the same rights to all property of the debtor. If the debtor is unable to pay its debts, the assets of the debtor are subjected to creditors[54]. From the provision that is described in Article 1131 of

[52] C James, Duff. *Bankruptcy Basics* http://www.uscourts.gov/uscourts/FederalCourts/BankruptcyResources/bankbasic.pdf.. last viewed on 19th December 2013.

[53] http://diaz_fhuns.staff.uns.ac.id/files/2010/07/prinsip-prinsip-hukum-kepailitan.pdf *Prinsip-Prinsip Dalam Hukum Kepailitan.* Last viewed on 19 December 2013

[54] Mahadi. *Falsafah Hukum: Suatu Pengantar*. Alumni. Bandung. 2003. Page 135

Indonesian Civil Code, it explains that the debtor is responsible for its debts. The debtor's responsibilities are secured by the existing assets and the assets that will exist in the future, both movable and immovable property. This principle is necessary in order to provide a sense of responsibility toward the debtor in order to perform its obligations and does not raise any loss to the creditors. This principle is also necessary to protect the balanced rights among the creditors that gives the loan to the debtor. The debtor must be aware that its actions result in the prevalence of debt to the creditors by the existence of the provisions and principles of the established loan agreement. Therefore, the debtor must be aware of its obligation to pay off its debts because if the debts are not paid when they are due, all of the debtor's assets will be confiscated through the bankruptcy process[55].

The philosophy of *paritas creditorium* principle considers that it is somewhat injustice if a debtor has assets which are not possible to pay the debts. The law secures all of the creditors' right by the seizure of the debtor's assets. According to *paritas creditorium* principle, the object of the general seizure toward the estate is limited to the debtor's assets and not to another aspect. The personal status and the other rights of the debtor apart from the debtor's assets will not be affected by the debtor's debt[56]. *Paritas creditorium* principle implies that all the debtor's wealth in form of movable or immovable goods, both existing or will be existing

[55]S Man, Sastrawidjaja. *op. cit.* Page 74
[56] Shubhan, Hadi. *loc. cit.*

in the future, belongs to the debtor is bound to the debt settlement of the debtor[57].

According to Kartini Muljadi, in case that a debtor has only one creditor, and the debtor does not voluntarily pay its debt, the creditor can only possible to sue the debtor in a civil court in which all the assets of the debtor become a source of its debt acquittances[58]. Another thing that we need to know in this context is that the "paritas" here refers to the creditors and not to the debt. A debtor who has debts only to one creditor does not fulfill the *paritas creditorium* principle. However, if a debtor has a loan agreement in which the agreement involves multiple creditors, the *paritas creditorium* principle can be applied[59].

In the case that a debtor has many creditors and the debtor's assets are not sufficient to pay all of the creditors, the creditors will race using all means, either permitted or not permitted by the law, to abtain the debt acquittances. In this principle, the creditor who comes late will not receive their payment[60]. The formulation of Article 1131 of Indonesian Civil Code shows that any action taken by legal subject in the field of civil law will affect the legal subject's assets, and the action is possible to reduce or increase the amount of the assets. It means that the assets owned by the legal subject will always be in a dynamic circumstance and the development is possible to every time changes. Thus every agreement

[57] *Ibid.* Page 27-28.
[58] *Ibid.* Page 67.
[59] *Ibid.* Page 78
[60] *Ibid.* Page 68

that is made by a legal subject can lead to the increase or decrease of its assets[61].

However, this principle cannot be applied in the *letterlijk* way as this will cause another injustice. In this principle, the legal position of the creditors is equal between one another which factually reflects injustice. This principle does not differentiate the treatment for each creditor's condition. The creditor which has the security right is considered as having the same legal position with the creditor which do not hold the security right. There is no differentiation between the amount of the debts, either large or small. Since this principle is weak in the implementation, it needs to be paired with *pari passu pro rata parte* and *structured creditors*[62].

b. Pari Passu Pro Rata Parte Principle

The aims of pari passu pro rata parte principle is to provide justice to the creditors with the concept of proportional fairness. Proportional fairness means that the creditors who have lent large amount of money will receive payment more than the creditors who only lend small amount of money[63]. The basic concept of this principle comes from the Article 1132 of Indonesian Civil Code where it states that the proceeding of the foreclosure of all debtor's properties shall pari passu pro rata parte (be

[61] *Ibid.* Page 69
[62] *Ibid.* Page 29.
[63] *Ibid.* Page 30

balanced) and be divided amongst the creditors except if there is a creditor who has a reason to receive its precedence based on the law.

The Article 1132 determines that every one (creditor) who is entitled to the engagement fulfillment must obtain the engagement fulfillment from the debtor's assets based on the principles of:[64]

1) Pari passu, meaning that all of the creditors jointly receive the payment without any differentiation made to the creditors who will take the precedence
2) Pro rata, meaning that proportional distribution of the debt acquittances is based on the debt amount all of the debtor's assets.

This principle means that the assets of the debtor are the joint collateral for the creditors and the result should be distributed proportionally among them, unless amongst the creditors there is one who by law must take precedence in receiving the debt acquittances[65].

c. Structured Creditor Principle

The use of the paritas creditorium principle which is equipped by the pari passu pro rata parte principle still remains weak in the bankruptcy concept. It is weak if the creditors who have the security right are not distinguished from the creditors who do not have the security

[64] Jono. *Hukum Kepailitan.* Sinar Grafika. Jakarta. 2008. Page 3.
[65] Article 1132 of Indonesia Civil Code

right and or not distinguished from the creditors that are explicitly specified to receive the precedence by the law[66].

The structured creditor principle is the acomplishment of the paritas creditorium and pari passu pro rata parte principles. This principle functions as the way out to realize the justice action in dividing the debt acquittances. The distribution of the debt acquittances must be based on the creditor's rank. The Structured creditor principle is a principle that classifies the creditor classes in bankruptcy into:[67]

1.) Secured creditors

2.) Preferred creditors

3.) Unsecured creditors

If a privilege right is involved to take precedence including preceding the secured creditor, the reank will be as folows:[68]

1) Preferred creditor

2) Secured creditor

3) Unsecured creditor

The security interests are in rem right that vest in the creditor by agreement and subsequent performance of certain formalities is the secured creditor definition according to Jerry Hoff. A creditor whose interests are secured by an in rem right is usually entitled to the cause of a foreclosure of the collateral, without a judgment, to satisfy his claim of the proceeding with the priority over the other creditors. The right to

[66] Subhan, Hadi. *op. cit.* Page 31.
[67] Remy Sutan, Sjayhdeini. *op.cit.* Page 7
[68] *Ibid.*

foreclose without a judgment is called the right of immediate enforcement[69].

The secured creditor can act as if no such bankruptcy arises whenever it takes its security right and sells the collateral. It is possible for the secured creditor to ask for the remaining due of the acquittance but in form of unsecured creditor representation. The remaining due of the acquittance is possible to be requested as long as the debtor's collateral does not fulfill the acquittance settlement of the debtor. On the other hand, if the sales result exceeds the debt and bank interest after the bankruptcy declaration[70], the excess of the sales result must be given back to the debtor according to Article 60 paragraph 1 of Bankruptcy Law[71]. An important characteristic of the secured creditors is that the creditors can sell off part of the company's assets apart from the normal bankruptcy proceeding in order to collect their acquittances beforehand[72].

The secured creditors, as the mortgagee, the pledgee, or the harvest pledgee (oogstverband-houder) retain their right or execution as if there is no adjudication of bankruptcy. They may realize for their own benefit and are permitted to sell the mortgaged or pledged property themselves. Those who have the right of retention on certain properties of the debtor,

[69] *Ibid.* Page 32.
[70] Law No. 37/2004 concerning Bankruptcy Law and Suspension of Payment Article 134 (3)
[71] Nating, Imran. *op. cit.* Page 48.
[72] Cabrillo, Francisco. et.,al. *op. cit.* Page 3

for example, a broker with regard to the bankrupt's properties which are in the broker's possession, have the same right. [73]

It has been regulated in Article 1134 of Indonesian Civil Code that the preferred creditor has a privilege that is given by the law towards the creditor to receive the advance payment before the secured creditors receive their payments[74]. Preferred creditor is a creditor regulated by the law must receive the advance payment based on the nature of the bankruptcy estate. The payment is privileged over the sales of the movable or immovable goods of the debtor's assets[75].

Jerry Hoff argues that the preferred creditors have a preference in their claims. Obviously, the preference issue is only relevant if there is more than one creditor and if the assets of the debtor are not sufficient to pay all of the creditors (there is a concursus creditorium). Preferred creditors are required to present their claims to the receiver for a verification and are thereby charged a pro rata parte share of costs of the bankruptcy[76].

Meanwhile, unsecured creditors according Jerry Hoff is they are who do not have priority and will therefore be paid if any proceedings of the bankrupty estate remains after all the other creditors have received payment. Unsecured creditors are required to present their claims for a

[73] Gautama, Sudargo. *Indonesian Business Law.* PT. Citra Aditya Bakti. Jakarta. 1995. Page 557.

[74] Article 1134 of Indonesia Civil Code

[75] Syamsudin M, Sinaga. *op. cit.* Page 17.

[76] Subhan, Hadi. *op. cit.* Page 32

verification to their receiver and they are charged a pro rata parte share of the costs of the bankruptcy[77].

Unsecured creditors are the creditors that are based on the amount of debts without particular binding provisions. Those creditors will receive their payments based on the amount of the debts as it has been regulated in Article 1132 of Indonesian Civil Code[78]. The unsecured creditors, such as credit cards, personal loans, and medical bills do not have any rights to specific assets of the debtor and simply share in any distribution of the estate. Whether there is a distribution depends on the assets owned by the debtor and the exemption laws of the state in which the debtor resides[79].

d. Balance principle

This legislation establishes several provisions which embody the principle of balance, which on the one hand, there is a provision that will prevent the bankruptcy abuse of the debtors dishonest, and on the other hand, there is a provision that will prevent the bankruptcy abusement which is conducted by the creditor who is not acting in good faith[80].

[77] *Ibid.* page 31-32

[78] Syamsudin M, Sinaga. *loc. cit* .

[79] http://www.thebalmingilead.org/forms/Economic%20Empowerment/Bankruptcy. Pdf. *Bankruptcy*. Last viewed on 19th December 2013.

[80] Hartini, Rahayu. *op. cit*. Page 75.

3. The Conditions for a Bankruptcy Decision

It is a vital importance to know beforehand which condition should be fulfilled in accordance with the Bankruptcy Law if an individual or a legal entity intends to file a petition for bankruptcy at the Commercial Court. It is important to know the conditions, because if the petition does not fulfill the conditions, the Commercial Court shall not award the petition. These conditions are provided in Article 2 paragraph 1 of the Bankruptcy Law[81].

According to Article 2 paragraph 1 of the Bankruptcy Law and Suspension of Payment:[82]

> The debtor having two or more creditors and who do not pay at least one debt due and claimable is declared bankrupt based on an authorized court decision as stipulated in Article 2, either at his own petition or at the petition of one or more of his creditors.

From the provision of Article 2 paragraph 1 of the Bankruptcy Law and Suspension of Payment, it can be concluded that a petition for a bankruptcy decision against a debtor can only be filed if it fulfills the following condition:[83]

a. Two or more creditors

The existence of two or more creditors is regulated in Article 2 paragraph 1 of the Bankruptcy Law which means a debtor could be declared bankrupt if the debtor has at least two creditors. The term of the

[81] Remy Sutan, Sjayhdeini. *Recent Development on Indonesia's Bankruptcy Law.* http://www.aseanlawassociation.org/docs/w6_indo.pdf. Last viewed on 19th December 2013

[82] Law No. 37/2004 concerning Bankruptcy Law and Suspensiotn of Payment article 2 paragraph 1

[83] Anisah, Siti. *Bankruptcy Law*. *op. cit.* Slide No. 12. Page 3.

existence of at least two creditors or more is known as *concurcus creditorum*[84]. The condition of having two creditors or more that is regulated in Bankruptcy Law is the implementation of Article 1132 of Indonesian Civil Code[85]. The reason why a debtor cannot be declared bankrupt if he has only one creditor is because it means that the debtor does not need to share or divide the bankrupt property among the creditors. It means that there is no conflict raised by the debtor in sharing the bankrupt property to the creditor. The creditor is entitled to all of the bankrupt properties of the debtor, and there is no *concurcus creditorum*[86].

To prove the existence of two or more creditors, it can be conducted by requesting the creditor list from the bank or the tax office. The existence of a syndicate of creditors fulfills the bankruptcy condition in terms of two or more creditors. A syndicate of creditors is considered as an independent creditors which is possible to propose a Bankruptcy Lawsuit[87].

According to Article 8 paragraph 4 of Bankruptcy Law and Suspension of Payment, the bankruptcy petition should be granted if there are facts or circumstances proven in a simple authentication. Simple authentication means that the facts or circumstances are proven in simple terms in which the debtor has more than one creditor and has the due and

[84] Remy Sutan, Sjayhdeini. *op. cit.* page 64
[85] Muljadi, Kartini and Gunawan Widjaja. "*Pedoman Menangani Perkara Kepailitan"*. (jakarta: Raja Grafindo Persada.2003). page.107.
[86] Nating, Imran. *op .cit* Page 24
[87] Syamsudin M, Sinaga. *op. cit*. Page 93.

billable payment, but the debtor cannot pay his debts. Simple authentication is about two things, namely the existence of the debtor's debt and the existence of two or more creditors[88].

b. Debt

The other condition that must be fulfilled by the applicant who proposes the Bankruptcy Lawsuit is the existence of debt in the lawsuit. Article 1 point 6 of Bankruptcy Law states that:

> Debt is an obligation that is possible to consider in amount of money, whether in Indonesian or foreign currency, either directly or will be incurred in the future, arises because from an agreement or law, and it must be fulfilled by the debtor, and its creditor will receive the rights of fulfillment from the debtor property if it is not settled by the debtor[89].

According to Article 1233 of Indonesian Civil Code an obligation or debt can arise from an agreement or the law. The obligation is related to an action of giving something, doing something, or not doing something. The examples of an obligation that arises due to an agreement are:[90]

1.) Debtor's obligation to pay the interests and the debt to the lender (creditor)
2.) Seller's obligation to give a car to the buyer
3.) Developer's obligation to build a house and give it to the house buyer

[88] Nating, Imran. *op. cit*. Page 23
[89] *Ibid.*
[90] *Ibid.* Page 25

4.) Guarantor's obligation to secure the debtors debt agreement to the creditors

Those kinds of obligations are entitled as debt from the debtor to the creditor. The creditor is possible to request for the obligation fulfillment as the responsibilities of the debtor that fails to perform its responsibilities[91].

A debt refers to payment which is due and payable. It has actually been regulated in the agreement about when the payment becomes due and payable. Bankruptcy Law and Suspension of Payment determines in Article 2 paragraph 1 that the "due and payable" is an obligation to pay a debt that has matured because it has been agreed and is also based on the acceleration maturity date, the imposition of sanctions or penalties by the competent authority, as well as the court decision, the arbitrator or panel of arbitrators[92]. Generally, the credit agreement expressed clearly and strictly when a payment is due and payable. The debtor can be declared bankrupt if the debtor cannot pay the due and payable debt[93].

c. Debtor cannot pay at least one debt which has matured and becomes payable

Article 2 paragraph 1 of Bankruptcy Law and Suspension of Payment does not stipulate about the debtor who is unable to pay its debts. This Article stipulates about the debtors who have two or more

[91] *Ibid*. Page 26.
[92] *Ibid.*
[93] Syamsudin M, Sinaga. *op. cit.* Page 92.

creditors and cannot pay in full amount at least one of his debts that has matured and become payable. In this case, the debtor will be declared bankrupt by court decision[94].

The existence of Article 2 paragraph 1 of Bankruptcy Law and Suspension of Payment proves that the Indonesia's Bankruptcy Law creates a balance legal position between debtor and creditor. Debtor cannot ignore to perform its obligations to the other creditors, especially the creditors with small amount of debt. The debtor must take responsibility in fair and proportional conduct towards the creditors' interests. A debtor who is declared bankrupt by the commercial court is the business actor that has a lot of assets, but he do not want to pay his debts[95].

The above requirements are considered as cumulative. It means that those bankruptcy conditions that are regulated by the law must be fulfilled and must present the evidence before the court. The bankruptcy decision will not be granted if the requirements are not fulfilled and the debtor is not going to be bankrupt[96].

4. Legal consequences of bankruptcy declaration

Bankruptcy is only to regulate the debtor's assets and not the personal status of the debtor, so the debtor can still conduct his other activities, such

[94] *Ibid*. Page 95.
[95] *Ibid.* Page 96.
[96] *Ibid.* Page 90.

as the rights arising from parental authority (*ouderlijke macht*). One of the example of parental authority is the maintenance of the debtor's son's property such the debtor is carrying out the custody and the divorce divorce demands which is embodied by him. In other words, the object of bankruptcy refers to the debtor's estate. Debtor does not lose the ability to perform the legal acts concerning himself, except when the legal act concerns the transfer of the existing estate. The debtor is entitled to the estate that will exist in the future, but the estate that is entitled to him must be submitted to become the bankrupt's estate[97].

It has been regulated in Article 24 paragraph 1 of Bankruptcy Law and Suspension of Payment that debtor will lose the ability toward its bankrupt estate. By the bankruptcy decision that is declared by the commercial court, it does not mean that the debtor lose its civil right (*volkomen handelingsbevoegdheid*) to perform all of its activity. The debtor remains the legal owner but has no power over the estate. The executorial title is not needed but may have equal rights under the liquidation proceeding[98]. The legal consequences of the bankruptcy declaration is stipulated in Article 21 of Bankruptcy Law and Suspension of Payment which states that bankruptcy shall apply to all the assets of the debtor at the time the declaration of bankruptcy is pronounced as well as all assets acquired during

[97] Nating, Imran.o*p. cit.* Page 44.
[98] Remy Sutan, Sjayhdeini. *op. cit.* Page 190.

the bankruptcy[99]. The other legal consequences that are entitled to the debtor are as follows:[100]

a) All court products against any part of the debtor's estate acquired before the bankruptcy declaration must be stopped immediately.

b) All the foreclosures that have been made must be erase.

c) The debtors who are detained due to the conduct of violation against the Bankruptcy Law and Suspension of Payment must be released.

d) All materials related to the right transfer agreement which have been agreed before the bankruptcy declaration can not be implemented.

e) There is no expiry date on the bill that will be submitted for the debt matching purpose.

f) If there is a provision of the merchandise delivery agreement with a specific period, and if the submitting party is declared bankrupt, the delivery agreement is considered clear.

g) Lease agreement conducted by the debtor can be stopped by the receiver.

h) The debtor's laborss can terminate their employment.

i) The secured creditor's execution is suspended at the latest 90 days.

j) All lawsuits involving the debtor's estate are filed by or to the receiver.

[99] Anisah, Siti. *Bankruptcy Law*. *op. cit*. Slide No. 19. Page 7.
[100] Syamsudin M, Sinaga. *op. cit.* 117.

k) All the actions of the debtor which cause loses to the creditor's interests, which occur before the bankruptcy declaration, can be cancelled.

B. General Review on Labor Law

1. Definition of Labor Law

Labor is a part which cannot be separated from the national development with 1945 Constitution and Pancasila as the basic[101]. Labor has a very important position and role as a principal to achieve the national development goals. The rights set out in the Indonesian labor laws which include the protection of labor is to strive for the dignity and to create the humanity sense for the labors. Labor protection intends to secure the basic rights of labors with regard to the progress of the development of national and international business world[102].

According to A. N. Molenaar, labor law is a law which regulates the relationship among the labors and between the labors and the employer. MG. Levenbach argues that labor law is a law regarding the labor relations, such as the occupation that is conducted under the employer supervision and has labor relations sustainability. In addition, Nell Van Esveld states that labor law is part of a positive law consisting of the labor relationship with

[101] See Act No. 13/2003 concerning Labor Law Article 2
[102] Syahrizal, Darda. et,.al,. *op. cit.*. Page 107

the employer, including the labor who conducts the job in his own responsibilities. Iman Soepomo explains that the labor law is a set off in written or unwritten regulation which has relation with an actions, such as one who works for another and receives wage[103]. From the scholars' opinion above, we can conclude that labor law is an action conducted by a person which results in a relationship between a labor and an employer as the supervisor. In fact, labors and employer is a unity which cannot be separated. Employer needs labors to realize the employer interests. Since labors have an important role, it needs some regulations to give protection toward the labors.

Most of the nature of labor laws is imperative. Imperative law is the law that must be obeyed absolutely or strictly. This fact is based on the function and purpose of labor law, namely:[104]

a. To achieve and implement the social justice in the field of labor law,
b. To protect the labor against the employer authority.

2. Regulation on Labor

The regulation regarding protection for labors is written in Law No. 13 of 2003. According to this Article, labor is all matters related to labor at the time before, during, and after years of service[105].

[103] Setia Hadi, Tunggal. *Memahami Hukum Ketenagakerjaan Indonesia*. Harvarindo. 2013. Page1-2.
[104] *Ibid.* Page 14
[105] Act No. 13 of 2003 concerning Labor Law article 1 (1).

The term of labor was legally found in the Law No. 25 of 1997 concerning employment which is repealed and replaced with the Law No. 13 of 2003 that distinguishes between labor and labors. Labor is any person who is able to do the job in order to produce goods or services to meet the needs of themselves and society. From this provision, it is clearly stated that the labor definition has broader meaning covering the whole population in particular working age, either already having job or still looking for job. The minimum age of people who want to find job is 15 years old as it has been regulated in the Article 69 of Law No. 13 of 2003 on Labor. According to Article 1 point 3 of Labor Law, it is stated that labor is every person who works and earns wage or is entitled to a reward as other form of money. The definition of labor itself is also regulated in Article 1 point 9 of Law No. 2 of 2004 on the Settlement of Industrial Dispute (PPHI)[106].

For the purpose of accident insurance benefits in the protection of Worker Social Security (Jamsostek) under Law No. 3 of 1992, the labor insured is expanded into:[107]

a. Internship and student who has job in a corporation which is entitled to wage or not
b. Contractors
c. A prisoner who is employed by a company.

Act No. 13 of 2003 concerning Labor Law states that Employment agreement is an agreement made between labor and employer which

[106] Sunyoto, Danang. *op. cit.* Page 21
[107] *Ibid.* Page 21-22

contains the work conditions, rights, and obligation of both parties[108]. Employment relationship is a relation between labor and employer based on the employment agreement which contains job, wage, and command elements[109]. Both regulations are made to clearly regulate the action that has to be conducted by both labor and employer in performing their tasks.

For the consequence of the obligation that has been conducted by the labor as it is stipulated in the employment agreement, the employer has an obligation to pay wage to the labor. Labor is entitled to wage as the reward of their dedication to the employer. Act No. 13 of 2003 concerning Labor Law Article 1 paragraph 30 states that wage is the right of labor that is received and expressed in form of money as a reward from the employer to the labor. The wage is paid according to the employment agreement and regulations, including allowances for labors and their families for jobs and or services that have been or will be conducted by the labors[110].

The purposes of labor development are:[111]

a. Empowering and making efficient use of people available for jobs optimally and based on the humanity;
b. Creating equal opportunity and providing labor (supply of people available for job) that suits the need of the national and provincial/municipalities development;

[108] See Act No. 13 of 2003 concerning Labor Law Article 1 point 14
[109] See act No. 13 of 2003 concerning Labor Law Article 1 point 15s
[110] Syahrizal, Darda. et,.al,. *op. cit.* Page 207.
[111] *Ibid.* Page 9.

c. Providing protection for people available for job for the realization of their welfare;

d. Improving the welfare of people available for job and their families.

Article 4 of Labor Law explains that all efforts must be made to ensure the equal distribution of job opportunities throughout all the territory of the Unitary State of the Republic of Indonesia as a unified unity of job. The empowerment and the effective employment of labors and the development of their potentials shall go hand in hand as an integrated labor. Through the empowerment and employment/potential development, Indonesia labors shall be able to participate optimally in the national development but with keeping on upholding their values as human being[112].

During the short term of Habibie administration (May 1998-October 1999) the important steps were taken in the industrial relations. For instance, on 5 June 1998 the government ratified eight International Labor Organization (ILO) conventions on worker's basic right, including ILO convention No. 87 of 1948 on Freedom of Association and Protection of the Right to Organize. This was a positive step toward creating a fair platform for industrial relation negotiations which would be internationally more acceptable, particularly in regards to protection for workers to form or become members of labor organizations which aims to defend and protect

[112] *Ibid.* Page 114

the worker's interests[113]. ILO Convention No. 87 was ratified become Law No. 81 of 1998[114].

Indonesia has also ratified the ILO Convention No. 81 concerning Labor Inspection in Industry and Commerce as known as Law No. 21 of 2003 concerning The Ratification of ILO Convention No. 81 on Labor Inspection in Industry and Commerce. These convention consists of:[115]

1.) ILO member states that enforce this convention should carry out labor inspection system in the workplace
2.) Labor inspection system in the workplace should be applied in all workplaces under the laws and the supervision conducted by the labor supervisory
3.) The function of labor inspection system must:
    a) Ensure the laws enforcement regarding working conditions and labor protection and regulations concerning working time, wages, safety, health and welfare, the employment of children and young people, and other problems associated
    b) Provide information on the technical issues to employers and labors concerning the most effective way to comply with legislation
    c) Informe the government concerning the conduct of a violation which is not regulated in the applicable law

[113] Kusumastuti Sri, Rahayu. *The Practice of Industrial Relations in Indonesia.* http://www.smeru.or.id/report/work-paper/practindustrel/practindustrel.pdf. Last viewed on January 1st, 2014. Page 5

[114] Setia Hadi, Tunggal. *op. cit.* Page 396

[115] *Ibid.* See the complement part page 7

4.) Labor supervisory shall be under the supervision and control of the central government

5.) The central government should adopt legislation to improve:

a) Effective cooperation between the supervisory units and the government and other private agencies that deal with similar activities

b) Cooperation between the labor supervisory against the employer organization and labor organization

6.) The labor supervisory who is entitled to the supervision consists of the civil servant whose the employment status and condition of their duties are regulated in such a way to ensure the implementation of labor inspection tasks which are independent

7.) In accordance with the terms of the civil servants to be laid down in national legislation, the labor supervisory must:

a) The recruitment is observed from the position condition

b) Are entitle for a training to conduct their job as well as possible

8.) Recruitment and training requirements should be set by the government

9.) The number and specialization of labor supervisory should be sufficient to ensure the implementation of supervisory tasks are effective

10.) Competent authorities have an obligation to:

a) Assign necessary arrangements for labor supervisory to receive a local office, equipment and transportation facilities in accordance with the requirements of the job duties

b) Make the necessary arrangements to reimburse the costs traveling in the implementation of the labor supervisory duties

11.) Labor supervisory must provide periodic reports to the central monitoring office (government) as the results of supervision activity

12.) ILO member States which ratify this Convention shall provide a report on the implementation of the convention

The installment of the Abdurrachman Wahid government saw new legislation on unions ratified through Law No. 21, 2000 on Labor Unions. According to this law, a labor union can be established with a minimum of ten members. This law also stipulates that no party is allowed to prevent the formation of labor unions, or prohibit their formation. Similarly, no party is permitted to prevent workers from becoming union organizers or members, or obstruct unions from either carrying out or not carrying out their actiivities. According to the legislation, sanctions will be imposed on any person who does not comply with the above stipulations. Through the ability of the one union policy (at the national, regional and enterprise level), the new government provided wider opportunities for unionists to establish free and independent organizations. These changes, combined with the ratification and subsequent implementation of ILO Convention No. 87, have resulted in a significant increase in union activities.[116]

[116] *Ibid.* Page 8

It has been regulated in Law No. 21 of 2000 concerning Labor Unions which states that labor unions are:[117]

a. Labor union is an organization formed of, by, and for the labors, both in the company and outside the company, which is free to be open, independent, democratic, and responsible to fight, defend, and protect the rights and interests of the labors and their families.
b. Labor union in a company is a labor union that is established by the labors of the company, while labor union outside of the company is a labor union that is established by the labors who are not working in a company
c. Federation of labor unions is an alliance of the labors. Confederation of labor unions is an alliance of the labors. Labor is every single person who is entitled to wage and a reward as another form of money.
d. Labor unions, federation, and confederation of labor unions are subject to Pancasila and 1945 Constitution as the basic rules of the laws and regulations in Indonesia.

The Article 1 point 5 of Law No. 13 of 2003 concerning Labor Law explains about employer as it is also explained in the Article 1 point 6 of Law No. 2 of 2004 concerning Settlement of Industrial Relations Disputes as follows:[118]

a. An individual, partnership, or legal entity that operates a self-owned enterprise

[117] Sunyoto, Danang. *op. cit.* Page 22-23
[118] *Ibid.* Page 28

b. An individual, partnership, or legal entity that independently operates the company which is not owned by him

c. An individual, partnership, or legal entity which is located in Indonesia representing the company as mentioned in the above points which is domiciled in Indonesia

The purposes of the above understanding are:[119]

a. Individual is a person who runs or supervises the operations of a company

b. Partnership is a form of business that is not incorporated such as CV, firm, maatschaap, and others aiming for profit or not

c. Legal entity (recht person) is a body which by law is considered as an individual which can have separate assets, have the legal rights and obligations and conduct an action under the law to the other party

Moreover, the definiton of company is written in Law No. 13 of 2003 and Law No. 22 of 2004 which state that:[120]

a. Every business incorporated or not, owned by an individual, partnership, or legal entity, either private or owned by the state employing labors by paying wages or other forms of remuneration

b. Social enterprises and other enterprises that have administrators and hire someone else then pay wages or other forms of remuneration

The Decree of Minister of Manpower No. 150 of 2000 on The Settlement of Employment Termination and Determining the Payment of

[119] *Ibid.* Page 28-29
[120] *Ibid.* Page 29

Severance Pay, Long Service Pay, and Compensation in Firms (Kepmenaker No. Kep-150/Men/2000) was issued by the government in June, 2000. Prior to the release of Kepmenaker No. Kep-150/Men/2000, the regulation applicable for the settlement of employment termination was the Regulation Of Minister of Manpower No. 3 of 1996 on Settlement of Employment Termination and Determining the Payment of Severance Pay, and Compensation in Private Firms (Permenaker No.03/Men/1996) which was effective from 14 February 1996[121].

In contrast to Permenaker No.03/Men/1996 which resulted in few objections, Kepmenaker No. Kep-150/Men/2000 drew a strong negative reaction from employer who argued that this decision would create a financial burden on the employers. In response to these objections, the government modified several articles in the decision through the Decree of Minister of Manpower and Transmigration No. 78 of 2001 (Kepmenakertrans No. Kep-78/Men/2001) released on 4 May 2001 and the Decree of Minister of Manpower and Transmigration No. 111 of 2001 (Kepmenakertrans No. Kep-111/Men/2001) released on 31 May 2001. These changes eventually trigerred conflict and mass labor unrest because Kepmenakertrans No. 78 and No.111 were believed to favor employers, while Kepmenaker No. 150 was considered by unions and workers to provide adequate protection for the labor[122].

[121] Kusumastuti Sri, Rahayu. *op. cit.* Page 6
[122] *Ibid.*

The labors demanded the reinstatement of Kepmenaker No. Kep-150/Men/2000 and protested against the release of new decisions using various forms of industrial unrest and mass strikes in several regions. Considering the negative reaction of the labors to the new decicion, ultimately the government reinstated Kepmenaker No. Keo-150/Men/2000 on June 15, 2001 despite the employers' concern. The reinstatement of the decision was based on a meeting between employers, labor representatives, and the government, and will remain effective until the New National Tripartite Forum is formed. The new forum is a result of the Minister of Manpower and Transmigration's awareness that Kepmenakertrans No. Kep-78 and 111/Men/2001 were not formed based on tri-partite consultation, because previously each tri-partite meeting always reached a dead end[123].

3. Industrial Relationship

It is difficult to define the term of industrial relations in a precise and universally accepted way. Industrial relations are more than simply an area of organizational management, and should be viewed not just in terms of simple organizational work regulation but in a broader social, political, and economic context. Industrial relations are integrated with, and not separated from the political and economic environment. The development of industrial relations in Indonesia reflects the changes in the nature of work within society (both in economic and social terms) and differences of view about

[123] *Ibid.*

the employment regulations. According to Solomon, industrial relations encompass a set of phenomena, both inside and outside the workplace, which are concerned with determining and regulating the employment relationship. They involve a range of concepts, such as fairness and equity, power and authority, individualism and collectivism, rights and responsibilities, and integrity and trust[124].

Basically labor relationship arises because of the existence of employment agreement. According to a scholar named Hani Subagio, an employment agreement that becomes the nature of a labor relationship consists of four elements, namely[125]:

a. The existence of a job, regulated in Article 1601a of Indonesia Civil Code
b. The existence of wages, regulated in Article 1603p of Indonesia Civil Code
c. The existence of command, regulated in Article 1603b of Indonesia Civil Code
d. The existence of a certain limit of time

The definition of work or job is an action that should be done by the employment receiver (labors) and the job should not be transferred to another party. Wages are the reward of the work performed by employment receiver, which may take the form of money. Wages can be viewed in terms

[124] Kusumastuti Sri, Rahayu. *op. cit.* Page 3
[125] Sunyoto, Danang. *op. cit.* Page 93- 94.

of nominal and real terms. The usefulness of wage it self is in order to meet the needs of labor life. Therefore, the technical term of minimum wage is usually known to fulfill the labors needed which set by the government to review the usefulness of the wages. The remuneration system usually is based on the time or the result of the work which is conduct by the labors. Some general principles that exist in the society in terms of wages are[126]:

a. Wages implicit in every employment relationship, it has been known that in any working relationship is always linked to the wage issue,
b. The existence of non discrimination principle, there is no difference in terms of wage,
c. No work no pay principle, is applicable with an exception,
d. The parties involved in the employment relationship can pledge on wage, as long as it is more favorable to the labors,
e. Prohibition of wage expenditure as known as truck stelsel,
f. In terms there a reduced to wages, it must be with the consent of the worker concerned, and
g. Application of fines, cut, compensation, and other things that will be included in wages, should not be more than 50 percent.

By the existence of command its make the employment receiver very dependening on the work orders / instructions / directions from the employer. Although the receiver has the expertise or the ability to work alone in terms of doing his job, the labors is under the employer command.

[126] Setia Hadi, Tunggal. *op. cit.* Page 41-42

As long as there is dependence between the labors against the employer, it can be said that there is a relationship of subordination. The element of time in this case is that there is a time to do the job intended or duration of labors doing the job provided by the employer[127].

Labor relationship between employers and labors occurred after the employment agreement between the labors and the employer. In this case the employment agreement should contain labor requirements, rights, and obligations of the parties because by this agreement the two sides had been bound and thus would arise the rights and obligations that must be met by both parties. It implies that the agreement in an employment agreement should have an element of work, wages, and commands. By the obligation that have been conduct by the labors as it is stipulated in the employment agreement, the employer have obligation to pay in the form of wages to the labors[128].

Every labors has the right and obligation as stipulated in Act No. 13/2003 concerning Labor Law where the right is a matter that should be accepted by the labors according to the agreement made with the employer. The obligation is something that must be carried out or shall be carried out by labors in accordance with an agreement which have been made with the employer[129]. The labors right and obligation are as follows.

[127] Ibid. Page 43
[128] Syahrizal, Darda. et,.al,. *op. cit.*. Page 167.
[129] Sunyoto, Danang. *op. cit.* Page 35

a. The Labors right consist of[130]:

1) The right to earn wages or salaries
2) The right toward the employment and a humanity decent income
3) The right to freely choose and move the from the job according to their talents and abilities
4) The right to vocational skills training to acquire and add the expertise and skills
5) The entitlement to the protection of the safety, health and a treatment in accordance with human dignity and moral religion
6) The right to form and become the members of the labor organization
7) The right to annual rest
8) The rights toward the fully wages during the annual rest
9) The right to a reimbursement payment of annual rest
10) The right to conduct negotiations or industrial disputes settlement

b. The obligation of labors are[131]:

1) Must conduct an action
2) Must obey the company regulations
3) Must obey the employment agreement
4) Must obey the labor agreement
5) Must keep the company secrets
6) Must obey the employee regulations
7) Must fulfill all of the obligation in case there an appeal verdict arise.

[130] *Ibid.* 35-46
[131] *Ibid.* Page 46

Beside the employment agreement will arise the labors right and obligation, it also will give an obligation and right to the employer. The right and obligation of an employer toward the labors is regulated in the Indonesia applicable law concerning the labor.

a. The right of employer[132]:

1) Entitle for a better result of the production
2) Provide a command
3) Placing and moving the workers at the desired position
4) The right to deny the labors claims
5) Ask for a compensation toward the labors if there is a productt damage made by labors
6) Give sanction for a violation conduct by labors

b. The obliogation of employer are[133]:

1) Obliged to keep in his company to does not do the job as opposed to the applicable law
2) Obliged to provide information requested by the competent authority
3) Obliged to give wages to the labors
4) Obliged to give wages to the labors who are not perform the labors obligation due to the labors is committing the state duty
5) Obliged to pay the wages due to the labors is committing their obligation in relations to the religion

[132] *Ibid.* Page 51- 55
[133] *Ibid*. Page 59- 61

6) Obliged to pay wages to the labors who are willing to do the work that had been promised, but employers will not hire him because of his guilty
7) Obliged to pay due time the labors wages
8) Obliged to pay the assurance entire on each payment of wages

4. Termination of labors

Various termination of employment termination consist of termination of employment by law, termination of employment by employer, termination of employment by labors, and termination of employment by court[134]. According to Article 1603e of Indonesia Civil Code termination of employment by law occurs by a due period of time concerning the employment agreement[135], the death of employer or labors, and the superannuation of employer or labors[136]. The termination of employment by labors is because of the labors or employer is resigned and the labors is request on it due to they get mistreatment by the employer. Termination of employment by court occurs whem the employer employing the under age child and does not fulfill the applicable law[137]. The termination of employment by employer or company occurs because of labors or employer conduct major offenses and the company's development is decreasing[138].

[134] Sunyoto, Danang. *op. cit*. Page 112.
[135] *Ibid.* Page 113.
[136] *Ibid*.
[137] *Ibid.*
[138] Sunyoto, Danang. *op. cit*. Page 114.

In practice, termination of employment that occurs because of the due time or expiration of time as stipulated in the agreement does not cause problems on both sides of the labors and the employer. Termination of employment that occurs because of the expiration of a time does not cause problems for both parties because the parties concerned have been aware of the expiration of the employment relationship. This condition will be contradiction if the termination of employment occurs as a result of dispute, where the labors will get losses due to they have a weak legal seat[139].

C. General Review on Taxation

1. Taxation Definition

Rachmat Soemitro argued that taxation is a contribution from the society to the state based on the law which the implementation can be enforced that is used to booster, obstacle, or deterrent to achieve the state financial purpose. According Soemitro, understanding of tax law perspective is the emergence of an engagement toward the society duty to deposit a certain amount of revenue to the state, where the state has the power to force and the tax money should be used for the gornment's used. From this law approached the tax that is collected must be based on the law so it has legal certainty[140]. Taxation debt arises from the society obligation

[139] *Ibid.* Page 109

[140] Soemitro, Rochmat., et.al. *asas dan dasar perpajakan*. Refika Aditama. Bandung. 2004. Page 48.

to pay tax which it comes from the legal binding of the state to the society based on the applicable law.

Roger H. Soltau stated that state is an agencies authority managing or controlling these (common) affairs on behal of and in the name of the community. Harold J Laski argued that state is a community that is integrated by strong authority and bigger than the individual/ group of the society which the goals is a creation of those condition underwhich the members of the state may attaint the maximum satisfication of their desire. John Bouvier stated that tax is a pecuniary burden imposed for the support of the government. The enforced proportional contribution persons and property levied by the authority of the state for the support of the government and for all public needs[141].

Tax is the whole of the regulations covering government authority to take a person's wealth and hand it back to the society through the state treasury, so it is part of the public law governing the legal relations between the state and the persons or bodies who are obliged paying taxes[142]. It has been written in Traite de la Science des Finances book concerning tax that is written by Leroy Beaulieu, which is stated *"L' impot et la contribution, soit directe soit dissimulee, que La Puissance Publique exige des habitants ou des biens pur subvenir aux depenses du Gouvernment".* Leroy Beaulieu argued that taxation assistance, either directly or indirectly, imposed by a

[141] Karmilla, Mila. *Tax Law.* PPT Slide No. 3 page 1. Course material presented on February 2013.

[142] Dewi Chandra, Puspitasari. *Hukum Pajak.* PPT Slide 17

public authority toward the society or a goods, to cover government spending[143].

According to Deutsche Reichs Abgaben Ordnung, he stated "*Steuern sind einmalige oder laufende Geldleistungen die nicht eine Gegenleistung fur eine besondere Leistung darstllen, und von einem offentlichrectlichen Gemeinwesen zur Erzielung von Einkunften allen auferlegt werden, bei denen der Tatbestand zutrifft an den das Fesetz die Leistungsplicht knupft*", which it means tthat tax is money's relief in insidentall or periodically, which is collected by the general body (state), to earn income, where there is a target of taxation (*tatbestand*), that is because the law has caused the tax debt[144].

Taxation based on Mr. Dr. N.J. Feldmann in his book of *De overheidsmiddelen van Indonesia* is "Belastingen zijn aan de Overheid (volgens algremene, door haar vastgestel*de normen) verschuldigde afdwingbare prestties, waar geen tegenprestatie tegenover staat en uitsluitend dieneb tot dekking van publieke uitgaven",* it means that tax is an action imposed unilaterally and become payable to the authorities according to the norms set out in general, in the absence of contra, and are used solely to cover general expenses[145].

[143] Santoso R, Brotodihardjo. *Pengantar Ilmu Hukum Pajak.* Refika Aditama. Bandung. 2008. Page 3.
[144] *Ibid.*
[145] *Ibid.* Page 4

According to Soeparman Soemahamidjaja, tax is a mandatory fee, in the form of money or goods, collected by the authorities based on legal norms, in order to cover the cost of production of goods and services collectively to achieve common prosperity. Besides that, Edwin R.A. Seligman in his essays of taxation stated that tax is a compulsery contribution from the person, to the government to defray the expenses incurred in the commen interest of all, without refernce to special benefit conferred[146].

The characteristics of the various taxes are summed up in the definition (other than Dr. Soeparman definition of the opening of new ideas) are[147]:

a. Transfer of tax from the wealth of an individual or an entity to the government
b. Tax is collected with the power of law and the procedures law, so it can be enforced
c. The payment of tax can not be directly demonstrated the existence of contra in individually gr by the government
d. Tax is collected by the state, either by the central government or the local government
e. Taxes is destined for government expenditures, which if there is still a surplus of revenue, is used to finance public investment

[146] Suandy, Erly. *Hukum Pajak*. 2002. Jakarta. Salemba Empat. Page 8-9
[147] *Ibid*. Page 11

f. Taxes is a tool to achieve the government's aims

g. Taxes can be collected directly or indirectly

2. Regulation on Taxation

As it has been regulated in Law No. 16 of 2009 concerning General Review and Tax Retribution and in Law No. 19 of 2000 concerning Tax Collection with Forced Letter, taxation is a mandatory contributions which is become payable to the society as an individual or an entity by state that is enforceable under the laws which are used for the welfare of the society. A tax is collected by the central government and local governments based on their respective authorities, including customs and excise[148]. Society is a community that is intended by the law or *Gemeinschaft* in the terms of Ferdinand Tonnies, not people who are *Geselschaft.* Need merely note, that people lives in a society, need also to know the rights and obligations of society against their individual, and the rights and obligations of the individual to society[149].

The term of taxes has close relations against the tax payer as it regulated in Law No. 16 of 2009 concerning General Review and Tax Retribution and in Law No. 19 of 2000 concerning Tax Collection with

[148] *Susunan Dalam Satu Naskah Undang-Undang Perpajakan*. 2013. Fokusmedia. Bandung. Page 2 and 312

[149] Soemitro, Rochmat. *Asas dan Dasar Perpajakan.* 1990. Bandung. PT Eresko. Page 1.

Forced Letter. Tax payer is an individual or legal entity who are entitle for the right and obligation toward the taxation based on the applicable law[150].

Tax is a collection of rules that govern the relationship between the government as tax collectors and the people as taxpayers[151]. Subject of tax and the object of tax is regulated in the tax law. If we discuss in broad way, the subject of the tax is a parties that are entitle to be the tax subject, while the tax object is anything that would be taxed. Taxpayer is subject to tax that has met the objective conditions that is required by the taxes. In other words, every taxpayer is a subject of tax[152].

Income of tax is consider as object of tax which it means that tax is imposed because the subject has fulfill the condition as it has been regulated in the tax law. So there is decisiveness that if there is no tax subject, it clearly explains that the income tax will not appear. Tax income is one of the tax regulations which is regulated about the subject of tax[153]. Subject of tax as it has been written in Law No. 36 of 2008 concerning tax income in Article 2 point 1 are[154]:

a. Person/ individual and Undivided inheritance as a unity entity that is entitled to replace
b. Legal body

[150] *Ibid.*
[151] Bohari. *Pengantar Hukum Pajak.* 1995. Raja Grafindo Persada. Jakarta. Page 25
[152] Suandy, Erly. *op. cit*. Page 47
[153] *Ibid.*
[154] *Susunan Dalam Satu Naskah Undang-Undang Perpajakan*. 2013. Fokusmedia. Bandung. Page 113

c. Form of fixed enterprise

Person or an individual is the legal seat of a person as tax subject, may reside in or out of Indonesia. Person, does not distinguish age and socioeconomic level which it means there non-discrimination principle apply. In this matters, undivided inheritance as a unity entity is subject to a substitute tax, replacing those who qualify to be the heir. Legal body who are entitle as subject of tax is not only talk about the legal body in the field of bussiness, but also in the field of social, society, and the others, as long as the establishment is established with the competent deed. Form of fixed enterprise is a bussiness form which is used by a person or an individual, may reside in ouside of Indonesia or inside of Indonesia less than 183 days in the periods of 12 months, or a legal body which is not established or are not domiciled in Indonesia in running their bussiness activity[155].

What are entitles as an object of tax is determines as the tax object in the field of taxation. In Indonesia tax law always strictly regulated about the tax object considering the important and strategic of tax. Because of that, Law No.36 of 2008 Article 4 in the first and second paragraph concerning the tax income provides some affirmation that income has close relations to the tax object[156]. Income definition according to the Law No.36 of 2008 concerning tax income stated that income is[157]:

[155] Suandy, Erli. *op. cit.* Page 49
[156] *Ibid.* Page 59
[157] *Ibid.*

> Each additional economic benefit received or obtained by a taxpayer, whether originating from Indonesia and outside Indonesia, which can be used for consumption or to increase the wealth of the taxpayer, with the name and in any form.

Tax law as positive law is part of a national law which the legal sources are as follows[158]:

a. 1945 Constitution of Republic of Indonesia

Before the 1945 Constitution was amended, the taxation provision is provided in Article 23 paragraph 2 of the 1945 Constitution in chapter eight which it stated that[159]:

> In terms of financial, the usefulness of any tax for the state treasury purpose which regulated under the laws

The regulation contains the principle of legality which lays authorizes the state to collect taxes if the country needed it, but the conditions must be based on the law. The implementation of Article 23 paragraph 2 has been determined in various tax laws, which it have been apply for the material, formal, or a combination of both in the implementation. After the 1945 Constitution amendment, the provisions of the tax had changes becoming very principle. Article 23A 1945 Constitution still contains the principle of legality as it contained in Article 23 paragraph 2 of the 1945 Constitution before the amendment.

b. Taxation agreement

[158] Djafar Muhammad, Saidi. *Pembaruan Hukum Pajak*. 2007. Raja Grafindo Perkasa. Jakarta. Page 5

[159] Suandy, Erly. *op. cit.* Page 13

Taxation agreement is a source of tax law which is written as a result of the agreement of two or more countries. Taxation treaty aims to prevent the occurence of international double taxation which caused burden on taxpayers, which it is to prevent the international tax avoidance and tax evasiion.

c. Taxation jurisprudence

Taxation jurisprudence is decision regarding tax matters and tax disputes that include tax crime that has a legally enforceable.

d. Taxation doctrine

Doctrine of taxation can only arise because the tax law expert opinion, not a legal expert in general because the tax has its own characteristics which have differences with other laws.

3. Benefit of Taxation

According to Fritz Neumark, the benefit of taxes are categorized into[160]:

a. Fiscal or budgetary function

b. Economic function

c. Social function

According to fiscal or budgetary function, tax benefits is to cover the government expenses, such as the expenses for an items that are not

[160] Nurmantu, Safri. *Pengantar Perpajakan*. 2003. Granit. Jakarta. Page 54-55

financed with certain items such as profits of government enterprises and creating a new money. Based on the economic function, tax benefits is to apply the purpose of government generally such as preventing the occurence of jobless, monetary stability, and economic growth. If we reversed to the social function, so the tax benefits is a tax role as a tool equalization, which is to minimize the wealth and income differences which are unevenly distributed among the population (society) of a country[161].

Tax revenue component in the contemporary economy is a part of fiscal policy which is seen as a policy that has a role and a very significant influence against the economic development, due to[162]:

a. The existence of taxes is an important tool in reining the increasing demand against the consumer goods brought which caused the development process
b. Taxation is not just aiming to get a greater income, but also acts as an incentive to save and invest
c. To transfer human resources to the government to be used more productively
d. Taxation should fix the investment pattern in the field of economy
e. One of the main objectives is to reduce the tax revenue difference gap of the people who are rich and poor
f. Taxation mobilize the economic surplus for the sustainable development

[161] *Ibid.*
[162] Suandy, Erly. *op. cit.* Page 14-15

4. Types of Taxation

The characteristic of tax are a transfer of resources from private sector to the state or gavernment, No directly benefit to the tax payer individually, the action is based on law, and tax revenue will be used for government's expenditures[163]. Tax law consists of[164]:

a. Subject of tax
b. Object of tax
c. Tax payer's obligation to the government
d. The existence and abolishment of taxt debt
e. Tax claim procedure
f. Objection and appellate procedures

The types of tax are consists of[165]:

a. Tax Income

Tax income is a taxes imposed on any income derived by the taxpayer received. Income in question is any additional economic benefit received or obtained by a taxpayer, whether originating from Indonesia and outside Indonesia that can be used for consumption and increase the wealth of the taxpayer, with the name and in any form.

b. Value added tax

[163] Karmilla, Mila. PPT Slide No. 16 page 3.
[164] *Ibid.* PPT Slide No. 18 page 34.
[165] www.pajak.go.id/content/buku-lebih-dekat-dengan-pajak. *Lebih Dekat dengan Pajak.* Last viewed on 4 January 2014

Value added tax is a tax collected on the consumption of any consumer goods or services in the country. In principle, any goods and services subject to value added tax, unless stipulated otherwise by law, such as basic necessities such as rice.

c. Sales tax on luxury goods belonging

Sales tax on luxury goods belonging is a tax imposed against the consumer's goods which are categorized as luxury, such as:

1) The goods is not categorized as necessity goods
2) The goods is consumed by certain people only
3) The goods is consumed by the people which have high salaries
4) The goods is consumed to show the status of a people

d. Land and building taxes

Land and buillding taxes is a taxes imposed on the ownership or use of land and or building.

CHAPTER III

TAXATION AND LABOR MATTERS IN BANKRUPTCY

A. The Legal Position of Taxation and Labor as Preferred Creditors

It has been known that creditors in the field of Bankruptcy Law and Suspension of Payment consist of secured, preferred, and unsecured creditors. In this paper, the writer would discuss more specifically in relation to the preferred creditors. Preferred creditors in this paper are related to the taxation and the labor wage. The statement of taxation as preferred creditor is proven with the existence of Article 1137 of Indonesian Civil Code. The statement that proves labor as preferred creditor is written in Article 1149 point 4 of Indonesian Civil Code in form of wage.

Preferred creditor is a creditor which because of the nature of the debt has a privilege and is entitled to the acceptance of the advance payment from the debtor's estate sales result. As regulated in Article 1134 of Indonesian Civil Code, preferred creditor is a right that is given by the law toward the creditors to receive the advance payment before the secured creditors do[166].

As what has been discussed in chapter 2 of this paper, paritas creditorium, pari passu pro rata parte, and structured creditor are the basic principles used in the settlement of the bankruptcy problem. Further elaboration of Article 1131 and 1132 as paritas creditorium and pari passu pro

[166] Indonesia Civil Code Article 1134

rata parte principles in the Indonesian Indonesian Civil Code are stipulated in:[167]

1. Law No.37 of 2004 concerning Bankruptcy Law and Suspension of Payment Article 1 point 1

   This Article focuses on the general seizure of the debtor's estate to secure the debtor's estate from the similar action conducted by the creditors. By the declaration of the debtor's assets which has been foreclosed with a general seizure, so all of the debtor's activity, either legal or illegal, must be stopped. This philosophy shows that the interests of the debtor must be protected against the measures that could harm the creditors in paritas.

2. Law No.37 of 2004 concerning Bankruptcy Law and Suspension of Payment Article 2 paragraph 1

   This Article emphasizes on the existence of at least two creditors who have the receivables against the debtor. The requirement of the existence of at least two creditors means that bankruptcy is the way out that will be used by the debtor against the creditors. If the debtor has only one creditor, the bankruptcy will then lose its significance as a tool of collective proceedings. The requirement of the existence of at least two or more creditors in bankruptcy is as the form of paritas creditorium and pari passu pro rata parte principles.

[167] Hadi, Shubhan. *op. cit.* Page 71

3. Law No.37 of 2004 concerning Bankruptcy Law and Suspension of Payment Article 21

   This article states that bankruptcy concerns with all of the debtor's assets and everything that is earn during the bankruptcy since the bankruptcy declaration is issued.

The combination of these two articles, Article 1131 and 1132 of the Indonesian Civil Code assists the bankruptcy settlement. We can conclude that both of the Articles mean that creditors are entitled to all of the debtor's assets which its distribution will be based on the debt amount.

The writer has the same opinion with Hadi Shubhan who states that the Article 1131 and 1132 of Indonesian Civil Code have weaknesses in their implementation[168]. However these articles still enable a possibility of conflict among creditors even though both articles have stipulated that the debtor's assets who are declared bankrupt will provide as the debtor's estate which will be distributed to the creditors based on the debt amount. The conflict might occur because of both of these article have not explained about who are entitled to receive the advance payment. The principles of paritas creditorium and pari passu pro rata parte need an additional regulation concerning the creditor's rank to solve the problem which occurs among the creditors as they are racing to be the first creditors who are entitled to receive the advance payment.

[168] *Ibid.* Page 31

If we refer to Hadi Shubhan, the structured creditors principle need to be applied in the implementation of paritas creditorium and pari passu pro rata parte principles. The structured creditor principle is the complementary principle for both paritas creditorium creditorium and pari passu pro rata parte principles. This principle classifies the creditor rank in receiving the payment. The creditor rank is regulated in this principle to settle the distribution of debt in a just way based on the creditors' classes[169].

According to the writer, the goal of Bankruptcy Law is to achieve justice amongst the creditors by the implementation of paritas creditorium, pari passu pro rata parte, and structured creditor principles. The doubt and seizing against the debtor's assets will not occur by the existence of these three principles. It is because that the principle that is used in the bankruptcy settlement has regulated that all of the debtor's assets are entitled to all of the creditors where the debts will paid based on the debt amount in accordance with the creditor rank in the ditribution of debt.

According to the Indonesian Civil Code, preferred creditor is distinguished into the specialized credit in general, the special rights on the certain property, and the specialized credits on all movable and imovable property in general. One of the specialized credits in general regulates that taxation is categorized into preferred creditor which is written in Article 1137 of Indonesian Civil Code. The special rights on the certain property is

[169] *ibid*

regulated in Article 1139 of Indonesina Civil Code. The specialized rights on the certain property is regulated in the Article 1149 of Indonesian Civil Code.

According to Article 1139 of Indonesian Civil Code, the special rights upon the certain of property are:[170]

1. Costs of lawsuit which are solely caused by a condemnation to auction off a movable or immovable property,
2. Rental fee of the immovable property, repairment or renovation expenses which become the obligation to the lessee and concerning any obligation to fulfill the lease agreement,
3. The buying prices of movable property which have not been paid,
4. Expenses which have been spent for saving a property,
5. Costs to perform a work on property which must be paid to a craftsman,
6. What has been served by the owner of a lodge as such to a guest,
7. Transportation costs and additional costs,
8. What must be paid to the stone worker, carpenterr, and other workers for construction, addition, and repairment of the imovable property. As long as the credit is not longer than three years, the ownership upon the concerned land is still under debtors,
9. Replacements and payments which must be borne by the officers in charge to a public function or duty because of negligence, fault, infringement, and crimes done in his function or duty.

[170] Mangunsong, Rany. et. al. *Indonesian Indonesia Civil Code*. 2004. PT Gramedia Pustaka. Jakarta. Page 247

According to Article 1149 of Indonesian Civil Code, the specialized credits on all movable and immovable property in general are those mentioned herein below in which the credits are settled by the income generated from the selling of those properties in the following sequence:[171]

1. Proceedings expenses, that are solely caused by the settlement and auction of inheritance; these expenses shall be in advance to the pawn and hypothec
2. Funeral expenses, without prejudice to the judges power to reduce it if the expenses is too high
3. All treatment and medical expenses of the last sickness
4. The wages of the labors during last year and wages that have been paid during the on going year, including wages increment according to the Article 1602q, the amount of expenses that have been made by the labors for the employer's interests, the amount of money that the employer must pay to the labors, based on Article 1602y, based on Article 7 paragraph 3 of additional regulation regarding the plantation entrepreneur, the amount of money the employer must pay to the labors at the time of employment termination based on Article 1603 bis, the amount of money the employer must pay to the labor's family at the time the labor dies, based on Article 13 paragraph 4 of additional regulation regarding plantation entrepreneur, the amount of money the employer must pay to the labor or to the vessel crew member or their left behind family, based on the accident regulation

[171] *Ibid.*

1939 or accident regulation on vessel crew member 1940, including credit based on regulation on to return the labor 1939

5. Credit due to foods surrender that is made to the debtor and his family, during the last six months
6. Credits of the boarding school managers for the latest year
7. Credits of minors and persons under custody against all guardian and custodian, concerning their management. If the credits cannot be settled by the hypothec or other securities, that must be made according to the title fifteenth of book one of this Code, and so do the allowances that according to book one must be paid by the parents for the maintenance and education of their legitimate minors.

The above aforementioned shows us both of taxation and labor are considerd as preferred creditors. The taxation and labor as preferred creditors must receive the payment in balance without being differentiated to one another. Basically labors are entitled to the wages they earn[172]. It has been written in Article 95 paragraph 4 of Law No. 13 of 2003 concerning labors which states that :

> In case that the company is declared bankrupt or liquidated by the legislation in force, wages and other rights of workers / labors are prioritized debt payments.

Law No. 13 of 2003 Article 95 paragraph 4 tries to explain that labor is considered as preferred creditors. Labors are entitled to receive their advance payment. Concerning about the company's bankruptcy, it is regulated in

[172] Indonesia Civil Code Article 1149

Article 165 of Law No 13 of 2003 that employer is possible to terminate the labor employment due to the bankruptcy of a company[173]. In accordance with the retrenchments, the compensation that is given by the company to the labors are;

1. labors are entitled to receive severance payment,[174]
2. appreciation payment of the working period,[175]
3. and the money for entitlements.[176]

The goal of Indonesia as mandated in the 1945 Constitution is to create independent states, united, sovereign, just, and prosperous. The realization of a just and prosperous state can be achieved by development. The realization of this regulation needs domestic revenue in form of tax. The Article 21 paragraph 1 and paragraph 3a of Law No. 16 of 2009 state that the state has its right to take precedence of the tax payer assets related to the tax payment and the receiver is not possible to distribute the tax payers (debtor) assets to the creditor in the bankruptcy matters[177]. This Article tries to explain that tax payer is obliged to pay the tax before performing the acquittances to the other parties. This Article also sets the position of the state as a preferred creditor that has the right to take precedence from the tax payer assets that will be

[173] Syahrizal, Darda and Rukiyah L. *op. cit.* Page 243.
[174] Law No. 13 of 2003 Article 156 paragraph 2 concerning Labors
[175] Law No. 13 of 2003 Article 156 paragraph 3 concerning Labors
[176] Law No. 13 of 2003 Article 156 paragraph 4 concerning Labors
[177] Law No. 6 0f 1983 concerning general provisions and procedures of taxation as amended by Law No. 16 of 2009 Article 21.

auctioned in public. The other creditors are possible to receive the acquittances after the tax acquittances if there are still remains[178].

Besides that, in the Article 21 paragraph 3 of Law No. 16 of 2009 clearly states that the privilege of tax debt exceeds the other privilege except to; court fees which caused condemnation due to auctioning the movable and imovable goods, the expenditures fees to safe the movable and immovable goods, and court fees because of auction and the inheritance settlement.[179] Due to taxation and the fact that labors are categorized as preferred creditor, tax and labors are the creditors who are entitled by the law to receive precedence. It has been explained by Sutan Remy that if in a bankruptcy settlement does exist a creditor who is entitled to receive its precedence,the creditor's rank becomes[180]:

1. Preferred Creditors
2. Secured Creditors
3. Unsecured Creditors

In the debt distribution according to Article 1135 of Indonesian Civil Code, it is regulated that amongst the preferred creditors, the rank will be arranged according to the variety of the nature of the privilege. The privilege consists of privilege on certain goods concerning the movable or immovable

[178] *Susunan Dalam Satu Naskah Undang-Undang Perpajakan*. Fokusmedia. Bandung. 2013). Page 60.
[179] Law No. 16 of 2009 Article 21 paragraph 3
[180] Remy Sutan, Sjayhdeini. *op. cit.* Page 31.

goods, where the first must take precedence than the second[181]. Hadi Subhan differentieates preferred creditors into three categories, namely;[182]

1. creditors who have staturory priority,
2. creditors who have non statutory priority, and
3. estate creditors.

Creditors who have statutory priority are regulated by the law and have a particular priority as set out in Article 1139 and 1149 of Indonesian Civil Code. It means that all of the creditors mentioned in Article 1139 and 1149 of Indonesian Civil Code are considered as preferred creditors and are entitled to be creditors who have a statutory priority. Creditors who have non statutory priority consist of retention of title, compensation/ set-off, the right of the seller to reclaim the goods, and the right to terminate the agreement. Estate creditors are the creditors that appear due to the credits created as the effect of bankruptcy, such as in form of receiver, bankruptcy settlement, and labor payment[183].

The Bankruptcy Law and Suspension of Payment Article 39 paragraph 2 states that since the bankruptcy decision is declared, the payable wages either exist before or after the bankruptcy declaration are categorized as estate creditor. The wages will become payable when the labors have conducted their duties while the labors have not received their payment yet. Giving legal certainty to the labors is the purpose of this article. As it has been regulated in

[181] See Article 1138 of Indonesia Civil Code
[182] Shubhan, Hadi. *loc. cit*
[183] *Ibid.* Page 145.

article 1 point 4 of Labor Law, employer is a person, entrepreneur, or legal entity which employs labor by paying wages.

Even though tax as preferred creditor is not regulated in Articles 1139 and 1149 of Indonesina Civil Code, tax is considered as the creditor who has statutory priority. Tax debt is separated from the other preferred rights in Articles 1139 and 1149 because taxation have no relation with certain goods, and movable and immovable property since taxation is regulated in Article 1137 of Indonesian Civil Code. Tax debt must take the precedence due to the taxation purpose that is for the state welfare in which the state has many activities to reach the goals. Tax is related to the general purpose of a state while labor concerns more on the individual purpose of a person.

Moreover, Sutan Remy argues in his book that privilege that must take its precedence over the secured creditors are:[184]

1. The privilege which is stipulated in Article 1137 paragraph 1 of Indonesian Civil Code

   This article stipulates that the rights of state treasure, auction office and other governmental bodies are considered as creditors that have priority as preferred creditors.
2. The privilege which is regulated in Article 21 paragraph 3 of Law No. 6 of 1983 concerning General Review and Tax Retribution as ammended in Law No. 16 of 2009.

[184] Remy Sutan, Sjayhdeini. *op. cit.* Page 6

This article also strengthened by the statement of receiver prohibits to distribute the debtor's assets before it is distributed for the taxation which means that the legal position of taxation as state treasure must have its precedence.

3. The privilege which is regulated in Article 1139 paragraph 1 of Indonesian Civil Code

   This article regulates the costs of lawsuit which are solely caused by a condemnation to auction off a movable or imovable property. The costs are paid by selling property prior to paying all other specialized credits, even prior the pawn and hypothec.

4. The privilege which is regulated in Article 1149 paragraph 1 of Indonesian Civil Code

   Proceedings expenses, that are solely caused by the settlement and auction of inheritance.

5. Receiver fee as stipulated in Law No. 37 of 2004 Article 18 paragraph 5

   This article clearly states that fee of receiver is categorized into a creditor which must receive precedence before the creditors who are not secured with a security rights get their payment.

Tax debt is considered as a creditor who has statutory priority in that Indonesina Civil Code has put the tax debt to take precedence before the other creditors as what has been written in Article 1137 which states that:

> The privilege which by law must take precedence over the right with security right are taxation, auction institution, and other public institution that is established by the government.[185]

Even tough taxation and labor has the same legal position as preferred creditor in bankruptcy, but labors still need to struggle their right before the court. If we refer to Article 1138 in the statement of the first is proceded than the later, labors has lower legal position than the taxation. In another hand, according to the taxation law, it clearly stipulated that taxation is higher than the other preferred creditor, which the lex xpesialis derogat lege generalis is apply in this case. Besides that, taxation is the society contribution to the state based on the applicable laws which directly is used for the public expenditures. When we refers to the terms of its benefits, so taxation is the one who must take precedence than labors. The taxation purpose is to achieve the public welfare which one of the realization of achieving the public welfare is the existence of the infrastructure development. Road, school, bridge, transportation, and another public facilitie are one of the infrastructure development existence. Taxation is used for the public financing in order to provide sense of felling secured amongst the society. When we refers to the labors's benefit, labors are not entitled for the precedence position. It because of the labors interest is in relation to a group in a society, not a society.

[185] Indonesia Civil Code Article 1137

B. The Fulfillment of Taxation and Labor Rights in Bankruptcy Settlement

As it has been known, the applicable law used in Indonesia refers to the law of the Dutch because Indonesia was colonialized under the Dutch for three and half decades. Indonesia applies the Indonesian Civil Code which is known as Burggerlijk Wetboek as the general law concerning the civil law regulation. One of the regulations written in the Indonesian Civil Code contains Bankruptcy Law regulation.

We know that the Bankruptcy Law has been applied in all the states all over the world. Bankruptcy Law is private law which occurs due to the occurence of a financial distress of a company in most of the states in the world. Each state has regulated this kind of financial distress conducted by a company into their national law. The purpose of a state to create the national law concerning the financial distress conducted by a company is to protect every party arising in this action. In this context of study, the writer would like to discuss the bankruptcy settlement concerning taxation and labor in the applicable law of Indonesia compared to the Bankruptcy Law of the United States of America. The United States of America is one of the states that apply Bankruptcy Law in its national law.

The bankruptcy settlement concerning taxation and labor in Indonesia can be compared to that of the United States of America in the case of Batavia Air which has been declared bankrupt before the Commercial Court, of Indonesia. The extension of credit from the creditors to the debtor in commercial and personal transactions is important to the viability of the

American and world economies. On this occasion, however, the borrowers become overextended and are unable to meet their debt obligations. Years ago in Britain and Europe, person who could not meet his debts was sentenced a prison or indentured to their creditor untill the debt was worked off. To avoid such harsh results, many countries adopted Bankruptcy Law that was intendeed to achieve a better balance between debtor's right and creditor's right. Federal Bankruptcy Law was amended in 1994 in several major respects. The bankruptcy reform act of 1978, as amanded, is referred to as the bankruptcy code[186].

The US Bankruptcy Law is divided into chapters. Chapter 1, 3, and 5 include definitional provisions and provisions for the administration of bankruptcy proceedings. They apply to all forms of bankruptcy. The most common forms of bankruptcy are provided by the following chapters: Chapter 7 (liquidation), 11 (reorganization), and 13 (consumer debt adjustment). The remaining chapters of the bankruptcy code govern the bankruptcies of municipalities, stockbroker, and railroads. The primary purpose of federal Bankruptcy Law is to discharge the debtor from burdensome debts. The law gives debtors a fresh start by freeing them from legal responsibility for past debts by;[187]

1. Protecting debtors from abusive activities by creditors in collecting debts
2. Preventing certain creditors from obtaining an unfair advantage over other creditors

[186] R Henry, Cheesman. *Contemporary Business Law.* 3rd edition. Prentice-Hall, Inc. Page 497.

[187] *Ibid.* Page 498

3. Protecting creditor from actions of debtor that would diminish the value of bankruptcy estate
4. Providing for the speedy, efficient, and equitable distribution of the debtor's nonexempt property to claim holders
5. Preserving existing business relations

Based on the federal Bankruptcy Law in the United States of America, the distribution of the estate debt is classified into three classes, namely:[188]

1. Secured Creditor

   A secured creditor's claim to the debtor's property has priority over the claims of unsecured creditors. The secured creditor may accept the collateral in full satisfaction of the debt, foreclose on the collateral and use the proceeds to pay the debt, or allow the trustee to retain the collateral, dispose of it at sale, and remit the proceeds of the sales to him or her[189]. Secured creditors proceed directly against the collateral. If debt is fully satisfied, they have no further interest; if debt is only partially satisfied, they are treated as general creditors for the balance.[190]

2. Unsecured Creditors called priority creditors

   The distribution is made to nine classes of priority claims in order. Each class must be fully paid before the next class receives anything. If the funds are not sufficient to satisfy everyone in a class, then each member of

[188] David J, Reitzel. et.al,. *Contemporary Businesss Law: Pronciples and Cases*. 4th edition. Page 555.

[189] R. Henry, Cheesman. *Op. Cit.* Page 506

[190] P Jane, Mallor., et.al,. *Business Law and the Regulatory Environment: Concept and Cases. 10th edition.* 1996. Page 594.

the class receives the same proportion in claim. The unsecured creditors called as priority creditors consist of:[191]

a. Costs and expenses of administration
b. Involuntary proceeding expenses incurred in the ordinary course of business after petition filed but before appointment of trustee
c. Claims for wages, salaries, and commissions earned within 90 days of petition; limited to $4,000 per person
d. Contribution to employee benefit plans arising out of the services performed within 180 days of petition; limit of $4,000 (including claims for wages, salaries, and commissions) per person.
e. Unsecured claims for grain or the proceeds of grain against a debtor who owns or operate a grain storage facilitty or up to $4,000 by a US fisherman against a debtor who operates a fish production or processing facility and who has acquired fish or fish production from the fisherman.
f. Claims of individual, up to $1,800 per person, for deposit made on consumer goods or services that were not received.
g. Allowed claims for debts to a spouse, former spouse, or child of the debtor for alimony to, maintenance for, or support of such spouse or child in connection with a separation agreement, divorce decree, or other court order (if not assigned to someone else).
h. Government claims for certain taxes

[191] *Ibid.*

i. Allowed unsecured claims based on a commitment by the debtor to a federal depository institution regulatory agency.

3. Other unsecured creditors are called general creditors.

If funds are not sufficients to satisfy all general creditors, then each of the creditors will receive the same proportion of their claims consisting of:[192]

a. General unsecured creditors
b. Secured creditors for the portion of their debt that was not satisfied by collateral
c. Priority creditors for amounts beyond priority limits

The debtor will receive any remaining funds. The rights of the various kinds of creditors depend on rules governing proof of claim, allowability of claims, and priority of payments[193].

Unsecured creditors must file a proof claim stating the amount of their claims against the debtor. Proof of claim is a document required to be filed by unsecured creditors that states the amount of their claim against the debtor. The form for the statement is provided by the court. The proof of claim must be timely filed, which generally means within six months of the first meeting of the creditors. Secured creditors are not required to file proof of claim. However, a secured creditor whose claims exceed the value of the collateral, may submit a proof a claim and become unsecured claimant as to the

[192] *Ibid.*
[193] *Ibid.*

difference[194]. A proof of claim is required for the the recovery of the deficiency. Unless a proof of claims is timely filed, a claim cannot be allowed even though the claim is otherwise valid.[195]

Allowability of claims only allows claims which are eligible for payment out of the debtor's estate, and then, of course, allowed claims will be paid only to the extent that funds are available. Upon the filing of a proof of claim, the claim is deemed allowed unless an interested party such as a creditor or the trustee objects to the allowance of the claim. If there is an objection, the bankruptcy court must decide whether the claim is to be allowed. Claims filed after the 6-month limit will not be allowed. Where a debtor has a defense to an alleged debt, a claim for payment of the debt will not be allowed. The code lists other claims that will and will not be allowed. Where a claim is valid but contingent or unliquidated, the court must estimate the amount of the claim for purposes of allowance so that the closing of the case will not be unduly delayed[196].

Basically when we compare the case of Batavia Air on the distribution of debtor's estate based on the Indonesian Bankruptcy Law compared to the United States of American Bankruptcy Law, both of them have similarity and distinction. The United States of America Bankruptcy Law in the nature contains a secured creditors, preferred creditor, and unsecured creditor. In the US Bankruptcy Law, the terms of unsecured creditor called priority creditor is similar with the terms of preferred creditors in Indonesian Bankruptcy Law.

[194] *Ibid.* Page 500
[195] David J, Reitzel. et.al,. *loc. cit.*
[196] David J, Reitzel. et.al,. op. cit. Page 555-556

The terms of unsecured creditor called as general creditor in the US Bankruptcy Law is similar with the terms of unsecured creditor in Indonesian Bankruptcy Law.

In the Bankruptcy Law of Indonesia preferred creditor and unsecured creditor are not categorized in the same legal position in which they are separated. Indonesian Bankruptcy Law distinguishes the preferred creditor because the opinion of preferred creditors has privilege which cannot be considered having the same legal position over the unsecured creditor since preferred creditors receive their privilege which is given by the law. The distribution of debtor's estate will change if in a bankruptcy settlement there is a preferred creditor. If we refer to the Indonesian bankrutpcy law, the legal position of secured creditors will be moved to the second class. Different from the Bankruptcy Law of the United States of America, even though in a bankruptcy settlement there is a creditor who has priority, the secured creditor's legal position will not be changed or moved to the second class.

The nature term of secured creditor in both Indonesia's Bankruptcy Law and Federal bankruptcy code of United States of America has the same essence. In Indonesia Bankruptcy Law, secured creditors are the creditors who are secured with a security right and so does the essence of secured creditors in the federal bankruptcy code of the United States of America.

The comparison of Batavia Air case which was declared bankrupt by the Commercial Court of Jakarta, Indonesia toward the US Bankruptcy Law shows us a very fundamental difference in relation with the bankruptcy

settlement over the taxation and the labor. As it has been explained in Chapter 1 of this paper, in the case of Batavia Air which was declared bankrupt, the labors still need to fight for their wages. It is because that Indonesian Bankruptcy Law has so many Special Laws concerning the preferred creditors on taxation and labor. Both taxation and labor regulations clearly state the privilege of taxation and labor as a preferred creditors. But, when we refer to the labor and taxation to the structure of creditors in the Indonesian Civil Code, taxation has higher legal position compared to the labor even tough the labor is also categorized as preferred creditor.

Taxation has higher legal position than the labor wage in the Bankruptcy Law because of some assessments. Tax has a purpose for the public interests in which the goal of tax itself is to gain or create a welfare for the society. The taxation will be used for the state development. Even though the labor wage is related to a large number of people, it is considered as an individual interest. The labor wage cannot be classified as the public purpose due to the wage of labor will be used for their private needs. If we refer to the legal position of taxation and labor wage in the Bankruptcy Law of the United States of America, the labor wage has higher legal position than the taxation.

In relation to the case of Batavia Air as known as PT Metro Batavia, Turman M Panggabean as the Batavia Air receiver, states that he will distribute the debtor's estate in proportion without distinguish the legal position of taxation and labors. Turman also argued that the debt distribution

must be based on the pari passu pro rata parte principle.[197] In another hand, Hadi Subhan have the same argumentation toward the Batavia Air receiver which stated that the debt distribution must be based on pari passu pro rata parte principle. In accordance to this argumentation, Hadi Subhan add some opinion which he stated that the debt distribution must not only prevalent against the creditor but also must be distribute in proportional.[198] From the receiver opinion, it clearly stated that the receiver is trying to apply the Indonesian Civil Code concerning the debt ditribution of preferred creditor which must be paid in a balanced.

The example distribution of the debt based on pari passu pro rata parte principle is such as if the bankruptcy estate of a debtor is in the amount of 10 billion rupiahs, which the creditors as such explain below[199]:

1. A has claim in the amount of 20 billion rupiahs
2. B as has claim in the amount of 15 billion rupiahs
3. C has claim in the amount of 10 billion rupiahs
4. D has claim in the amount of 3 billion rupiahs
5. E has claim in the amount of 2 billion rupiahs

The debt distribution of A, B, C, D, and E will be distributed based on the debtor's estate which it will distributed based on the debts precentages. A with claim in the ammount of 20 billion rupiahs will receive 40 percent of the

[197] http://www.hukumonline.com/berita/baca/lt514ee167707bb/buruh-minta-didahulukan-dari-pajak-dalam-kepailitan. *Buruh Minta Didahulukan Dari Pajak Dalam Kepailitan.* Last viewed on 7 December 2013

[198] http://www.hukumonline.com/berita/baca/lt51bece237c41d/bedah-kasus-kantor-pajak-sebagai-kreditor-kepailitan. *Bedah Kasus Kantor Pajak Sebagai Kreditor Kepailitan.* Last viewed on 22 January 2014.

[199] Subhan, Hadi. op. cit. Page 31

payment which is consider in 4 billion rupiahs. B with claim in the ammount of 15 billion rupiahs will receive 30 percent of the payment which is consider in 3 billion rupiahs. c with claim in the ammount of 10 billion rupiahs will receive 20 percent of the payment which is consider in 2 billion rupiahs. D with claim in the ammount of 3 billion rupiahs will receive 0.6 percent of the payment which is consider in 0.6 billion rupiahs. E with claim in the ammount of 2 billion rupiahs will receive 0.4 percent of the payment which is consider in 0.4 billion rupiahs.

CHAPTER IV

CONCLUSION AND RECOMMENDATION

A. Conclusion

Based on the research that has been conducted by the writer, the writer concludes that:

1. In the perspective of law, both taxation and labor have the legal certainty as preferred creditors which are regulated by the law, but the implementation regarding with the labor is still weak. In the bankruptcy settlement, taxation is the preferred creditor that will take its precedence compared to labor because taxation is categorized as creditor who has statutory priority and the taxation law clearly stipulated that taxation is higher than the other preferred creditor. The tax debt must take its precedence since the tax is concerning with the public or state interests. The aim of the public interest is related to the society welfare and development. Meanwhile the unpaid wage of labor is related to the individual interests of the labor. The individual interest of the labor is considered as the private aspect of labor. The private aspect of labor arises based on the employment agreement which is made between the employer and the labor. Labor is categorized as estate creditor due to the nature of the agreement that arises in this action. When we compare the taxation to the labor, taxation must take its precedence due to the tax is an interest which has relation to the public purpose which must be advanced than the private interest. The regulation concerning the taxation and labor is

strengthened in the Indonesian Civil Code, Bankruptcy Law and Suspension of Payment, Taxation Law, and Labor Law.

2. The US Bankruptcy Law usually has three classes of creditors, namely secured, unsecured priority, and unsecured general creditor. The legal position of labor wage in the Bankruptcy Law of the United States of America is higher than the tax. On the contrary, in Indonesia Bankruptcy Law the taxation is higher in terms of legal position than the labor wage. In the bankruptcy settlement, in the case of Batavia Air which was declared as bankrupt, the receiver actually applied the Indonesian Civil Code which stipulates that amongst the preferred creditors the debt distribution will be paid egually. It means that the receiver applied Indonesian Civil Code in the bankruptcy settlement which is possible for the labor to receive the payment without being differentiated with the taxation.

B. Recommendation

The recommendations proposed in this research are:

1. In addition to its regulation stipulated in the Indonesian Civil Code, preferred creditor must be regulated in more detailed in the Bankruptcy Law and Suspension of Payment. The Bankruptcy Law and Suspension of Payment states that labor wage is entitled to receive the precedence, but it does not clearly regulate how far the precedence of labor wages can be apply or implemented. The Bankruptcy Law and Suspension of Payment must clearly state the legal position of labor wage.

2. It is better for Indonesia to make the Bankruptcy Law refer to the US Bankruptcy Law especially regarding with the preferred creditors rank in which labor is prior to tax. The US Bankruptcy Law gives the certainty to the receiver in conducting his duties without any doubts to distribute the debt aquittance. The US Bankruptcy Law clearly regulates the legal position of the creditors starting from the secured creditor, unsecured priority creditor, and unsecured general creditor. The creditor structure that is regulated in the US Bankruptcy Law clearly states that the creditor rank is impossible to change, so it will not arise many opinions in solving the bankruptcy matters.

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