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A Guideline: Positive Administrative Silence (*Fiktif Positif*) in Indonesia



Have you ever experienced the circumstance when a Government Authority (“Authority”) withholds or does not issue your license for no reason, even though the law obliges the Authority to issue it within a specific period of time? You have no clue what the reason might be or what to do, but you need the license and the Authority is not as cooperative as you want them to be in giving you any clarifications on the status of your licenses.

Many seem to either forget or not be aware that we have a fairly new law, Law No. 30 of 2014 concerning Governmental Administration (“**Law 30/2014**”) that tries to solve this issue by giving a party with this problem the right to obtain a license through a court decision. This is in line with the principle of positive administrative silence (or in Indonesian *fiktif positif*) where an Authority is deemed to approve or grant a decision and/or action if the Authority is silent on an application requesting the decision and/or action. Prior to the issuance of the Law 30/2014, the principle that was applied was negative administrative silence (or in Indonesian *fiktif negatif*), in which the Authority was deemed to refuse an application to obtain a decree in the event of the Authority’s silence in responding to the application.

In fact, three years after the issuance of Law 30/2014, the Supreme Court responded to the matter by issuing Regulation No. 8 of 2017 as a guideline to the positive administrative silences (“**Supreme Court Regulation**”). The Supreme Court Regulation basically provides the mechanism and procedure for a party to file a court application with a State Administrative Court (“**Court Application**”), to obtain a Decree and/or Action the Authority has not issued and/or performed, despite the party having filed an application for it. Notwithstanding the above, the Supreme Court Regulation, at the same time, limits the positive administrative silence by granting the State

Administrative Court the authority to examine the Court Application.

The Object of the Supreme Court Regulation

Since the Supreme Court Regulation is intended to implement and, at the same time, examine positive administrative silences, the objective of the Supreme Court Regulation is to give a guidance for a State Administrative Court in examining a Court Application challenging the silence of the Authority on its obligation to issue a decree or perform an action. It can be seen from the Supreme Court Regulation that the object of this regulation is any silence of the Authority on its obligation to issue a decree and/or to perform an action.

Period for Submission of Application

Notwithstanding the broad interpretation of the object above, the Supreme Court Regulation limits the submission of the Court Application to 90 (ninety) calendar days from (i) the date by which the Authority should have issued the decree or performed the action under the prevailing laws and regulation; or (ii) 10 (ten) days from when the application for the decree and/or action was filed by the applicant and completely received by the Authority, if the law is silent on the period for the issuance of a decree or the performance of an action. Failure to comply with this period can make the Court declare the Court Application inadmissible.

Fundamental Differences with General Court Examination

The Supreme Court Regulation provides different Court examination procedures from those applicable to a State Administrative examination. The first difference is that the Supreme Court must settle the application within 21 (twenty-one) working days from when the application is registered. Another difference is that the Supreme Court Regulation eliminates the process of dismissal and preparation and third party intervention. Those differences mean the State Administrative Court can accelerate the examination of the Court Application and then give its decision.

Final and Binding Decision

The Supreme Court Regulation also provides that the decisions issued by the State Administrative Court on the Court Application are final and binding, and therefore the decision will be enforceable and cannot be appealed. If the Court grants the Court Application, the Court will order the Authority to issue the decision and/or perform the action.

Our examination of the precedents shows the State Administrative Court has issued a decision related to this matter, which is Decision No. 04/P/FP/2016/PTUN-JKT granting the Positive Administrative Silence petition filed with the Head Prosecutor of South Jakarta (the "Respondent") by Yenny Sovianna, Camellia Octavia and Vicky Suviana Sudaryanto. The issue of the matter was the failure of the Respondent to issue a decision on the status of confiscated goods within the mandatory period of 10 (ten) working days.

In this case, the State Administrative Court granted the application as a whole.

Conclusion

The Positive Administrative Silence principle in Law 30/2014 provides fresh air for an applicant for a license or action from an Authority, in which the Authority is silent in responding it. However, not much can be seen yet in its implementation since there was no implementing regulation on the Positive Administrative Silence. The absence of the implementing regulation has now been resolved by the Supreme Court in the Supreme Court Regulation as an implementing regulation on Positive Administrative Silence. On the other hand, the Supreme Court Regulation also limit the Positive Administrative Silence, by adding an authority for a State Administrative Court to examine the Court Application, and thus the Positive Administrative Silence does not guaranteed a positive outcome.

The Supreme Court Regulation not only provides the period of the Court Examination and the final and binding status of the decision, it also provides the form of Court Application so that the applicant can properly exercise its rights to obtain the legal status of its application. Its existence gives the applicant legal certainty regarding its application for a decree and/or action to which an Authority has failed to respond. On the other hand, this regulation should also be welcomed by the Authority as a way to implement Good Corporate Governance principles.

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