



DECISION

Number 3/PUU-VI/2008

FOR THE SAKE OF JUSTICE UNDER THE ONE ALMIGHTY GOD

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA

[1.1] Examining, hearing, and deciding upon constitutional cases at the first and final level, has passed a decision in the case of petition for Judicial Review of the Law of the Republic of Indonesia Number 28 Year 2007 regarding the Third Amendment to Law Number 6 Year 1983 regarding the General Taxation Provisions and Procedures against the 1945 Constitution of the State of the Republic of Indonesia, filed by:

[1.2] **The Audit Board (BPK)**, having its address at Jalan Jenderal Gatot Subroto Number 31 Jakarta 10210 by virtue of a Special Power of Attorney dated January 8, 2008, granting power of attorney to Bambang Widjojanto, S.H., LL.M., and Iskandar Sonhadji, S.H., advocates, acting jointly or severally, having their address at Jalan KH. Mas Mansyur Number 121, Central Jakarta, and the Attorneys elect their domicile in the office of the Authorizer.

Hereinafter referred to as **Petitioner;**

[1.3] Having read the petition of the Petitioner;

Having heard the statement of the Petitioner;

Having heard and read the written statement of the Government;

Having heard and read the written statement of the People's Legislative Assembly;

Having examined the evidence;

Having heard the statements of the experts presented by the Petitioner and the Government;

Having heard the statements of the witnesses presented by the Government;

Having read the written conclusions of the Petitioner and the Government;

3. LEGAL CONSIDERATIONS

[3.1] Considering whereas the purpose and objective of the *a quo* petition shall be to review the constitutionality of Article 34 Paragraph (2a) Sub-Paragraph b and the Elucidation of Article 34 Paragraph (2a) of Law Number 6 Year 1983 as amended several times, most recently by Law Number 28 Year 2007 regarding the General Taxation Provisions and Procedures (hereinafter referred as the Taxation Law) against the Constitution of the State of the Republic of Indonesia Year 1945 (hereinafter referred as the 1945 Constitution).

[3.2] Considering whereas prior to further examining the Principal Issue of the Petitioner, the Constitutional Court (hereinafter referred to as the Court) shall first consider the following matters:

1. Whether the Court has the authority to examine, hear and decide upon the *a quo* Petition;

2. Whether the Petitioner has the legal standing to file the *a quo* petition;

With respect to the foregoing two issues, the Court is of the following opinion:

AUTHORITY OF THE COURT

[3.3] Considering whereas based on the provision of Article 24C Paragraph (1) of the 1945 Constitution *juncto* Article 10 Paragraph (1) of Law Number 24 Year 2003 regarding the Constitutional Court (hereinafter referred as the CC Law), the Court has the authority to hear at the first and final level the decision of which shall be final, among other things, to review a law against the 1945 Constitution.

[3.4] Considering whereas the *a quo* petition is a petition for judicial review of a law against the 1945 Constitution. Therefore, the Court has the authority to examine, hear, and decide upon the petition.

LEGAL STANDING OF THE PETITIONER

[3.5] Considering whereas Article 51 Paragraph (1) of the CC Law provides that petitioners in the judicial review of a law against the 1945 Constitution shall be those who deem that their constitutional rights and/or authorities are impaired by the coming into effect of a law, namely:

- a. individual Indonesian citizens (including groups of people having a common interest);

- b. customary law community units insofar as they are still in existence and in accordance with the development of the community and the principle of the Unitary State of the Republic of Indonesia regulated in law;
- c. public or private legal entities; or
- d. state institutions.

Therefore, in order for a party's legal standing to qualify in the petition for judicial review of law against the 1945 Constitution, the said party must describe the following:

- (a) The party's qualification, whether as an individual Indonesian citizen, a customary law community unit, a legal entity, or a state institution;
- (b) the impairment of the party's constitutional rights/authority, in the qualification as stated in item a.

[3.6] Considering also, following Decision Number 006/PUU-III/2005 as supplemented by Decision Number 011/PUU-III/2007 up to the present day, the Court is of the opinion that the impairment of constitutional rights/authority must fulfill the following requirements:

- a. the Petitioner must have constitutional rights and/or authority granted by the 1945 Constitution;
- b. the Petitioner deems that his constitutional rights and/or authority have been impaired by the coming into effect of the law petitioned for review;

- c. the impairment of such constitutional rights and/or authority must be specific and actual or at least potential in nature which, pursuant to logical reasoning, will take place for sure;
- d. there is a causal relationship (*causal verband*) between the impairment of constitutional rights and/or authority and the coming into effect of the law petitioned for review;
- e. if the petition is granted, it is expected that such impairment of constitutional rights and/or authority will not or does not occur any longer;

[3.7] Considering whereas the Petitioner has stated its qualification as a state institution namely the Audit Board (BPK), as intended in Article 23E Paragraph (1) of the 1945 Constitution which reads, “For auditing the management of and accountability for state finances, a free and independent Audit Board shall be established”. Therefore, the Petitioner fulfills the requirements to have the legal standing as Petitioner in this case as intended in Article 54 Paragraph (1) Sub-Paragraph d of the CC Law.

[3.8] Considering, therefore, what should the Court consider next is whether in the qualification of the Petitioner as a state institution as referred to in **[3.7]** above, the Petitioner’s constitutional rights and/or authorities are impaired by the coming into effect of Article 34 Paragraph (2a) Sub-Paragraph b and the Elucidation of Article 34 Paragraph (2a) of the Taxation Law. Regarding this matter, the Petitioner set forth its argument as follows:

[3.8.1] Whereas the Petitioner constitutionally based on Article 23E Paragraph (1) of the 1945 Constitution has the authority to freely and independently audit the management of and accountability for state finances;

[3.8.2] Whereas the authority of the Petitioner as stated in paragraph **[3.8.1]** above is justified and affirmed by several laws, namely:

- a) Law Number 15 Year 2006 regarding the Audit Board (hereinafter referred to as the BPK Law).

Article 6 Paragraph (1) of the BPK Law reads, *“BPK has the duty to audit the management of and accountability for state finances which managed by the Central Government, Regional Governments, other State Institutions, Bank Indonesia, State-Owned Enterprises, Public Service Enterprises, Region-Owned Enterprises, and other institutions or agencies managing state finances”*.

Article 9 Paragraph (1) of the BPK Law reads, *“In performing its duties, BPK has the authority to request information and/or documents which must be provided by every person, organizational unit of the Central Government, Regional Government, other state Institutions, Bank Indonesia, Public Service Enterprises, Region-Owned Enterprises, and other institutions or agencies managing state finances”*.

- b) Law Number 15 Year 2004 regarding the Audit of the Management of and accountability for State Finances (hereinafter referred as the Audit of State Finances Law).

Article 3 of the Audit of State Finances Law reads, *“The audit of the management of and accountability for state finances performed by BPK shall include the element of state finances as referred to in Article 2 of Law Number 17 Year 2003 regarding State Finances”*

Article 10 of the Audit of State Finances Law reads, *“In performing the audit duties, the auditor may:*

- a. *Request documents which must be provided by the official or party concerned with the performance of audit of the management of and accountability for state finances;*
- b. *Access all data stored in various mediums, assets, locations, and any articles or documents in the control of the entity being audited or other entities as deemed necessary in the performance of its audit duties.”;*

[3.8.3] Whereas based on the provisions of Article 3 of the Audit of State Finances Law *juncto* Article 2 of Law Number 17 Year 2003

regarding State Finances (hereinafter referred to as the State Finances Law), BPK has the authority to perform audits of the entire state finances including the audits of state income – both tax or non-tax incomes, every assets and state receivables and debts, the allocation of state assets – and the use of state expenditures;

[3.8.4] Whereas the authority of BPK granted by the 1945 Constitution, and bolstered by several laws as described in sub-paragraphs **[3.8.1]** through **[3.8.3]** above, is limited by the norms in Article 34 Paragraph (2a) Sub-Paragraph b and the Elucidation of Article 34 Paragraph (2a) of the Taxation Law. It is deemed to have been limited because the provision of Article 34 Paragraph (2a) Sub-Paragraph b of the Taxation Law provides the norm that tax officials and/or experts may only provide information to the BPK after receiving a designation by the Minister of Finance. The intended Article 34 Paragraph (2a) of the Taxation Law describes that the authority to perform audits of state finances is not the sole possession of “state institutions”, namely BPK, but also possessed by “government agencies”. Meanwhile the Elucidation of Article 34 Paragraph (2a) of the Taxation Law is deemed to have limited the authority because not all data and/or information may be provided to BPK as a “state institution”; only information regarding the identity of Taxpayers and general information regarding taxation may be provided. Therefore, the Petitioner is of the opinion that

both provisions of the Taxation Law clearly and explicitly reneges on and are contrary to Article 23E Paragraph (1) of the 1945 Constitution and other laws as stated in sub-paragraphs [3.8.2] to [3.8.3] above, thus greatly impairing the constitutional authority of the Petitioner;

[3.8.5] Whereas the Petitioner argues that the matters described in sub-paragraphs [3.8.2] to [3.8.3] above should be considered and believed to have the potential to impair the constitutional authority of the Petitioner because with such Taxation Law provisions, the Petitioner cannot freely and independently perform audits of state income from taxes, whereas tax contribution from Taxpayers to the state is one of the forms of state income or at the very least a part of state finances income according to Article 2 of the State Finances Law;

[3.9] Considering, based on the description in paragraph [3.8] above, it is evident that the existence of impairment of constitutional rights/authorities in the *a quo* petition is directly related with the principal issue of the petition and therefore the impairment of constitutional rights and/or authorities as referred to in Article 51 Paragraph (1) of the CC Law may only be determined after the Court examines the Principal Issue of the Petition;

PRINCIPAL ISSUE OF THE PETITION

[3.10] Considering whereas based on the description of the Petitioner in its petition, the constitutional issue in the *a quo* petition is whether the provisions in Article 34 Paragraph (2a) Sub-Paragraph b and the Elucidation of Article 34 Paragraph (2a) of the Taxation Law impair the Petitioner’s constitutional rights and/or authorities, and therefore such provisions are contrary to the 1945 Constitution, *in casu* Article 23E Paragraph (1) of the 1945 Constitution.

Article 34 Paragraph (2a) Sub-Paragraph b of the Taxation Law reads, “*Excluded from the provisions as referred to in Paragraph (1) and Paragraph (2) are:*

- a. *Officials and experts acting as witnesses or experts in a court hearing; or*
- b. *Officials and/or experts designated by the Minister of Finance to give information to officials of state institutions or Government agencies authorized to perform audits of state finances”.*

Meanwhile, Elucidation of Article 34 Paragraph (2a) reads, “*Information that may be given shall be the identity of the Taxpayer and general information regarding taxation.*

The identity of the Taxpayer includes:

- 1. *name of the Taxpayer;*
- 2. *Taxpayer Registration Number;*
- 3. *address of the Taxpayer;*

4. *address of the business activity;*
5. *business trademarks; and/or*
6. *the business activities of the Taxpayer.*

General information regarding taxation includes:

- a. *national tax income;*
- b. *tax income per Directorate General of Taxes Regional Office and/or Tax Office;*
- c. *tax income per type of taxes;*
- d. *tax income per business classification;*
- e. *number of Taxpayer and/or registered Taxable Entrepreneurs;*
- f. *register of Taxpayer applications;*
- g. *national taxes in arrears; and/or*
- h. *taxes in arrears per Directorate General of Taxes Regional Office and/or Tax Office”.*

[3.11] Considering whereas in order to support its arguments, the Petitioner, in addition to submitting written evidence (Exhibit P-1 through Exhibit P-24, as completely set forth in the Facts of the Case part of this Decision), has also presented experts who have given their statements, as set out in the Facts of the Case part of this Decision, which are principally as follows:

1. Expert Faisal Basri, S.E., M.A.

- Whereas, the Expert is of the opinion that, in developing the economy, it is necessary to possess healthy political and economic

institutions, which include among them taxations. The Expert considers the substance of the *a quo* petition as part of the effort to establish the said healthy institutions;

- Whereas some of the causes of Indonesia's weakened economy the state income from taxation not being optimized and high level of corruption. The Government cannot act effectively. The Expert is of the opinion that the level of Government's effectiveness is only better than that of Laos, Cambodia, and Myanmar but is far behind when compared to Vietnam, China, Thailand, Malaysia, and Singapore.

2. Expert Iman Sugema, Ph.D.

- Whereas, the Expert is of the opinion, that the role of BPK is to conduct layered verification on state income, especially income from taxation, to avoid the problems of: (i) asymmetric information, namely the difficulties in obtaining correct information regarding the amount of taxes; (ii) agency problem, in that many tax agents acted on behalf of themselves instead of the Government; (iii) mutual collusion, a mutually beneficial cooperation between Taxpayers and the tax authorities for not paying taxes as they are supposed to; (iv) organized corruption, namely multilevel, organized, and systematic corruption which is difficult to prove;
- Whereas in auditing Taxpayer data, there is a mechanism called the Chinese wall, which prevents BPK auditors from disclosing

Taxpayer data to the public arbitrarily or from extorting the Taxpayer;

- Whereas, the expert is of the opinion that the mechanism set forth in Article 34 Paragraph (2a) does not provide a Chinese wall facility and is contrary to the Chinese wall principle.

3. Expert Prof. Dr. Philipus M. Hadjon, S.H.

- Whereas the essence of BPK's authority under Article 23E of the 1945 Constitution is an attributive authority, therefore its further elucidation by the law shall not be contrary to the freedom and independence principles, as set forth in the Elucidation of Article 34 Paragraph (2a) of the Taxation Law;
- Whereas the freedom and independence of BPK is imperatively elucidated in Article 6 of the BPK Law;
- Whereas the *ratio legis* of Article 34 Paragraph (2a) is to respect the secrets of the Taxpayer. That spirit is actually also regulated in the BPK Law which states that documents requested by BPK shall only be used for audit purposes.

4. Expert Denny Indrayana, S.H., LL.M., Ph.D.

- Whereas taxes are a part of state finances. Therefore, taxes are a part of BPK's auditing domain;
- Whereas, both literally and grammatically, only BPK is ascribed with the term *free and independent*. The original intent of the

freedom and independence principle is to be free from the influence of the government and other state institutions;

- Whereas the designation from the minister of Finance in relation to audits of state finances in Article 34 Paragraph (2a) of the Taxation Law may result in BPK's being influenced by the government;
- Whereas the limitation in Article 34 Paragraph (2a) of the Taxation Law indicates a conflict of interests, not being in accordance with socio-historic interpretation, and constitutes an arbitrary act of the government;
- Whereas the designation by the minister of Finance in Article 34 Paragraph (2a) of the Taxation Law is an independent designation, whereas instead of being dependent, a ministerial stipulation should be independent.

5. Expert Drs. Ahmadi Hadibroto, M.Ms.

- Whereas it is necessary to handle tax problems through the audit procedures. In this regard, the Minister of finance is the party entitled to determine who has the authority to perform audits, where such determination can be decided beforehand;
- Whereas, in relation to taxes, the gateway for BPK to perform audits of state finances is Article 34 Paragraph (2a) of the Taxation Law. But the obstacle is due to the fact that the authority to provide information by officials or experts appointed by the Minister of Finance is to be granted subsequently;

- Whereas, the Expert is of the opinion that within the scope of detailed and comprehensive tax audits, if BPK's audits of SPT are connected with Taxpayer data being protected property rights, it is actually irrelevant. The Expert agrees that property rights must be protected, but the limits of such protection must be determined so as not to make those property rights considered too sacred.

6. Expert Prof. Dr. Frans Limahelu, S.H., LL.M.

- Whereas BPK is the only state institution that audits the management of and accountability for state finances;
- Whereas BPK's free and independent authority in auditing the management of and accountability for state finances is not subject to the rules or procedures of the Minister of Finance as stated in Article 34 of the Taxation Law.

[3.12] Considering whereas the Court have heard the statement of the People's Legislative Assembly (DPR) (DPR), as completely set forth in the Fact of the Case part of this Decision, which in principle is as follows:

- 1) With respect to the Petitioner's argument that Article 34 Paragraph (2a) Sub-Paragraph b and the Elucidation of Article 34 Paragraph (2a) of the Taxation Law have limited the authority of BPK because tax officials and/or experts may only provide information to BPK after receiving a designation from the Minister of Finance, DPR is of the opinion that in principle the norms set out in Article 34 Paragraph (2a) Sub-Paragraph b

is an exception and is closely related to the restrictions contained in the preceding paragraph namely in Article 34 Paragraph (1) aimed at protecting the Taxpayers and especially their secrecy.

Article 34 Paragraph (1) reads:

Every official are prohibited from disclosing to other parties anything he/she knows or has been by a Taxpayer in the course of his/her position or work in order to implement the provisions of taxation laws and regulations.

The exception in Article 34 Paragraph (2a) Sub-Paragraph b cannot be construed in a way that it restricts or hinders audits by the state Audit Board but rather to protect the secrecy of the Taxpayer as intended in the preceding paragraph namely Article 34 Paragraph (1).

In order to protect the secrecy of the Taxpayer, in principle, every official and/or expert is prohibited from disclosing to another party anything he knows or has been told by a Taxpayer in the course of his position or work in order to implement the provisions of tax laws and regulations [*vide* Article 34 Paragraph (1) of the Taxation Law], however with certain requirements and procedures (namely Officials and/or Experts designated by the Minister of Finance) such principles may be excepted [*vide* Article 34 Paragraph (2a) Sub-Paragraph b of the Taxation Law].

Those requirements and procedures contain the meaning that the parties designated by the Minister of Finance, in this matter only certain officials and/or experts are permitted/legally allowed (exempted from the prohibition) to provide information to the state institution or government agency officials authorized to perform audits of state finances provided that they are designated by the Minister of Finance.

Besides for legality purposes, such requirements and procedures are also aimed at decriminalizing the prohibition of officials from disclosing to other parties anything he/she knows or has been told by a Taxpayer. This is in accordance with the General Provisions of the Indonesian Penal Code, in Article 51 which reads, *“Not punishable shall be the person who commits an act for the execution of an official order issued by the competent authority”*.

Whereas the phrase “designated by the Minister of Finance” in principle is not intended to limit the constitutional authority of BPK in performing audits of the management of and accountability for state finances in relation to the Taxpayers. BPK may perform special audits of the management of and accountability for state finances in relation to the Taxpayers by fulfilling certain requirements and procedures as regulated in Article 34 Paragraph (2a) Sub-Paragraph b of the Taxation Law.

Therefore, the phrase “designated by the Minister of Finance ” to a greater extent mean that only certain officials and/or experts are designated to

provide information to state institutions or government agencies in performing audits of the management of and accountability for state finances in relation with information concerning Taxpayers.

- 2) With respect to the Petitioner's argument that Article 34 Paragraph (2a) Sub-Paragraph b of the Taxation Law, to the extent it contains the phrase "or government agencies" has impaired its authority because it can lead to an interpretation that there are two auditors of state finances namely "state institutions", in this matter in accordance with Article 23E Paragraph (1) of the 1945 Constitution, and "government agencies", DPR states that general supervision on the management of state finances are performed by BPK. However, the Finance and Development Supervision Agency and Inspectorate Generals in every Department are also authorized as internal supervisors. This means that in addition to BPK as a state institution authorized to perform audits of the management and accountability on state finances there are also government agencies that, based on the job description, have the authority to perform audits in government agencies.

- 3) With respect to the Petitioner's argument that according to the Elucidation of Article 34 Paragraph (2a) of the Taxation Law not all data and/or information may be provided to BPK; only information regarding the identity of the Taxpayer and general information regarding taxation may be provided, DPR is of the opinion that the general taxation principles must be understood more accurately. The *self assessment* principle in

taxation gave the freedom for every Taxpayer to fill out their taxation obligations. The taxation obligations performed by the Taxpayers are a private domain which cannot be intervened by any party. The self assessment principle must be respected by the tax authorities, unless the tax authorities receive data or information on the falsehood of taxation obligations [Article 10 Paragraph (1) of the Taxation Law]. Furthermore, the taxation principles also regulate that the tax authorities also have the obligation to keep secret everything reported by the Taxpayers to the tax authority officials [Article 34 Paragraph (1) of the Taxation Law]. Taxation obligation in the form of money deposited to the state is the state's right as a form of state income in the taxation sector. The consequence of the state's receipt of such taxes is that this becomes a public domain.

Regarding the Elucidation of Article 34 Paragraph (2a) of the Taxation Law, information and information are not limitations; this is in line with the provision of Article 34 Paragraph (1) that taxation data from the Taxpayers are private in nature (the Taxpayer's private domain) and is in line with the self-assessment principle.

[3.13] Considering whereas the court has also heard the statement of the President (Government), in this matter represented by the Minister of Law and Human Rights and the Minister of Finance, completely set forth in the Fact of the Case part of this Decision, which in principle is as follows:

1. **Article 34 of the Taxation Law is aimed at Protecting the Rights of Taxpayers**

Whereas the collection and the payment of taxes are the form of the people's trust in their government. By paying taxes, the people have disclosed their private data to the government, among other things as to how much income they receive and how much assets they possess. In order for people to voluntarily and honestly disclose such private data, the tax collection process must be performed with due observance of universal principles including among other this the need for the protection of the secrecy of Taxpayers' data.

Therefore, the secrecy of Taxpayers' tax data and/or information must be legally protected. The legal protection efforts in accordance with the provision of Article 34 of the Taxation Law is actually the **realization of constitutional protection of Taxpayers' human rights** and is **clearly the constitutional duty of the government.**

Even based on tax data secrecy practices in several countries with very developed tax reputations and achievement including the United States, Canada, England, Australia, New Zealand, and France, the secrecy of the tax data submitted by Taxpayers to the Government is greatly protected. Such practices indicate that judicially, countries that uphold the values of democracy and human rights of their citizens also regulate the secrecy of tax data.

2. Article 34 of the Taxation Law is Not Contrary to Article 23E Paragraph (1) of the 1945 Constitution

a. The Phrase “designated by the Minister of Finance to”

Whereas the authority of the Minister of Finance to designate officials or experts as regulated in Article 34 Paragraph (2a) Sub-Paragraph b of the Taxation Law is aimed at implementing the prudence principle which also legitimizes the officials and/or experts in providing taxation data and information to the state institution or government agency officials who perform audits in state finances. This has been intended especially to protect the human rights of Taxpayers based on the 1945 Constitution and to protect the officials and/or experts from criminal sanctions. (Article 41 of the Taxation Law).

Whereas the Taxation Law appoints the Minister of Finance as the authorized official to give exemptions for tax officials and/or experts from the criminal sanction for the prohibited disclosure of Taxpayers' data/secrets, not in the capacity as a right owner or stakeholder, but to fulfill the requirement of an “official/ruler authorized to give official orders”, in conformity with the general provisions of criminal law regarding reasons for decriminalization. Article 51 Paragraph (1) of the Indonesian Criminal Code reads:

“Not punishable shall be the person who commits an act for the execution of an official order issued by the competent authority”.

Therefore the official/ruler authorized to give official orders, in this matter the Minister of Finance as the highest superior of the tax officials and/or experts, is a *conditio sine qua non* or a requirement that must be fulfilled in order to enable the tax officials/experts to be exempted from criminal sanctions for disclosing the data/secrets of Taxpayers to other parties.

b. The Phrase “or Government Agencies”

In the context of creating a clean Government in accordance with the good governance principles, it would be necessary to have good supervision and audits of the management of and accountability for state finances whether done by internal or external auditors. The role of internal auditors is more emphasized as a controlling tool for the government’s own interests in implementing their governance functions including to control the management of state finances without any obligation to report the results of their task implementation to the People’s Legislative Assembly. In other words, the role of the internal auditors is more intended as the Government’s tool of internal supervision.

Whereas the external auditor, in this matter the BPK, is obligated to handover the results of the audit of state finances to the People’s

Legislative Assembly, the Regional Representative Council, and the Regional People's Legislative Assembly, in accordance with its functions based on Article 23E Paragraph (2) of the 1945 Constitution. The report of BPK audit results shall then be used by the People's Legislative Assembly, the Regional Representative Council, and the Regional People's Legislative Assembly as a means of political supervision on the executive functions.

In auditing, BPK as an external auditor may also use the results of audits performed by the government's internal audit officials. This is in accordance with the provision in Article 9 Paragraph (1) of Law Number 15 Year 2004 regarding Audit of the Management of and accountability for State Finances which reads, "In auditing the management of and accountability for state finances, BPK may use the results of audits performed by the government's internal auditors".

Therefore, the existence of government agencies as the internal auditors of the Government does not reduce the role of BPK as external auditors with the function to audit the management of and accountability for state finances based on Article 23E Paragraph (1) of the 1945 Constitution.

c. Elucidation of Article 34 Paragraph (2a)

The elucidation of Article 34 Paragraph (2a) is a further description or elaboration of the word “information” written in the body of Article 34 Paragraph (2a) Sub-Paragraph b of the Taxation Law which reads:

Excluded from the provisions as referred to in Paragraph (1) and Paragraph (2) are:

- a. ...
- b. *Officials and/or experts designated by the Minister of Finance to give **information** to officials of state institutions or Government agencies authorized to perform audits of state finances”.*

Therefore, the Elucidation of Article 34 Paragraph (2a) of the Taxation Law is not *illegal* and is not unconstitutional and does not impair the constitutional rights of the Petitioner. Therefore, it cannot be qualified as being contrary to Article 23E Paragraph (1) of the 1945 Constitution.

d. Whether it is True that BPK does not Audit Taxpayers.

In the statements given orally by the Principal Petitioner, the attorneys, or the Experts of the Petitioners, it is stated that BPK does not audit Taxpayers. Nevertheless, in the petition, the data requested by BPK have been the data and documents of individual

Taxpayers which must be handed over to the BPK, so that BPK may perform research or evaluation on those individual documents. If, based on the results of the said research or evaluation, BPK states that there are taxes in arrears, then **in reality BPK has performed an audit of Taxpayers.**

The Government affirms that auditing Taxpayers should not be interpreted only as visiting the Taxpayers, but also as research and evaluation of the Tax Return (SPT), the Taxpayer's Financial Statements, and other documents/information from the Taxpayers and then stating that the Taxpayer had not paid all his/her taxes, then in reality BPK had performed audits of Taxpayers.

e. The Consequence if the Petitioner's Petition is Granted

The Government is of the opinion that granting the Petitioner's petition for review of Article 34 Paragraph (2a) Sub-Paragraph b of the Taxation Law, particularly the phrase "designated by the Minister of finance to" and the phrase "or Government Agencies" and the Elucidation of Article 34 Paragraph (2a) of the Taxation Law would result in legal uncertainty for the community especially regarding protection on the secrecy of private data/information of the Taxpayers which is a part of human rights. Some of the consequences are:

- 1) violation on the human rights of the Taxpayers in the form of the protection on the Taxpayer's private and secret data and information, among them the Tax Return (SPT), financial statement, and other matters reported by the Taxpayers;
- 2) failure of implementing the prudence principle, because with no binding legal force of that phrase then every officials and/or experts may provide information to the officials of state agencies authorized to perform audits of state finances without considering the authority and competence of the said official and the reasons of the need;
- 3) lack of any guarantee of the legality, accuracy, and validity of the data/information provided by officials and/or experts;
- 4) stating that the phrase "or government agencies" shall have no binding legal force would also eliminate the role of internal audit as a part of the good governance management practices;
- 5) increased risk of abuses of the Taxpayer's data and/or information beyond the interests of fulfilling tax obligations. The concern is that this may reduce the public trust on public institutions;
- 6) in relation with the trust of the Taxpayers, the loss of public trust in the Government may influence the level of compliance of the Taxpayers in performing their civic

obligation in taxes. This condition may result in disruption of state income and thus hindering governance which in the end would make the national objectives as set out in the 1945 Constitution unachievable;

- 7) objections of Taxpayers leading to the judicial review petition of the provision of Article 34 filed by BPK have arisen because the Taxpayers consider their Constitutional rights are being violated.

[3.14] Considering whereas, along with its statement, the Government in addition to presenting written evidence (*Pemt-1* through *Pemt-49*), as completely set out in the Fact of the Case part of this Decision, has also presented experts and witnesses whose statements have been heard by the Court, as completely set out in the Fact of the Case part of this Decision, which in principle are as follows:

1. Expert Prof. Dr. Satrio Budihardjo Joedono

- Whereas, the expert is of the opinion that the authority of BPK which procedurally may not be influenced by any parties is concerned with audits of state finances, not personal finances;
- Whereas the documents required for tax audits are separated into private documents and public documents. Auditing private documents is to be avoided to the maximum possible extent;
- The most important matter to consider is to avoid conducting audits of personal finances as it would create legal uncertainty because of

dualism in the audits and the concern of personal secrets being publicly disclosed through BPK's report.

2. Experts Drs. Soedarjono and Drs. Kanaka Puradiredja

- Whereas the Taxpayers' information contained in the SPT is private property which is confidential. Therefore, actions violating such secrecy are punishable under the criminal law;
- Whereas the exception with respect to the said secrecy principle may be made by and in the following events:
 - The official in possession of those secrets acts as a witness or expert in a court hearing;
 - Officials and/or expert designated by the Minister of finance to provide information to state institution or government agency officials authorized to perform audits of state finances; or
 - For state interests.

3. Expert Prof. Dr. Gunadi M.Sc.,Ak.,

- Whereas there are several reasons for providing protection of Taxpayers, namely:
 - In accordance with international customs and best practices;
 - To respect the political and contractual relationship between the state and Taxpayers;
 - To protect the privacy of Taxpayers;

- To prevent the arbitrariness of the rulers;
- To provide legal certainty;
- To increase the community's taxation compliance with on taxation integrity;
- Whereas the protection of Taxpayers' secrets may be exempted in the following events:
 - witness or expert statements are required in a court hearing;
 - statements by a state institution or government agency authorized to perform audits of state finances are required;
 - For state interests;
 - For the interests of a court examination.

4. Expert Abdul Hakim Garuda Nusantara, S.H., LL.M.

- Whereas tax data as a property is guaranteed as a human right as regulated in Article 28G Paragraph (1) *juncto* Article 28H Paragraph (4) of the 1945 Constitution;
- Whereas there is a double jeopardy to the Taxpayers if on the one hand they face audits by officials of the tax office while on the other hand they face audits by BPK with all of the associated risks;
- Whereas the protection of property may be excepted for the public interests with three limitations to the extent that such exception is:
 - lawful;
 - reasonable;
 - proportional;

- Whereas the disclosure of information without the consent of the owner is an illegal action;
- Whereas the Taxpayer's property of confidential information is a human right that may be breached for public interests which may only be conducted through statutory procedures, namely for:
 - audits;
 - court investigation;
- whereas a balance between the Taxpayers' human rights and public interests (due process of law) is necessary to prevent arbitrariness and to provide legal certainty.

5. Witness Frederik Tumbuan

Whereas granting BPK's petition would unavoidably create injustice and legal uncertainty for the Taxpayers, including the witness, and it would eliminate the witness' right to safety and protection from fear, even though those rights are guaranteed by Article 28G of the 1945 Constitution.

6. Witness Rheinald Kasali

- Whereas the witness, since only having a single source of income as a state employee until possessing various additional sources of income, has always willingly paid his taxes in accordance with the principle of self assessment adopted by the Taxation Law;
- Whereas, since obtaining his Taxpayer Registration Number (NPWP), the witness has undergone two tax audits. The witness

felt the discomfort of being audited by tax officials because the witness must disclose the witness' private personal matters, such as personal and family identity, savings, portfolio, assets (commercial papers), property, debts, inheritance, grants, and other assets both movable and immovable. But, because there is a guarantee that the secrecy of all matters disclosed by the witness shall be protected, the witness is a bit relieved even though there are still a few concerns especially regarding data which are business-related which may be used by business competitors or marketers who often invade privacy;

- Whereas the witness still vividly remembers, when residing in the United States of America, several distressing events befell people when data regarding their identities and riches were widely circulated and misused by irresponsible parties;
- Whereas the witness has also read that the American Central statistics Bureau refused the request of its intelligence agency to obtain data regarding citizens of Japanese-ancestry during the era of World War II;
- Whereas the witness offers to BPK that if BPK does not wish to obtain the permission of the Minister of Finance in performing audits of state finances in taxation, it would be advisable for BPK to request the permission of the Taxpayers but the Taxpayers must be given the right to establish a Taxpayers association in order to

protect their interests, not only concerning privacy but also the interest in legal certainty.

OPINION OF THE COURT

[3.15] Considering whereas after carefully examining the Petitioner's description in the petition and the Petitioner's statements in the hearing, the written evidence presented by the Petitioner, the written evidence presented by the Government, the statement of DPR, the statement of the Government, the Statements of Witnesses presented by the Government, the statements of Experts –presented by the Petitioner and the Government – as set forth above, the Court is of the following opinion:

[3.15.1] Whereas, Article 23E Paragraph (1) of the 1945 Constitution reads, *“For auditing the management of and accountability for state finances, a free and independent Audit Board shall be established”*. Therefore, the constitutional authority of BPK is to audit the management of and accountability for state finances. Meanwhile, the target of the exercise of the constitutional authority of BPK shall be parties performing the management of and accountability for state finances. In other words, whoever performed acts of management of and accountability for state finances, the said party will be subject to audits performed by BPK.

[3.15.2] Whereas, in accordance to Article 6 Paragraph (1) of Law Number 15 Year 2006 regarding the State Auditory Board (hereinafter referred to as the BPK Law) the objects of BPK's audit are parties who manage state finances. Article 6 Paragraph (1) of the BPK Law reads, "BPK shall have the duty to audit the management of and accountability for state finances performed by the Central Government, Regional Governments, other State Institutions, Bank Indonesia, State-Owned Enterprises, Public Service Enterprises, Region-Owned Enterprises, and other institution or agencies managing state finances". This law also affirms that BPK in performing the audit as intended shall be based on the law regarding the audit of management of and accountability for state finances, as explicitly stated in Article 6 Paragraph (2) of the BPK Law which reads, "the performance of audits by BPK as intended in Paragraph (1), shall be based on the law regarding the audit of the management of and accountability for state finances".

[3.15.3] Whereas, based on the description in sub-paragraph **[3.15.1]** and sub-paragraph **[3.15.2]** above, then in order to decide the existence of an impairment in the constitutional authority of BPK in the *a quo* petition shall depend on the following matters:

- a) What is intended by state finances;
- b) What is intended by audits;
- c) What is intended by the management of state finances;

d) What is intended by the accountability for state finances.

But, before answering the aforementioned questions in letters a) through d), the Court considers it necessary to affirm that the freedom and independence intended in Article 23E Paragraph (1) of the 1945 Constitution may not be interpreted solely in connection with the creation of BPK but shall also include the freedom and independence in performing the constitutional authority of BPK as granted by the 1945 Constitution. The reason is that, the purpose of establishing the BPK is to perform audits of the management of and accountability for state finances. Such purpose may not be achieved if the BPK is not free and independent in performing its authority. However, the freedom and independence of BPK in performing the said authority is not limitless, it must still be subject to the legal provisions in connection with the performance of its authority, namely in this matter the law regarding the audit of management of and accountability for state finances, as explicitly stated in Article 6 Paragraph (2) of the BPK Law. Without such limitation, the huge authority possessed by BPK as state auditor may be potentially be abused, as it would be the case with any authority possessed by any institution or agency.

In other words, the said limitation is an indispensable requirement in order to ensure the effectiveness of the checks and balances

mechanism between state institutions or organs in a democratic constitutional state and a democratic state based on law, with the said mechanism being one of the mechanisms to uphold the principle of constitutionalism which is the first requirement for a democratic constitutional state and a democratic state based on law.

- [3.15.4]** Whereas, in accordance with Article 1 Sub-Article 1 of Law Number 17 Year 2003 regarding State Finances (hereinafter referred to as the **State Finances Law**) and Article 1 Sub-Article 7 of the BPK Law, **State Finances** are *“all of the state’s rights and obligations which can be valued in money, and everything, both monetary or goods in nature, which may be possessed by the state in connection with the performance of the said rights and obligations”*. Furthermore, Article 2 of the State Finances Law reads, *“State Finances as intended in Article 1 Sub-Article 1 shall, include:*
- a. *The right of the state to collect taxes, publish and distribute money, and take loans;*
 - b. *The obligation of the state to perform public governance services and pay third-party claims;*
 - c. *State Revenues;*
 - d. *State Expenditures;*
 - e. *Regional Revenues;*
 - f. *Regional Expenditures;*

- g. State/regional assets which are self-managed or managed by other parties in the form of money, commercial papers, receivables, goods, and other rights which can be valued in money, including assets separated from state/regional companies;*
- h. Assets of other parties controlled by the government in the context of performing governance duties and/or public interests;*
- i. Assets of other parties acquired by using state-provided facilities”;*

Meanwhile, in accordance with Article 1 Sub-Article 1 of the State Finances Law and Article 1 Sub-Article 9 of the BPK Law, **Audit** is the process of problem identification, analysis, and evaluation performed in an independent, objective, and professional manner based on audit standards for assessing the truth, accuracy, credibility, and reliability of information regarding the management of and accountability for state finances.

Whereas **Management of State Finances**, in accordance with Article 1 Sub-Article 6 of the Audit of State Finances Law and Article 1 Sub-Article 8 of the BPK Law, is all activities of the officials managing state finances in conformity with their position and

authority, which includes planning, performance, supervision, and accountability.

Whereas **Accountability for State Finances**, in accordance with Article 1 Sub-Article 7 of the Audit of State Finances Law and Article 1 Sub-Article 11 of the BPK Law, is the Government's obligation to perform the management of state finances in an orderly, lawful, efficient, economic, effective, and transparent manner, with due regard to justice and propriety.

[3.15.5] Whereas, with the interpretation of state finances, audits, management of state finances, accountability for state management, as described in sub-paragraph **[3.15.4]**, linked with the arguments of the Petitioner as described in sub-paragraph **[3.8.1]** through sub-paragraph **[3.8.5]**, the determination of the existence of an impairment of BPK's constitutional authority as argued shall be based on the following:

- a) Whether Article 34 Paragraph (2a) Sub-Paragraph b and the Elucidation of Article 34 Paragraph (2a) of the Taxation Law are the objects of BPK's authority.
- b) If they are the objects of BPK's authority, whether those provisions have eliminated or hindered BPK from performing free and independent audits.

- c) Whether the existence of “state institutions” that also perform audits of the management of and accountability for state finances would result in the elimination or obstruction of BPK’s freedom and independence in performing its constitutional authority.

Since the objects of BPK’s authority to audit are officials who manage state finances in conformity with the position and authority of the corresponding officials, meanwhile the state’s right to collect taxes is also included in the meaning of state finances, therefore it is evident that both Article 34 Paragraph (2a) Sub-Paragraph b and the Elucidation of Article 34 Paragraph (2a), to the extent that they involve the actions or activities of officials who manages state finances, are included in the scope of authority of audits by BPK.

However, in this connection it must be affirmed that the essence of the Taxation Law is to regulate the relationship between the state and the Taxpayer, therefore overall, the Taxation Law contains the provisions regarding the balance of performance of state rights and obligations as the tax collector with the rights and obligations of the Taxpayers. The method for regulating such balance of rights and obligations of the respective parties depends of the taxation system adopted by the corresponding law. As we all know, the Taxation

Law adopts the system of self assessment and refers to the core policies of:

- a. improving the efficiency of tax collecting in the context of supporting state revenue;
- b. improving the service, legal certainty and justice to improve competitiveness in capital investment, with still supporting the development of small and medium-scale enterprises;
- c. adjusting the demands of socio-economic developments in the community and developments in information technology;
- d. improving the balance between rights and obligations;
- e. simplifying the procedures of taxation administration;
- f. improving the application of the *self assessment* principles in an accountable and consistent manner; and
- g. supporting the business climate to become more conducive and competitive (*vide* the General Elucidation of the Taxation Law item 3 and item 4).

Therefore, in relation with the *a quo* petition, the problem arising is to what extent would BPK's authority to audit may be performed because, on the one hand, as a consequence of the adopted principle of self assessment, the state *in casu* the Government through the Minister of Finance (and the officials in its environment) as tax authorities are prohibited from disclosing to other parties

everything they know of they have been told by the Taxpayers [Article 34 Paragraph (1) of the Taxation Law]; while on the other hand there is an obligation to provide information to officials of state institutions or government agencies authorized to perform audits of state finances which include the tax sector (in this matter the right of the state to collect taxes). If the said audit is performed by BPK, the results would then be submitted to the DPR, DPD, and DPRD in accordance with their authorities and then declared open to the public [*vide* Article 7 Paragraph (1) *juncto* Paragraph (5) of the BPK Law *juncto* Article 19 Paragraph (1) of the Audit of State Finances Law]. Even though there are regulations stating that reports of audit results which are declared open to the public do not include reports which contain state secrets [*vide* Article 19 Paragraph (2) of the Audit of State Finances Law], a question arises as to whether the personal data of Taxpayers may be considered as state secrets. If it is considered as state secret, then the extent to which BPK may access the private data of the Taxpayers would be unclear. On the contrary, if it is not considered as state secret, then it would mean that it is subject to the obligation to be declared as data open to the public, which would make it contrary to Article 34 Paragraph (1) of the Taxation Law.

In such situation, there is a clash between two legal interests, with both interests being protected by the Constitution, namely:

Firstly, the legal interest of the constitutional right of the Taxpayer to his/her property as intended in Article 28G Paragraph (1) of the 1945 Constitution, in this matter the statutory guarantee of secrecy of all information he provided to the state (tax authority) regarding his/her obligation to pay taxes based on the self assessment principle;

Secondly, the legal interest of the constitutional authority of BPK to perform free and independent audits of state finances [Article 23E Paragraph (1) of the 1945 Constitution] therefore obligating it to examine all documents in connection with audits of the management of and accountability for state finances [*vide* the Elucidation of Article 9 Paragraph (1) Sub-Paragraph b of the BPK Law].

In such conditions, the steps taken by BPK and the Minister of Finance by creating a memorandum of understanding, as disclosed in the hearings on February 27, 2008, in order to bridge the two clashing legal interests, for the time being, is the correct answer. Nevertheless, in the long run, there must be an adjustment between the two *a quo* laws (the Taxation Law and the BPK Law) and other laws connected with state finances thus guaranteeing the protection of those two legal interests, and that such adjustment is not the authority of the Court, but the authority of the lawmakers, *in*

casu the DPR and the President (government) in the context of legislative review.

In cases where there are two legal interests with both being guaranteed by the constitution, as it is the case with the *a quo* petition, it would not be possible for the Court to decide one interest to be constitutional and the other unconstitutional when the case is filed as a petition for judicial review against the 1945 Constitution. Such action may only be performed in the exercise of the Court's authority to decide on disputes of the authority of state institutions whose authorities are granted by the 1945 Constitution, not in the review of laws against the 1945 Constitution.

[3.15.6] Whereas, furthermore the Petitioner also argues that the authority of BPK granted by the 1945 Constitution, supported by several laws as set out in sub-paragraph **[3.8.1]** through sub-paragraph **[3.8.3]**, has been limited by the norm in Article 34 Paragraph (2a) Sub-Paragraph b of the Taxation Law because, according to the norm in the provision of Article 34 Paragraph (2a) Sub-Paragraph b of the Taxation Law, tax officials and/or experts may only provide information to BPK after receiving a designation from the Ministry of Finance.

With respect to this argument of the Petitioner, the Court is of the opinion, as set out in sub-paragraph **[3.15.5]** above, that as a

consequence of the self assessment system adopted by the Taxation Law, only the tax authorities (*in casu* the Minister of Finance) has the right to know all information pertaining to the Taxpayer and the tax authorities are prohibited from disclosing to other parties all information they possess. Such prohibition even applies to the experts appointed to assist the implementation of laws and regulations in taxation. However such prohibition is exempted or inapplicable if: (i) the said information is needed for the interests of the court or (ii) the said information is intended for audits of state finances, whether performed by state institutions (*in casu* BPK) or Government agencies. In other words, the party justified or authorized to provide information in the context of audits of state finances shall be the tax authority namely the Minister of Finance. Because such authority is with the Minister of finance, it would be logical if other parties – namely tax officials or experts under the Minister of Finance– would only be able to provide information after receiving a permission or designation by the Minister of Finance. Therefore, there would be no obstruction whatsoever for BPK to perform audits of state finances in this connection. If the problem, as disclosed in the hearing on February 27, 2008, that the permission or designation is often issued very late by the Minister of Finance thus causing BPK to be obstructed in performing its authority, such is not the result of the

unconstitutionality of a law but the untimely manner of the application of such law; therefore, the problem is a technical problem in the implementation. Such technical obstructions should be able to be solved through a memorandum of understanding as set out in sub-paragraph **[3.15.5]** above.

Meanwhile, in respect of the phrase “government agencies” in Article 34 Paragraph (2a) Sub-Paragraph b of the Taxation Law which the Petitioner considers as having obstructed the freedom and independence of BPK, with the argument that the 1945 Constitution only wishes for a **single** Audit Board, the Court is of the opinion that the word “a” in Article 23E of the 1945 Constitution is an affirmation that there is no other agency or institution that has the authority to audit the management of and accountability for state finances **which is similar to BPK in terms of freedom and independence as well as position**. If the Government (President) – to fulfill the need of internal audit – considers it is necessary to establish a separate agency, such action is allowed by the 1945 Constitution. The freedom and independence of such agency is not equal with the freedom and independence of BPK. Its position is also not equal with BPK, because it is a part of the Government (Executive). Therefore, the phrase “Government agencies” in Article 34 Paragraph (2a) Sub-Paragraph b of the Taxation Law would not obstruct the freedom and independence of BPK in

performing its constitutional authority. BPK should have even felt assisted by the existence of such “Government agencies”. Because, Article 9 Paragraph (1) of the State Finances Law reads, *“In performing audits of the management of and accountability for state finances, BPK may utilize the audit results of the Government’s internal supervision officials”*. Article 9 Paragraph (2) of the State Finances Law has even made it obligatory that in the context of audits of the management of and accountability for state finances, for the Government’s internal audit results to be submitted to BPK.

[3.15.7] Whereas the Petitioner has argued that the Elucidation of Article 34 Paragraph (2a) of the Taxation Law has limited the authority of BPK with the argument that the Elucidation of Article 34 Paragraph (2a) of the Taxation Law has created a new norm which does not conform to its essence as an exception to Article 34 Paragraph (1) of the Taxation Law. The court is of the opinion that this matter is also connected with the problem as set out in sub-paragraph **[3.15.5]** above, which is the clash between two legal interests with both interests being protected by the constitution, namely the legal interest of the Taxpayer’s constitutional right to his/her property as intended in Article 28G Paragraph (1) of the 1945 Constitution, in this matter the statutory guarantee of secrecy of all information given to the state (tax authority) in accordance with the principle of

self assessment adopted by the Taxation Law and the legal interest of BPK's constitutional authority to perform audits of state finances in a free and independent manner which obligates it to examine all documents pertaining with the audits of the management of and accountability for state finances. Therefore, it is *legislative review* that is needed by the lawmakers to ensure the harmonization of the various laws pertaining to state finances. Furthermore, as a short-term answer, as had suggested in sub-paragraph **[3.15.5]** above, this matter may be regulated in a separate regulation which includes the agreed matters in the memorandum of understanding draft between BPK and the Ministry of Finance (*vide* attachment 3 the Petitioner's Final Conclusion), as disclosed in the hearings.

[3.15.8] Whereas, prior to the harmonization of the various laws in the field of or pertaining to state finances as intended in sub-paragraph **[3.15.7]** above, if BPK, in performing its constitutional authority performed audits of the management of and accountability for state finances based on the provisions of Article 34 Paragraph (2a) Sub-Paragraph b and the Elucidation of Article 34 Paragraph (2a) of the Taxation Law, discovered indications that a crime has been committed, BPK may use the reason "for state interests" as intended in Article 34 Paragraph (3) of the Taxation Law to obtain written evidence from or regarding Taxpayers.

[3.16] Considering, based on the entire description in paragraph **[3.15]** above, that it is evident that there is no impairment of constitutional authority of the Petitioner as a result of the coming into effect of Article 34 Paragraph (2a) Sub-Paragraph b and the Elucidation of Article 34 Paragraph (2a) of the Taxation Law. Therefore, notwithstanding that the Petitioner has fulfilled the qualification requirements as a party that may file a petition for judicial review of a law against the 1945 Constitution in accordance with the provision of Article 51 Paragraph (1) Sub-Paragraph d of the CC Law, *in casu* as a state institution, the requirements of legal standing are not fulfilled because the requirements of impairment of a constitutional right/obligation are not fulfilled.

4. CONCLUSION

Based on all the foregoing descriptions, the Court has reached the following conclusion:

[4.1] Whereas the state of disharmony between laws, *in casu* the Taxation Law and several laws in the field of or pertaining to state finances (the State Finances Law, the Audits of State Finances Law, the BPK Law), has become the cause of two legal interests with both interest being protected by the constitution, therefore in the *a quo* judicial review case, which is not a dispute on the authority of state institutions, the existence of an impairment of constitutional authority of BPK as a result of the coming into effect of Article 34 Paragraph (2a) Sub-Paragraph b and the Elucidation of Article 34 Paragraph (2a) of the Taxation Law cannot be established;

[4.2] Whereas, notwithstanding the fact that BPK has fulfilled the qualifications as a party that may file a petition for judicial review against the 1945 Constitution, the requirements of legal standing as intended in Article 51 Paragraph (1) of the CC Law are not fulfilled because the impairment of the constitutional authority of BPK as set out in paragraph [4.1], cannot be established and therefore, the petition must be declared unacceptable (*niet ontvankelijk verklaard*);

5. RULINGS

In view of Article 56 Paragraph (1) of Law Number 24 Year 2003 regarding the Constitutional Court (State Gazette of the Republic of Indonesia Year 2003 Number 98, Supplement to the State Gazette of the Republic of Indonesia Number 4316);

Passing the Decision:

To declare the Petitioner's petition **unacceptable** (*niet ontvankelijk verklaard*);

Hence the decision was passed in the Consultative Meeting of Constitutional Court Justices on Monday, May 12, 2008 by nine Constitutional Court Justices and was pronounced in the Plenary Session open for the public on this day, Thursday, May 15, 2008 by Jimly Asshiddiqie as Chairperson and concurrent Member, I Dewa Gede Palguna, H.A.S. Natabaya, Maruarar Siahaan, H.M. Laica Marzuki, Harjono, H. A. Mukthie Fadjar, Soedarsono, and Moh. Mahfud

MD respectively as Members, assisted by Makhfud as the Substitute Registrar and attended by the Petitioner/its Attorneys, the Government or its representative, and the People's Legislative Assembly or its representative, as well as the Directly Related Parties.

CHIEF JUSTICE,

SIGNED,

Jimly Asshiddiqie,

JUSTICES,

SIGNED,

I Dewa Gede Palguna

SIGNED,

Maruarar Siahaan

SIGNED,

Soedarsono

SIGNED,

H.A.S Natabaya

SIGNED,

H.M. Laica Marzuki

SIGNED,

Harjono

SIGNED,

SIGNED,

H.A. Mukthie Fadjar

Moh. Mahfud MD

DISSENTING OPINION

With respect to the abovementioned Court Decision, Constitutional Court Justice Maruarar Siahaan has a dissenting opinion as follows:

From a very different point of view from that of the majority, I will consider the whole arguments of the Petitioners' Petition, which in principal have stated as follows:

1. Article 34 Paragraph (2a) Sub-Paragraph b of Law Number 6 Year 1983 in conjunction with Law Number 28 Year 2007 insofar as it is related to the phrase "designated by the Minister of Finance to", or in complete the article reads "**and/or Experts designated by the Minister of Finance to provide information to the officials of state institution or Government agencies authorized to perform audits of state finances**".
2. Article 34 Paragraph (2a) Sub-Paragraph b of Law Number 6 Year 1983 in conjunction with Law Number 27 Year 2007 insofar as it is related to the phrase "or Government agencies", or in complete the article reads: "officials and/or Experts designated by the Minister of Finance to provide information to the officials of state institution or Government agencies performing audits of state finance".

3. The whole Elucidation of Article 34 Paragraph (2a) which reads,
“Information that may be given shall be the identity of the Taxpayer and general information regarding taxation.

The identity of the Taxpayer includes:

- 1) *name of the Taxpayer;*
- 2) *Taxpayer Registration Number;*
- 3) *address of the Taxpayer;*
- 4) *address of the business activity;*
- 5) *business trademarks; and/or*
- 6) *the business activities of the Taxpayer.*

General information regarding taxation includes:

- a. *national tax income;*
- b. *tax income per Directorate General of Taxes Regional Office and/or Tax Office;*
- c. *tax income per type of taxes;*
- d. *tax income per business classification;*
- e. *number of Taxpayer and/or registered Taxable Entrepreneurs;*
- f. *register of Taxpayer applications;*
- g. *national taxes in arrears; and/or*
- h. *taxes in arrears per Directorate General of Taxes Regional Office and/or Tax Office”.*

Contradicts Article 23E Paragraph (1) of the 1945 Constitution, and shall therefore have no binding legal force.

LEGAL STANDING

Legal standing requirements as provided for in Article 51 Paragraph (1) of the CC Law and criteria stipulated by Court following the Decision Number 006/PUU-III/2005 and Decision Number 011/PUU-V/2007, must be seen from the aspect of constitutional right and authority provided for in Article 23E Paragraph (1) of the 1945 Constitution, which states the authority given to the Audit Board (BPK) to audit the management of and accountability for state finances. Based on the formulation of Article 51 Paragraph (1) of CC Law, whereas the Petitioner **considers** that its constitutional right and authority are impaired, with the arguments and evidence presented being deemed sufficient to be the basis for to state that legal standing requirements for the Audit Board to file a quo petition have been fulfilled. Any opinion to the effect that Article 23E Paragraph (1) of the 1945 Constitution does not regulate the Audit Board authority constitutes a literal interpretation which is inadequate to interpret the authority given by constitution, which in general constitutes fundamental regulation regarding state authority organization, and not regulating the constitutional right and authority in detail. The definition of constitution itself may serve as the principal guidance to provide interpretation of the authority granted by and stipulated in the 1945 Constitution.

Article 34 Paragraph (2a) Sub-Paragraph b, regarding the designation by the Minister of Finance of the Officials who will provide information, and the

officials acting as witnesses and/or experts in Court Hearing, is deemed to have impaired its constitutional authority by the Audit Board, should it is seen from the presented evidence showing that the appointment and license to do the audit is answered within a quite long period and even some of them are rejected (*vide* Exhibits P-12 up to P-17), while the matter must be fulfilled in accordance with the provision of Article 10 Sub-Paragraph a of Law Number 15 Year 2004 regarding the Audit of the Management of and Accountability for State Finances. Therefore, the formulation of Article 34 Paragraph (2a) Sub-Paragraph b should be formulated in such a way to support the constitutional duty of the Audit Board. In addition, the Petitioner considers that the elucidation of Article 34 Paragraph (2a) Sub-Paragraph b restricting the data and document that may be given to the Audit Board has obstructed the implementation of audit of the management of and accountability for state finances, and then according to us the accountability of the official of Directorate General of Taxation is to keep the Taxpayer data confidential against disinterested Parties while the Audit Board as the state institution having the duty to audit the validity of the duty implementation of Directorate General of Taxation in collecting and paying the taxes freely and independently shall, on the contrary, be based on the principal Taxpayer data. The confidentiality of data and information argued by the Minister of Finance may be breached by such audit contradicting with the purpose of the financial audit of the management and accountability of the Directorate General of taxation, since the Audit Board as the authorized state institution, shall also be obligated to keep the Taxpayer data confidential. In doing the audit of taxation data, what is meant

by the Taxation Law is none other than the Audit Board as taxation Law constitutes the sectoral provision in the field of taxation, and the Directorate General of taxation is responsible to **keep** the Taxpayer data **confidential toward another party** which has no right thereto, and not to the institution which is authorized to do the audit. The applied legal regime in observing the confidentiality on the Taxpayer data in **financial audit context**, shall be the Audits of State Finances Law, so that if the argument on such confidentiality uses the regulation regarding the accountability of the Directorate General of Taxation stipulated by the Taxation Law which is restrictive for the authority of the Audit Board, then it is obvious that the articles have impaired the authority of the Audit Board. By the formulation of criteria in Article 51 Paragraph (1) of the CC Law and Court Decision Number 006/PUU-III/2005, it is obvious that the legal standing of the Audit Board to file a petition for judicial review has been fulfilled.

The requirements of legal standing as provided for in Article 51 Paragraph (1) of the CC Law and the criteria adopted by the Court following its Decision Number 006/PUU-III/2005 and Number 011/PUU-V/2007, either seen from the aspect of constitutional right or the aspect authority provided by Article 23E Paragraphs (1), (2) and (3) of the 1945 Constitution, describing the authorities granted to the Audit Board to audit the management of and accountability for state finances, being granted only to one board, which is the Audit Board and not to any other board, and implemented freely and independently, and the audit results are to be submitted to the People's Legislative Assembly, the Regional Representative Council, and the Regional People's Legislative Assembly for

follow-up. Such constitutional authority is **deemed** to have been impaired as it is obstructed to conduct the financial audit freely due to Article 34 Paragraph (2a) Sub-Paragraph b, which stipulates the condition that to acquire data and information of taxation in the context of audit and management on state finance a Designation by the Minister of Finance of the Officials/Tax Experts that may provide data must be obtained in the first place, and Elucidation of Article 34 Paragraph (2a) which limits the data and documents, which in fact has established a new norm of the described norm, thus reducing or limiting the easiness on the part of the Petitioner to audit the management on state finances. The restriction on the authority granted by the Constitution to the Audit Board as further elaborated by Law regarding the Audit of the Management of and Accountability for State Finances and by Law regarding the Audit Board, even though interpreted by the Government as a traffic regulation for an orderly audit and designation of the officials authorized to provide information, in order to be released from the criminal responsibility arising from the responsibility to keep the information and data of taxation of Taxpayers confidential. Therefore, by observing the written evidence in Exhibit P-12 through P-17, it is evident that the Designation in Article 34 Paragraph (2a) of the *a quo* Taxation Law, which shall be meant to assist the Audit Board in conducting state finance audit, has prevented the Audit Board from properly conducting the audit as its constitutional authority. Based on the formulation of Article 51 Paragraph (1) of the CC Law, that the Petitioner shall **deem** that its constitutional right has been impaired, along with the arguments and evidence presented, This sufficient by the Court as

the basis to state that the legal standing requirement for the Audit Board to file the *a quo* petition for judicial review has been fulfilled.

PRINCIPAL ISSUE OF THE CASE

In our opinion, the assessment of this judicial review must begin with a description of the definitions of the following:

1. Audit of the management of and accountability for state finances;
2. Freedom and independence of the Audit Board to conduct the audit of the management of and accountability for state finances;
3. The position of Law Number 6 Year 1983 *juncto* Law Number 28 Year 2007 regarding Tax against Law Number 15 Year 2004 regarding the Audit of the Management of and Accountability for State Finances *juncto* Law Number 15 Year 2006 regarding the Audit Board in conducting audits of state finances.

With respect to said matter, the main thoughts are expressed as follows:

1. Definition of the Audit of the Management of and Accountability for State Finance

The Power separation principle in the sense of division of powers to delegate and divide power into different principal functions and different institutions, constitutes the basis for organizing the power in different branches, with a view to preventing the power from being centralized in

one hand, which may violate fundamental rights and freedom of the people as well as the legal provisions binding the state institutions granted with the authorities. To prevent such arbitrariness, then aside from the separation or division of power into different authority branches, such different authority branches shall have duty to exercise supervision within a checks and balances mechanism to each other. The power or authority of state institutions is regulated in constitution with the purpose of limiting their power or authority being inclusively regulated in such division of powers in such a way that it is expected to prevent deviation or misuse of power from happening.

As the elaboration of Article 23E Paragraph (1) of the 1945 Constitution, which stipulates the constitutional authority of the Audit Board, the detailed functions, duties, and authorities of the Audit Board are described in Law Number 15 Year 2004 regarding the Audit of the Management of and Accountability for State Finances, which formulates the following definitions:

- a. Audit shall be the process of problem identification, analysis, and evaluation performed in an independent, objective, and professional manner based on audit standards for assessing the truth, accuracy, credibility, and reliability of information regarding the management of and accountability for state finances. (Article 1 Sub-Article 1);

- b. Management of State Finances shall be all activities of the officials managing state finances in conformity with their position and authority, which includes planning, performance, supervision, and accountability. (Article 1 Sub-Article 6);
- c. Accountability for State Finance shall be the Government's obligation to perform the management of state finances in an orderly, lawful, efficient, economic, effective, and transparent manner, with due regard to justice and propriety. (Article 1 Sub-Article 7).

Seen from the horizontal supervision function within checks and balances mechanisms, as formulated in Article 23E Paragraph (1) and further elaborated by Law Number 15 Year 2004 regarding State Finance Audit, the aforementioned audit and supervision shall be a form of transparency, good governance, and accountability, which must be realized. Therefore, as the implementation of the principle of good governance which is transparent and accountable, then all state institutions and state officials having the authority to manage state finance, shall provide all assistance, facilities, and easiness in the context of implementing the audit of the management of and accountability for state finances. Any state institution and state official shall be obligated to provide all facilities and shall be open for providing access to data and information required for the said audit, because objective problem identification, analysis, and evaluation which to assess the validity,

accuracy, and credibility of financial management and accountability requires the easiness.

2. Freedom and Independence of the Audit Board

An objective, professional, and reliable audit can only be conducted if the auditors have easiness, either in accessing data or information, in making the analysis as well as in conducting the evaluation and then in submitting the said audit report to the concerned and authorized party. The freedom and independence of a state institution within its principal function and duty may not only be defined structurally on its organs and institutions in an organizational, administrative, and financial way without any influence and power of another state institution, but also especially may be defined functionally in implementing its principal duty, which may not be influenced, restricted, or obstructed by the influences which are illegal by the forces outside of the Audit Board, including the provisions of laws and regulations which are not harmonious with the said functional freedom. Independence and freedom shall be the principal preconditions for the realization of transparency, good governance, and accountability, as well as the enforcement of law and justice in managing the state finances, in the context of fulfilling the state's financial duty in administering the effective governance as well as improving the people's welfare. This principle shall be obviously embedded and reflected institutionally and individually within the BPK auditors for the audit process

that will be conducted, which should be fully respected and supported by all institutions which are audited or which become audit objects. Different from the Government's argument in its statement that the freedom and independence of the Audit Board are restricted only from the aspects of administration, finance, and organization of the Audit Board, then the foremost element of the freedom and independence of the Audit Board is precisely laid in its functional freedom, by having the easiness required in achieving the purpose to conduct evaluation, analysis, and at last acquire the audit results which are objective, reliable, and containing material validity. Therefore, the established Audit Board shall be given freedom and independence in the 1945 Constitution, so that the administrator of state authority using the granted authority in the field of state finance management and accountability will conduct the administration which is effective, efficient, transparent, and just/proper. Hence, it seems rather odd if the provisions of laws and regulations and the interpretation given to them are in fact not in line with the said constitutional substantive purpose, only due to the procedural cause which is viewed more predominant. Notwithstanding the importance of traffic regulation in financial audit that shall be maintained in the context of sectoral duty implementation and to prevent the ignorance of legal obligation resulting in criminal sanction, it is extremely disproportionate to arrange such reason in such a way it may have an implication of obstructing the implementation of the audit constitutional duty. Therefore, in its implementation, the Audit Board as

the institution and auditor that individually doing the audit function shall give assessment on the data, information, and other evidence independently, by denying all external influences, pressure, persuasion, threat, and promises from anyone or any institution for any reason, including the existence of laws and regulations which are not harmonious with the 1945 Constitution. With such independence, the auditor shall keep and maintain the independent image as well as develop the self-reliance standard in order to reinforce the community's trust in the results of the audit conducted.

3. The position of Law Number 28 Year 2007 regarding General Taxation Provisions and Procedures, Against the Constitution and Law Number 15 Year 2004 regarding the Audit of the Management of and Accountability for State Finances *juncto* Law Number 15 Year 2006 regarding the Audit Board

Article 1 Sub-Article 1 of Law Number 17 Year 2003 regarding State Finance, formulates that referred to as state finance shall be "*all of the state's rights and obligations which can be valued in money, and everything, both monetary or goods in nature, which may be possessed by the state in connection with the performance of the said rights and obligations*". Article 2 explicitly states that the state finance shall include including "*the right of the state to collect taxes, publish and distribute money, and take loans*". Thereby the tax shall constitute the state revenue

which in Article 1 Sub-Article 1 of Law Number 28 Year 2007 regarding General Taxation Provisions and Procedures is formulated as: “*obligatory contribution payable by the individual or institution to the state which is mandatory, without having any compensation directly and shall be used for state interest for the greatest prosperity of the people*”.

From the formulation of **state finances** and **state revenue** which are acquired from tax, then state finances in the form of state right and obligation which may be valued in money, and the tax stipulated by Taxation Law, shall constitute state right valued in money, which must be paid to the state pursuant to Law, by using procedures and calculation stipulated by the Taxation Law. Thereby, for state finances, tax shall constitute one of sectors that support state revenue, so that the Law on General Taxation Provisions and Procedures shall constitute the sectoral Law in the matter of State Finance Law. Law of General Taxation Provisions and Procedures shall constitute the law regulated state relations, which has the right and authority to force the settlement of Taxpayer Contribution to the state, and Taxpayers with their rights to acquire the protection and respect, whose relationship is made on the basis of mutual trust so that upon the formulation stipulated by state regarding how taxpayer obligation is calculated, then the Taxpayer will make the calculation and payment on the basis of Taxpayer self-assessment. The validity and accuracy of the self-assessment process, data, and result as well as the stipulation of taxes payable, shall be

examined in such a way that the state right on a part of Taxpayer revenue shall be guaranteed. The existence of public element in the state's right in enforcing the mandatory contribution payable in the form of such public process to the state based on Law, has the consequence that the confidentiality of information and data revealed by Taxpayers to tax authority must be maintained by disallowing the tax authority to reveal such information to other parties which has no authority. Article 34 of Law Number 28 Year 2008 regarding General Taxation Provisions and Procedures reads as follows:

Paragraph (1) *“Every official and/or expert is prohibited from disclosing to another party anything he knows or has been told by a Taxpayer in the course of his position or work in order to implement the provisions of tax laws and regulations”*

Paragraph (2) *“The prohibition as intended in paragraph (1) shall also apply to the Experts appointed by the Directorate General of Taxation to assist the implementation of the provisions of taxation laws and regulations.”*

Due to its characteristic containing public aspect in the form of contribution payable by Taxpayers conducted by self-assessment method, the confidentiality intended in the provisions of taxation laws may not be categorized as an absolute right to privacy, which is incontestable. In the

context of the implementation of financial audit, certain officials appointed by the Minister of Finance as witnesses or experts in a court hearing and also the officials designated to provide information to the officials of state institutions or government agencies authorized to conduct the audit in the field of state finance shall be the official instruction excluding the intended provision of information from the scope of punishable acts (*strafbaar*). Therefore, the information and **data of Taxpayers must kept confidential by the Tax Officials against uninterested parties.**

By understanding the position of Law on General Taxation Provisions and Procedures as the law regulating the relationship between state and Taxpayers, and Law of the Audit of the Management of and Accountability for State Finances as the law regulating the relationship of state officials managing the state finance as the accountability for the authority granted to them to the state, then in viewing the relationship with regard to the law regulating the right and obligation of state officials and state institutions/Government agencies concerned with the audit of state finance management and accountability under their authority, including among others the Directorate General of Taxation which is authorized to collect and manage the tax which is being Taxpayers' contribution, then the law applied in regulating such relationship shall be Law Number 15 Year 2004 regarding the Audit of the Management of and Accountability for State Finances. Therefore, the license or stipulation issued by Minister of Finance to certain officials or experts to provide information and provide

written evidence from or regarding Taxpayers as stipulated in Article 34 Paragraph (2a) Sub-Paragraph a and Article 34 Paragraph (3) of Law on General Taxation Provisions and Procedures may not be used as the basis to understand the relationship between General Taxation Provisions and Procedures and the Audit Board with regard to State Finance Audit, but as the internal regulation for the Officials of the Department of Finance in the context of implementing legal obligations as the basis for justifying (*rechtsvaardigingsgrond*) or the basis for exclusion or exemption (*schulduitsluitingsgrond*) from criminal sanction with respect to the prohibition of Taxpayers' data disclosure.

With this point of departure, I shall give an assessment of the constitutionality of the Petitioner' Petition, with the following description:

1. Article 34 Paragraph (2a) Sub-Paragraph b of Law Number 6 Year 1983 *juncto* Law Number 28 Year 2007 insofar as it is related to the phrase “designated by the Minister of Finance to”, which completely reads as follows: “*Excluded from the provisions as referred to in Paragraph (1) and Paragraph (2) are: Officials and/or experts **designated by the Minister of Finance to give information to officials of state institutions or Government agencies authorized to perform audits of state finances**” contradicts Article 23E paragraph (1) of the 1945 Constitution.*

The essence of the complete text of Article 34 shall be the obligation of the Officials of the Directorate General of Taxation to keep all information and data regarding Taxpayer given to them confidential in the context of their position or occupation or the implementation of Taxation laws and regulations, with criminal sanction being prescribed for any violation. However, several officials ***appointed or designated by the Minister of Finance***, shall be exempted from the obligation to keep information or data of taxpayer confidential, to provide information to the officials of state institutions or Government agencies **in the context of state finance audit**, so that I am of the opinion that as a matter of fact that the content of article which is not relevant to be reviewed against Article 23E Paragraph (1) of the 1945 Constitution, which the Audit Board has granted the authority to conduct the audit of the management of and accountability for state finance, in which function the Audit Board is given the independence and self-reliance. Functional independence to conduct an audit in the context of analysis and evaluation of the validity of management and accountability supposedly has no point of contact which can restrict and obstruct the independence and self-reliance of the auditor, since as a matter of fact the ***designation*** by the Minister of Finance of the officials appointed to provide information in the context of audit in relation to information and data of Taxpayers in a

way which contradicts the prohibition from disclosing the secrets Taxpayers, which only constitutes the internal procedures in the Department of Finance, with respect to who shall be given the official instruction to implement the content of Law, in order to prevent from being criminalized for such violation as *strafuitsluitingsgronden* or *rechtsvaardingsgronden*, with the prohibited act of disclosing confidential information of Taxpayers.

However, the matter which is related to a constitutional norm shall be in case where such designation is treated as having binding effect against the state institution that will conduct the audit in the sense that the audit conducted will be made dependent on the discretion of the Minister of Finance whether or not to issue the **stipulation of appointment of the officials** assigned to provide information, which shall have an impact on whether or not the audit is conducted, so that it becomes a particular obstruction to the constitutional authority of the Audit Board in conducting the audit on the management of and accountability for state finances. The proper and appropriate period to be claimed as an obligation in the context of supporting the **state interest** shall be in such a way that the process shall be quick, simple, and easy. Only with such condition, it shall be deemed constitutional. In other words, any issuance of stipulation contradicting the principle or condition of **quick, modest, and easy** process, with the issuance being slow,

complicated, and extremely difficult, would end up with the norm of Article 34 Paragraph (2a) Sub-Paragraph b of the *a quo* Law being contrary to the 1945 Constitution (*conditionally constitutional*). Such consideration shall, *mutatis mutandis*, apply to Article 34 Paragraph (3) which, although it is petitioned for judicial review, constitutes a provision that shall be read as an integral part within the framework access for auditor to conduct the audit. No issuance of the **license** and **stipulation** the all officials of the Directorate General of Taxation to provide information in the context of audit by the Audit Board within the proper and appropriate period based on the *a quo* Article 34 Paragraph (2a) Sub-Paragraph b shall be deemed to have been taken as the authority to give a license or as a refusal, which is contrary to the substance of Article 23E Paragraph (1) of the 1945 Constitution and Article 10 of Law Number 15 Year 2004 regarding the Audit, Management, and Accountability for State Finances.

2. Article 34 Paragraph (2a) Sub-Paragraph b of Law Number 6 Year 1983 *juncto* Law Number 28 Year 2007 insofar as it relates to the phrase “or *Government agencies*” which completely reads as follows:

*”Officials and/or experts designated by the Minister of Finance to give information to officials of state institutions **or Government agencies** authorized to perform audits of state finances”*, argued by

the Petitioner as being contradictory to Article 23E Paragraph (1) of the 1945 Constitution, especially regarding the provision that there shall be only one Audit Board examining the management of and accountability for state finances freely and independently. By the phrase "*state institutions or government agencies authorized to perform audits of state finances*", as found in Article 34 Paragraph (2a), shall be interpreted in such a way that in addition to BPK, there are still other **Government agencies** that also have the authority pursuant to Law to conduct audits in the field of state finances. The Agency for Finance and Development Audit (BPKB), the Inspectorate General of each department which is also authorized to audit financial field, and the Regional Supervision Board which is authorized to conduct supervision at the level of Regional Government are found in reality. The matter that must be considered shall be whether the 1945 Constitution indeed **orders only one agency** to audit the management of and accountability for state finances, so that other agencies are not desired by the constitution.

Whereas in considering this matter, the question to answer first shall be what becomes the scope of **other government agencies** as the auditor in the field of state finances referred to in the *a quo* article, so that it may be determined whether or not the **duplication** of authority occurs in auditing the management of and

accountability for state finances which is contrary to the mandate of Article 23E Paragraph (1) of the 1945 Constitution. Each Inspectorate General of governmental department shall be obviously authorized to conduct internal supervision in its respective department, so that the scope and accountability of its authority can be considered different from the authority and responsibility of the Audit Board. Similarly, the Regional Supervision Board (Bawasda), *in casu* in the audit in Directorate General of Taxation, in our opinion, the Inspectorate General of the Department of Finance shall be subject to the provisions of Law on General Taxation Provisions and Procedures, including particularly the said Article 34 Paragraph (2a), so that with different scope and accountability, the existence of other government agencies as the auditor in the field of state finances in the departmental scope, shall not contradict the mandate for the existence of **one auditor agency** pursuant to Article 23E Paragraph (1) of the 1945 Constitution. However, the existence of other state institutions having the authority to audit state finances as possessed by BPKP, constitutes a matter which should be seen in a broader perspective, either from the history and purpose of their establishment or from the scope of state finance management and accountability which is their duty in order to determine the constitutionality of their existence.

BPKP has undergone a number of changes since the *Djawatan Akuntan Negara/DAN (Regering Accountantsdienst)* was established by *Besluit* Number 44 dated October 31, 1936, with the principal duty of conducting the research on the accounting of many state companies and certain departmental agencies. In 1959-1966, the structure was changed and known as the Directorate General of State Finance Supervision (DJPKN). In 1983, by **Presidential Decree Number 31 Year 1983, DJPKN** changed its name into the Finance and Development Auditor Agency (BPKP). Furthermore, by Presidential Decree Number 103 Year 2001 BPKP became a Non-Department Government Institution in the Government of the Republic of Indonesia which was a Central Government Institution, and was established to implement certain Governmental duties from the President [Article 1 Paragraph (1)]. The Duties and functions of the BPKP are (i) the review and arrangement of national policy in the field of finance and development supervision, (ii) the formulation and implementation of policy in the field of finance and development supervision, (iii) coordination of functional activity in the implementation of BPKP duty, (iv) monitoring, the granting of guidance and development in finance and development supervisory activities, and (v) development and general administration services in the field of general planning, administration, organization and management, personnel, finance,

archival matters, code service, equipment, and internal affairs. In administering the foregoing functions, BPKP shall have the authorities among others in (i) macro-planning arrangement in its field, (ii) policy formulation in its field, (iii) development and supervision of regional autonomy administration including the granting of guidance, development, training, direction, and supervision in its field.

From the formulation of position and authority of BPKP, it seems obvious that BPKP shall not be an auditor agency which is independent and self-reliant, as it constitutes a Central Government Institution established to perform certain governmental duties from the President under and responsible to the President, and pursuant to Article 106 Paragraph (1) Sub-Paragraph f of Presidential decree Number 30 Year 2003 as the amendment to Presidential Decree Number 103 Year 2001, shall be under the Coordination of the State Minister for Administration Reforms. Therefore, either institution or its audit shall not constitute constitutional organ with the authority, self-reliance, and independence; either structural, organizational, or functional, but it shall constitute Government internal supervisory agency in the field of finance and development. Irrespective of **inefficiency** that **may occur** due to the duplication in government internal supervision among Inspectorates General from respective departments and regional Supervision Boards of

each regional Government and Finance and Development Auditor Agency (BPKP), then I do not see any violation of the provision of Article 23E Paragraph (1) UUD 1945 which stipulates the existence of an Audit Board to audit the management of and accountability for state finance freely and independently, as BPKP, Inspectorate General and Regional Supervision Board having audit characteristic, position, and scope as well as the level of independence which is far different from the Audit Board. Therefore, insofar as regarding the phrase “**or Government Agencies**”, which in Article 34 paragraph (2a) Sub-Paragraph b of Law Number 6 Year 1983 *juncto* Law Number 28 Year 2007, it completely reads “*Officials and/or experts designated by the Minister of Finance to give information to officials of state institutions or **Government agencies** authorized to perform audits of state finances*”, shall not deemed contradictory to Article 23E Paragraph (1) of the 1945 Constitution.

3. **Elucidation of Article 34 Paragraph (2a) Sub-Paragraph b.**

The elucidation reads as follows:

“Information that may be given shall be the identity of the Taxpayer and general information regarding taxation.

The identity of the Taxpayer includes:

1. *name of the Taxpayer;*

2. *Taxpayer Registration Number;*
3. *address of the Taxpayer;*
4. *address of the business activity;*
5. *business trademarks; and/or*
6. *the business activities of the Taxpayer.*

General information regarding taxation includes:

- a. *national tax income;*
- b. *tax income per Directorate General of Taxes Regional Office and/or Tax Office;*
- c. *tax income per type of taxes;*
- d. *tax income per business classification;*
- e. *number of Taxpayer and/or registered Taxable Entrepreneurs;*
- f. *register of Taxpayer applications;*
- g. *national taxes in arrears; and/or*
- h. *taxes in arrears per Directorate General of Taxes Regional Office and/or Tax Office”.*

The Petitioner argues that the elucidation of Article 34 Paragraph (2a) has clearly and explicitly ignored and contradicted Article 23E Paragraph (1) of the 1945 Constitution. Audits conducted by the Audit Board including audit on state finance management and accountability, and the audit scope of the Audit Board shall constitute state finance including the right of state to collect tax,

spend and circulate money and make the loan (Article 2 Sub-Paragraph a of Law Number 17 Year 2003 regarding State Finance), as further regulated in Law Number 15 Year 2004 regarding the Audit, Management, and Accountability on State Finance and Law Number 15 Year 2006 regarding the Audit Board.

On the other hand, in its statement the Government states that it is very misleading if the Petitioner assuming that the provision of Article 34 Paragraph (2a) Sub-Paragraph b of General Taxation Provisions and Procedures and its elucidation contradict the 1945 Constitution. It is further explained that any state institution shall observe other associated laws and regulations in implementing its function, duty, and authority so as to prevent it from being implemented to the greatest possible extent, in which it is in line with one of main principles of state administration that shall be observed by any state institution, which is human rights protection. Human rights restriction by state shall be justifiable insofar as it is enabled by Law approved by the community itself through its representatives. Any state authority administrator including but not limited to the Audit Board shall not use its authority arbitrarily which results in human rights violation. In the perspective of modern state, the main duty of the state shall be to advance human rights; therefore, prudential principle has become a

necessary condition to firmly held by any state apparatus in the governmental administration.

In assessing the Petitioner' arguments, Government arguments and statements of Experts, the Petitioners, and also the government, then it is necessary to notice that the audit standards recognized anywhere require that it is sometimes necessary to audit the transaction which becomes the calculation basis to observe the material validity. In observing to what extent the access may be given to the auditor with regard to the different views and interpretations on Law, a tension may arise, which is experienced similarly in several systems. Such tension has been resolved by the agreement and recognition that the auditor has the right to access the documents required by the auditor to perform its duty, and several agreements regulated to be able to manage the confidentiality of Taxpayer record and information properly. This is aimed at keeping the balance between the supervision required to protect state revenue and the inconvenience of business circles in fulfilling their obligation. The experience indeed has shown that Taxpayer tends to be more obedient voluntarily, if (i) tax apparatuses serve Taxpayer by providing education and assistance in performing their duties; (ii) the effective legal enforcement and sanction application for the violations creating the prevention of strong non-compliance; and (iii) Tax apparatus that is transparent,

honest, fair, and unbiased in implementing the tax law.. Voluntary compliance may be best obtained through self-assessment system, in which Taxpayers themselves calculate their own obligations, submit the reports of annual tax returns and pay the self-calculated tax, and in the event of failure, Taxpayers will face the risk of being imposed with a penalty. It shall also recognized that only tax apparatus is authorized to conduct an audit on Taxpayer and issue the stipulation on assessment that has been improved, and therefore, if the external auditor finds any error in calculation and assessment, such case would be the submitted to the tax apparatus to be followed up. Unless if it is related to alleged corruption, then the matter shall be referred to law enforcers. In such case, the confidentiality of Taxpayers data having a healthy policy basis, but it should provide the probability to reveal such confidentiality in some particular cases. As confidentiality is designed to encourage Taxpayers' voluntary compliance, then the challenge is how to guarantee that the process related to Taxpayers' privacy protection does not ignore the need in order to increase the community trust on the whole operation of taxation system. In the event that contradiction occurs between Law on the Audit, Management, and Accountability of State Finances and Law of the Audit Board providing access to Taxpayers' data, meanwhile taxation law prohibit its disclosure, then such tension or dispute

shall constitute the Justice's duty to solve it by the decision or delegate it to certain agreements, among other things through the memorandum of understanding (MoU) of the Audit Board with the Minister of Finance. However, as the guidance of best-practices generally followed by the world, as described in Article 20 of Lima Declaration which represents the results of ninth INTOSAI congress dated October 17-26, 1977 followed by 95 countries of five continents, which reads:

1. *Supreme Audit Institutions shall be empowered to audit the collection of taxes as extensively as possible and, in doing so, to examine individual tax files;*
2. *Tax audits are primarily legality and regularity audits however, when auditing the application of tax laws, Supreme Audit Institutions shall also examine the system and efficiency of tax collection, the achievement of revenue targets and, if appropriate, shall propose improvements to the legislative body.*

Furthermore, in assessing the Petitioners' petition regarding the Elucidation of Article 34 Paragraph (2a) Sub-Paragraph b, then the following matters shall be the questions that must be answered:

1. Whether the Elucidation of Article 34 Paragraph (2a) Sub-Paragraph b formulates a totally new norm rather than

explaining the norms in Article 34 Paragraph (2a) Subparagraph b.

2. Whether the new norm identifying the documents that may be given to the Audit Board Auditor as included in Elucidation of Article 34 Paragraph (2a) Sub-Paragraph b, in fact give assistance in the implementation of duty, function, and authority of the Audit Board in performing the audit, management, and accountability of state finance freely and independently, to be able to give analysis and evaluation accurately and correctly in the context of establishing *good governance, accountability and fairness*, in accordance with the mandate of the Constitution, where Article 10 of Law Number 15 Year 2004 stipulates that the Audit Board shall reserve the right to obtain access to such document and the Directorate General of Taxation shall be obligated to grant it.
3. Whether indeed the documents of Taxpayers' data and information given to and collected/obtained by the Directorate General of Taxation constitute the full right of ownership and privacy of the Taxpayers, which constitute the protected human rights and may not reduced in the manner that the Audit Board observe/read it in the context of financial audit.

According to the statements and the experts and evidence presented, we are of the opinion that:

1. Elucidation of Article 34 Paragraph (2a) Sub-Paragraph b includes a new norm

Section E item 148 of Law Number 10 Year 2004 regarding the Establishment of Laws and regulations and its attachment which constitutes an inseparable part, E point 148 and so forth, state as follows:

- *“Elucidation has the function as the formal interpretation of the establishment of laws and regulations on certain norms in the corpus. Therefore, elucidation only includes further description or elaboration of the norm stipulated by the corpus. Thereby, elucidation as the facility to clear up the norm in corpus may not result in the existence of obscurity of the explained norm”.*
- *“Elucidation may not be used as the legal basis to make further regulation. Therefore, it should be avoided to formulate a norm in the elucidation”.*
- *“In the elucidation, it is avoided to make a formulation with the content including the disguised changes in the provisions of Laws and regulations”.*

- *“to arrange the elucidation of Article by Article, it should be noticed that its formulation:*
 - a. *shall not contradict the principal material regulated in the corpus.*
 - b. *shall not extend or add the existing norms in the corpus.*
 - c. *shall not make repetition of the principal material stipulated by the corpus.*
 - d. *shall not repeat words, terms, or definitions that have been included in general provisions”.*

Based on the provision that shall be observed in the establishment of Law especially with respect to the relationship between elucidation and the corpus as explained, as it has been the Court Decision prior the existence of Law Number 10 Year 2004, then it seems that Elucidation of Article 34 Paragraph (2a) Sub-Paragraph b has extended or added the norm of Article 34 Paragraph (2a) Sub-Paragraph b and not clarify the norm in the corpus. The norm substance in Article 34 Paragraph (2a) Sub-Paragraph b, shall relate to *who is who* or who has been designated by the Minister of Finance to provide information to the officials of state institution official authorized to conduct the audit in the field of state finances; however in

the elucidation, its substance has changed into *which is which* that relates to what document may be given to state institution officials authorized to conduct the audit in such state finance field. In the event that the lawmaker indeed requires the norm substance in Elucidation of Article 34 Paragraph (2a) Sub-Paragraph b as the regulation which is binding in general, as its substance constitutes the particular norm separated from the norm of the corpus, then the substance of such elucidation shall constitute the part of the corpus regulating a necessary norm, which is improper to be added in the elucidation. Moreover, irrespective of the existence of the fact that such elucidation formulation has no correlation with norm substance in the corpus, then such elucidation substance also contradicts the Law prevailing in the field of Audit, Management, and Accountability on State finance stipulated by Law Number 15 Year 2004, Article 10 of which clearly provides that the Audit Board Auditors may request all documents deemed necessary for the audit and any official shall be obligated to grant them. The said Article shall be the elaboration of authorities to conduct the audit freely and independently. In view of the confidentiality of data that is obligated to be protected by the Audit Board officials, then such restriction shall be based on the objective

and rational need of the implemented state financial audit, and not being strictly restricted in Elucidation of Article 34 Paragraph (2a) which precisely does not support the purpose of the implemented audit to establish the transparency which without any obstruction may show how the utilization and administration of state authority is delegated to Tax official in a responsible way pursuant to the prevailing law according to the principle of *good governance*. Elucidation of Article 34 Paragraph (2a) illegally includes the new norm, which in fact also in a limitative way includes the document that may be accessed by the Audit Board Auditor in a manner that contradicts Article 10 of Law Number 15 Year 2004 which constitutes the elaboration of Article 23 E Paragraph (1) of the 1945 Constitution. Such Elaboration thereby has limited the independence and freedom of the Audit Board to conduct an audit, and constituted the matter which is improper to be used as the legal basis to restrict the freedom and independence of the Audit Board in determining the document which shall be deemed necessary for reviewing the accountability of tax apparatus in performing their duties. The confidentiality of Taxpayers' documents shall be kept from ***other uninterested parties, while the Audit Board shall be the party which has the***

right pursuant to the 1945 Constitution and Law of State Finance Audit, who is also subject to the legal obligation with respect to the confidentiality of such documents.

According to such arguments and consideration, it could be seen that such elucidation contradicts the 1945 Constitution, especially Article 23E Paragraph (1). The Government's argument regarding the best practices followed by many countries, after having been observed, precisely provides access as extensive as possible, by using certain rules and procedures, and not any of the system filed as best-practices in the world use restriction on the type of document that may be revealed by auditor in the context of state financial audit, as conducted with the norm in Elucidation of Article 34 Paragraph (2a) Sub-Paragraph b.

2. The elucidation does not support the state financial audit in the context of good governance, transparency, and accountability.

An audit in good governance framework, in auditing the utilization description of state authorization delegated to state official for the purposes stipulated openly, then between objectives and achievement, between aspirations and reality, between idealism and reality, will be found a gap, that occurs due to many factors. In auditing and examining

the existence of a gap, it is certain that there are many factors that influence them who are authorized to perform certain duties and authorities, which are certainly necessary to be observed from the relevant data to do the assessment or evaluation and accurate analysis, in accordance with the truth. Therefore, the evaluator or auditor needs the easiness pursuant to the standard stipulated previously *in casu* in state financial audit in taxation field, then the measurement that will be used shall be the definition of tax itself. Tax shall be defined as the obligatory contribution given to state with compulsory nature (Article 2 point 1) based on Tax return by Taxpayer used to submit the report of calculation and/or tax payment, tax object and/or non-tax object, and/or assets and obligation in accordance with tax laws and regulations (Article 1 Sub-Article 11) by self-assessment means. Even though the system constitutes the system chosen on the basis on mutual trust, the object of audit to measure the performance or audit for certain purpose from the official granted authorization shall relate to validity, accuracy, efficiency, and compliance with law. Such case may only be obtained by basing it on all documents are used in Tax return from self-assessment process, the stipulation of determined imposition, and the realization of deposit to the

state. Evaluation on such validity and accuracy will be obstructed in the event that the access for the auditor conducting the audit is limited to only to the extent of the document stipulated by audit object entity. Furthermore, the restriction criteria of document shall be based on laws and regulation with sectoral nature as mentioned in Elucidation of Article 34 paragraph (2a) Sub-Paragraph b, with the reason not being presented proportionally compared to the purpose that is going to be achieved. Of the documents that may be given to the auditor as mentioned in the elucidation, **there is barely any document which is relevant** to the validity and accuracy audit, which may refer to number, either derived from the result of self-assessment, or as the result of exercising the authority granted to the Directorate General of Taxation to stipulate tax payable to the state. Moreover, in the stipulation of tax restitution, then the actual data shall constitute the important instrument to conduct an audit. In the event that the confidentiality of such document is based on laws and regulations imposed to the Directorate General of Taxation which is obligated to keep the said confidentiality and not allowed to reveal it **to other parties for purposes other than** those intended by its duties, then the Audit Board as the auditor shall be the state institution

granted the authorization to audit the validity of the implementation of authority granted to the Directorate General of Taxation in performing tax collection, which shall constitute the institution that pursuant to the 1945 Constitution precisely has the right to obtain the access to Taxpayers' documents and information. Nevertheless, it should be maintained that such audit and access may not provoke the thing that the government's expert called as double-jeopardy within the obligation of Taxpayer that has been stipulated by the Directorate General of Taxation, so that it gives the impression that there is no legal certainty. The audit object of auditor shall be the tax apparatus in administering the state authority entrusted to him/her which must be justifiable. In the event that to achieve the good audit and accomplish the objectives, the auditor is of the opinion that it may only be implemented by seeing and reading the Taxpayers data and information that shall be deemed confidential, then the Elucidation of Article 34 Paragraph (2a) Sub-Paragraph b is not supposed to be used as the ground to restrict a good audit by providing access only to such general document and information. To the contrary, as the practice found in Australia and New Zealand, in fact the all required data which includes numbers

of data/information of Taxpayers may precisely be given to the Auditor, by covering the Taxpayers' identity which is irrelevant to the implemented audit regarding state finance management and accountability.

Especially in the audit conducted by the Audit Board, the probability of the existence of double jeopardy in the audit conducted by the Audit Board resulting in the lack of legal certainty may not occur if the Audit Board is consistent not to stipulating unfulfilled obligations of the Taxpayers, but only accessing the tax apparatus and stipulate it to replace the loss that may arise from the mistakes, either intentionally or unintentionally. [Article 10 Paragraph (1) and Paragraph (2) of Law Number 15 Year 2006 regarding the Audit Board].

Even though it has been briefly discussed in the beginning part, in the effort to further interpret the meaning and purpose of Article 23E Paragraph (1), Article 1 Sub-Article 1 and Article 10 of Law Number 15 Year 2004 in conjunction with the Elucidation of Article 34 Paragraph (2a) Sub-Paragraph b, then a comparative interpretation through best practices known in many countries in the world presented by the Petitioner namely the Audit Board (BPK) has been responded by the Government by stating that the

examples presented are only seen from one side, even though they have been briefly discussed in the beginning part, then it becomes essential to see the procedure, substance, and type of information/data obtained by the auditor according to best practices, presented by both parties which is also supposedly used by Court in making the decision on the *a quo* case as follows:

1. England

Tax officer shall be prohibited from disclosing any information kept by the tax authority in relation to its function, except for (i) the purpose related to taxation authority function, and (ii) not violating the restriction stipulated by the commissioner. [Article 18 Paragraph (2) Chapter 11 of Law regarding Commissioner for Revenue and Customs. The procedure for revealing the Taxation data of Taxpayers to the National Audit Office is that after receiving the request from NAO, the official must ask clarification regarding which information relates to audit and the reason why it is necessary to see such document. The request of such audit topic shall be referred to Her Majesty's Revenue and Customs (HMRC) business coordinator and make sure that such disclosure is known by the

senior manager and supervisor of such data directorate where there may be data being audited by NAO in the room of Her Majesty's Revenue and Customs (HRMC) [Pedoman Pengungkapan Informasi (IDG 65800)].

2. United States

*Section 6103 Subchapter B Chapter 61 Subtitle F
Title 26 Internal Revenue Code:*

(a) *General Rule, shall relate to the prohibition for the Official to reveal taxation data of **return and return information**;*

(b) *Definitions*

(1) *The term “**return**” means any tax or information return, declaration of estimated tax, or claim for refund required by, or provided for or permitted under, the provisions of this title which is filed with the Secretary by, on behalf of, or with respect to any person, and any amendment or supplement thereto, including supporting schedules, attachments, or lists which are*

*supplemental to, or part of, the **return** so filed*

- (2) **Return Information**, shall mean (a) a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, over-assessments, or tax payments ...*(b)..*
(c)...

Such data may not be disclosed, in the event that the Secretary determines that such disclosure will seriously disturb the calculation, collection, and tax enforcement pursuant to the internal revenue laws.

IRC Section 6103 (i) stipulates exceptions for the purpose of investigation, upon a written request from the *USA's Comptroller General*, **return and return information** must be disclosed for the purpose of GAO investigation when required. The request can be refused if it is not approved by the *Joint Committee on Taxation*, and the aforementioned disapproval is reached through a voting and the reply must be given

in a period of 30 (thirty) days upon the receipt of the written request.

3. Canada

Privacy Act protects confidentiality of a citizen's personal information kept and under the control of Government Institution, and shall not, without the consent of the individual concerned, be disclosed except for the purpose of information collection. The aforementioned *Privacy Act* also protects the aforementioned Taxpayers' data except for the purpose of data collection or in accordance with the objectives of the aforementioned data collection. The data presented by the Government does not quote the regulation concerning Taxpayers' data in the *Privacy Act* and *Information Act* except that *personal information under the control of Government Institution shall not, without the consent of the individual to whom it relates, be disclosed, except with a request for access to the institution controlling the information. Specifically, concerning Taxpayers' data, in the Income Tax Act as stated by the Government, prohibition of disclosure of data on Taxpayers is*

exempted in criminal process, legal proceedings in implementing and upholding the taxation law, and audit in accordance with the *Auditor General Act*.

4. Australia

The *Income Tax Assessment Act* states that government officials must not disclose another person's data to **any person**, but the *Australian National Audit Office (ANAO)* may require the disclosure of the data, though it is emphasized that the data/information be audited in the milieu of the tax office.

5. France

In relation to the investigation by *La Cour des Comptes (Supreme Audit Institution)*, data can be accessed with specific procedures, namely upon prior request and with due observance of functional confidentiality.

6. New Zealand

Taxpayers' data is confidential, but pursuant to Article 81 (4) of the *Income Tax Act 2004*, the data can be

disclosed for the purpose of prosecution pursuant to New Zealand Law or pursuant to Laws applicable in other states outside New Zealand. The information given does not disclose the taxpayer's identity, and it constitutes the **public interest**.

According to the Petitioner's opinion, which we can accept, from all stipulations raised regarding the adopted practices concerning Taxpayers' data, there is not any stipulation restricting the audit board to have access to Taxpayers' data, even though there are indeed procedures to be followed pursuant to the local taxation law. On the other hand, the Petitioner, in addition to the description of its version of *best practices* in the states referred to by the Government, describes the applicable practices in two other states, as follows:

1. Malaysia

The *Income Tax Act 1967 section 138* states that: (4) *(Disclosure to Auditor Generals publication of offenders)*.

"Nothing in this section shall prevent: The production or disclosure of classified material to the auditor-general (or to public officers under his direction and

control) or the used material by the Auditor General, to such an extent as is necessary or expedient for the proper exercise of the functions of his office.”

2. The Netherlands

*The Netherland Court of Audit is responsible for auditing and approving the annual financial accounts of central government as a whole. The NCA is entitled to conduct audits at this administration, both financial audit and performance audit. The NCA has **access to the files of the individual tax payers in the tax administration**. Despite the fact that access is given upon request, every information is given based on considerations in the framework of the implementation of audit work. (Article 87 subsection 1-2 *Comptabiliteitswet* 2002).*

From all versions of *best-practices* of the states regarding the access for audit board to Taxpayers' data and information, it can be concluded that Taxpayers' data and information are indeed regarded as confidential and therefore should be protected by tax official, however, the state audit board may access such information, and the authority must furnish any required data in the framework of

and in accordance with the implementation of its duty. Despite the fact that some states require procedural measures to be taken, in a specific *time-frame*, and any required settlement in such procedures must be given and if it is refused it will bring the consequences that there will be the third party that will judge and decide on such refusal.

3. Whether Taxpayers' data/information is Taxpayers' absolute (basic) rights and must not be disclosed for the sake of public interest.

The argument built by the Government and the experts it has presented, states that every state administrator, including but not limited to the Audit Board shall not exercise its authority arbitrarily in violation of human rights, where state's main duty in the perspective of modern state is to promote human rights, and therefore the prudence principle is an important condition that must be firmly held by all state apparatuses in state administration. Such statement is also supported by the statement which is based on the argument that Taxpayers' data/information is related to Taxpayers' rights which are confidential which constitute human rights, and therefore Article 34 Paragraph (2a) letter b of Law Number 28 Year 2007 is regarded as a

manifestation of Taxpayers' basic rights protection. Another expert from the Petitioner's side states that the *a quo* Law has juridical problems because in its *Consideration* part, there is not any article found firmly referring to the articles concerning human rights stated in Chapter XA of the 1945 Constitution. Furthermore, it is also stated that human rights can be classified into derogable and non-derogable rights, while, the property right mentioned by the Government and its experts, does not constitute *non-derogable right*.

Regardless of the argument, it has been the Court's opinion which is set forth in its decisions and pursuant to the stipulations of the 1945 Constitution itself, that human rights are not absolute. As set forth in Article 28J paragraph (2) it is stipulated that:

"In exercising his/her right and freedom, every person must submit to the restrictions stipulated in laws and regulations with the sole purpose to guarantee the recognition of and the respect for other persons' rights and freedom and fulfill fair demand in accordance with the considerations of morality, religious values, security, and public order in a democratic society."

It is realized that tax has crucial roles in state's life, especially in state life administration or in the development sector, because tax is the state's main source of income to support all state administration activities. Article 1 Sub-Article 1 states as follows:

“Tax shall be obligatory contribution payable by the individual or institution to the state which is mandatory , without having any compensation directly and shall be used for state interest for the greatest prosperity of the people”.

From the economic point of view, tax which is understood as a transfer of resources from the private sector to the public sector, is defined, on one hand as reduction of an individual's capacity in goods and services control, on the other hand as increase in state's financial capacity in goods and services provision for the fulfillment of the people's necessities. Furthermore, tax also has some functions, namely budget function, control function (*regulerend*), and the function of income stabilization and redistribution.

Even if the aforementioned Taxpayers' data and information are the property constituting Taxpayers' basic rights which must be respected and protected, related to a citizen's obligation to give a contribution which is called tax

to state to meet state's purposes in executing its constitutional functions for the greatest prosperity of the people, it brings the consequences that the respect for and the protection of Taxpayers' data and information must not be understood and implemented not in an unlimited absolutism, but in harmony and balance with other larger human rights of other people, which are based on the public interest. In the framework of prosperity materialization for the entire nation, one of the instruments used is tax policy, which can be utilized in prosperity equalization for all the people. To materialize the aforementioned purpose, tax officials or officials of the Directorate General of Taxation are assigned to collect tax, which are based on the taxation law to be applied in a just, efficient and clean manner to allow state to fulfill its constitutional obligation to protect the entire nation, to develop the intellectual life of the nation, and to advance general welfare. Therefore, the matter constitutes objective, rational, and proportional reasons and grounds for reducing or restricting human rights to the data/information of Taxpayers by giving access to the Audit Board to disclose them, insofar as it is executed pursuant to three bases, namely that it shall be (i) lawful, (ii) not arbitrary, and (iii) proportional. Basic rights in the form of such Taxpayers'

data/information protection are closely related with every citizen's obligation to comply with the law by paying tax, the collection and the management, and the accountability of which are assigned to the Directorate General of Taxation. I also think that property right with respect to Taxpayers' data/information cannot be equated to personal data or private data of an individual related to a patient's personal life concerning medical record confidentiality which must be protected in a doctor-patient relationship, because the acquired and given information is personal or private and acquired by a doctor based on private agreement and related to health service performance provided by the doctor, accompanied with a sum of honorarium as a compensation from the patient. Furthermore, if access to Taxpayers' data/information given to the Audit Board raises concern about **legal uncertainty** and **double jeopardy**, then the consequences for the aforementioned potential is unequal or disproportionate to the public interest which will be served, thus it is not valid to be the reason for hampering the Audit Board's access. Since the balance claimed is the balance between the concerned individual interests and the larger public interest for the fulfillment of state's income resources based on the authority of a government based on the

principles of good governance, transparency and accountability, such concern can be eliminated, because the restriction on the Audit Board's authority to access Taxpayers' data/information is accompanied with provisions on Taxpayer protection. The protection is intended to prevent the blackmail-nuanced arbitrary disclosure of the data, by restricting the authority of the auditor who can issue a Tax Underpayment Assessment Letter, to determine the total of principal amount of tax, the total of tax credit, the total of principal tax underpayment, the amount of administrative function and the payable tax. Since such capacity is still owned by the Directorate General of Taxation, even though under the Audit Board's supervision on the State Finance Management and Accountability Audit, which constitutes its capacity, which can be measured, evaluated, analyzed, and finally if the auditor finds a breach of the applicable taxation law it can be reported to the investigator to be reported to the court pursuant to the applicable law. Therefore, the argument about human rights raised by the Government and its experts, even though it is important to be considered, cannot be the reason to justify restriction on the type of document that can be given in state financial audit as stipulated in the Elucidation of Article 34

Paragraph (2a) Sub-paragraph b of the General Taxation Provisions and Procedures Law, contradictory to Law Number 15 Year 2004 concerning State Finance Management and Accountability Audit, because such matter is contradictory to the constitutional mandate. Even if it is true that the right on the document of Annual Tax Returns is the (basic) right of Taxpayer, right of property has social function which can be withdrawn if the public interest requires to do so. Furthermore, confidentiality of the acquired and audited Taxpayers' information is kept because the auditor while implementing general formula, is subject to the legal obligation to keep the confidentiality of the document, with a criminal sanction minimum imprisonment of 1 (one) year or maximum imprisonment of 5 (five) years and/or the minimum financial penalties in the amount of *one billion Rupiah* and the maximum amount of *five billion Rupiah*, if such provision is breached. Similarly, in Confidential Information Reporting stipulated in the State Financial Audit Standards, as included in the Regulation of the Audit Board of the Republic of Indonesia Number 01 Year 2007 Statement Investigation standards Number 03 item 29, which provides as follows:

"Confidential information is prohibited by the provisions of laws and regulations from being publicly disclosed in the report of audit result. However, the report of audit result must state the characteristic of the undisclosed information and the provisions of laws and regulations prohibiting the disclosure of such information".

With the aforementioned argument, it is important for all to consider, even if the argument of the Government and its experts is true that Annual Tax Returns document is the property of Taxpayers which constitutes human rights that must be protected as a reward or balance of *self assessment* principle in payable tax calculation, by paying attention to the existing resources and economic condition, the needs for optimal endeavors to increase state's income through taxation to finance all governmental administration activities which constitute state's constitutional obligation, and audit as state financial management and accountability function, the aforementioned argument is disproportionate. The constitution has guaranteed the respect for and the protection of human rights comprehensively, and formalized, as found in any state's political system, that right of property and human rights are never implemented absolutely without any potential restrictions. The Government, in raising an

argument about human rights protection as the ground for refusing the Petitioner's petition, should be positioned in such a way that it does not leave the impression that the Government favors the protection of Taxpayers' absolute basic rights to proportionally giving all access to the state via the State Audit Board pursuant to State Financial Management and Accountability Audit Law, and also emphasize the relevance of Taxpayers' basic rights protection. The exercise of state power requires appropriate supervision. Insofar as the available data has shown potentials for audit, and considering the efficiency, compliance to law and validity of the execution of power delegated to state officials as the essence of accountability, consequently such restriction must be the ground for further optimal regulation on Taxpayers' basic rights protection in accordance with constitution in the General Taxation Provisions and Procedures Law, not conversely. Therefore, in this way, the balance between individual human rights and the public interest which is the larger community's basic rights will be reached. As discussed before, a **consensus** on the best way to keep Taxpayers' data/information confidentiality in accordance with law so that it will not be misused and arbitrarily disclosed, it should be reached

between the Minister of Finance/the Directorate General of Taxation with the State Audit Board with the substance and considerations in the decisions on the *a quo* case.

In the event that a conflict between legal purposes which are both acknowledged and protected by law and constitution happens, the Court pursuant to the basic law should choose the legal purpose which is based on the higher regulation, by discarding the legal purpose which is set forth in the lower regulation. In the relationship between Law Number 15 Year 2004 concerning State Financial Management and Accountability Audit and Law Number 28 Year 2007 concerning General Taxation Provisions and Procedures, pursuant to the provisions of the constitution in Article 23E Paragraph (1) of the 1945 Constitution, the hierarchy of legal purposes and the ruling norms which are expressly acknowledged and protected by the constitution, should be settled by the Court with a decision that the legal purpose set forth in the Elucidation of Article 34 Paragraph (2a) Sub-Paragraph b must open up the opportunity for the State Audit Board independence to decide the relevant documents for the audit on State Financial Management and Accountability that it will conduct, and the Audit Board also has the obligation to keep the confidentiality.

Conclusions

Based on the aforementioned descriptions, we have reached the following conclusions:

1. Article 34 Paragraph (2a) Sub-Paragraph b of the Taxation Law insofar as it concerns the phrase "*assigned by the Minister of Finance to*" in the article, the entirety of which states, "*Officials and/or experts designated by the Minister of Finance to give **information** to officials of state institutions or Government agencies authorized to perform audits of state finances*", which is in fact an internal mechanism of Department of Finance, shall not be deemed contradictory to the 1945 Constitution, provided that (*conditionally constitutional*) the **assignment** is implemented in the shortest possible time, so that it will be understood as endeavors to support, not to hamper, the audit or investigation executed by the Audit Board in the best possible manner.
2. Article 34 Paragraph (2a) Sub-Paragraph b of the Taxation Law insofar as it concerns the phrase "**or Government agencies**" in the article, the entirety of which states: "*Officials and/or experts designated by the Minister of Finance to give **information** to officials of state institutions or Government agencies authorized to perform audits of state finances*", regardless of duplication and inefficiency potentials, shall not be deemed contradictory to Article 23E Paragraph (1) of the 1945 Constitution, because the existence of such government internal supervisory board

which is responsible to the President and under the coordination of the Minister of State Administrative Reform is not a free and independent supervisory board, but an institution executing some of the President's administrative duties in financial audit and supervision.

3. The entire Elucidation of Article 34 Paragraph (2a) Sub-Paragraph b of the Taxation Law, has not only formed new norms outside the norms explained to be contradictory to the Laws and Regulations Formulation Law, but also restricted the access of the Audit Board to Taxpayers' documents and data and information disproportionately and irrationally, which do not constitute non-derogable human rights, contradictory to Article 23E Paragraph (1) of the 1945 Constitution, because it is deemed restricting and hampering the execution of a free and independent State Financial Management and Accountability Audit by the Audit Board, in the framework of the principles of *good governance, transparency and accountability*. Based on the aforementioned descriptions, it is advisable that the Court decide:

- **To accept the petition partly;**
- **To declare that the Elucidation of Article 34 Paragraph (2a) Sub-Paragraph b of Law Number 28 Year 2007 concerning the General Taxation Stipulations and Procedures is contradictory to the 1945 Constitution, and it is also advisable,**

- **To declare that the aforementioned Elucidation of Article 34 Paragraph (2a) Sub-Paragraph b of Law Number 28 Year 2007 concerning the Stipulations and Tax Procedures does not have any binding legal force.**

SUBSTITUTE REGISTRAR,

SIGNED.

Makhfud