DECISION

Number 52/PUU-IX/2011

FOR THE SAKE OF JUSTICE UNDER THE ONE ALMIGHTY GOD

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA

[1.1] Hearing constitutional cases at the first and final levels, has passed a decision in the case of Review of Law Number 28 Year 2009 concerning Regional Taxes and Regional User Charges under the 1945 Constitution of the State of the Republic of Indonesia, filed by:

[1.2] 1. Name : **Indonesian Golf Course Owners Association**

Address : Wisma Pondok Indah I, 4th floor/R.402, Jalan Sultan Iskandar Muda Kav. V-TA Pondok Indah, South Jakarta.

Hereinafter referred to as ..... **Petitioner I**;

2. Name : **PT. Pondok Indah Padang Golf, Tbk,**

Address : Jalan Metro Pondok Indah, South Jakarta 12310

Hereinafter referred to as ..... **Petitioner II**;

3. Name : **PT. Padang Golf Bukit Sentul**

   Address : Jalan Sumur Batu, Sentul City, Sumur Batu Village, Babakan Madang District, Bogor Regency 16180

   Hereinafter referred to as ..... **Petitioner III**;

4. Name : **PT. Sanggraha Daksamitra**

   Address : Menara Batavia 10th Floor, Jalan KH Mas Mansyur Kav.126, Jakarta

   Hereinafter referred to as ..... **Petitioner IV**;

5. Name : **PT. Sentul Golf Utama**

   Address : Kadumanggu Village, Babakan Madang, Bogor Regency, West Java

   Hereinafter referred to as ..... **Petitioner V**;

6. Name : **PT. New Kuta Golf and Ocean View**

   Address : Jalan Raya Uluwatu, Kawasan Pecatu Indah Resort, Pecatu, Badung, Bali, 80361

   Hereinafter referred to as ..... **Petitioner VI**;

7. Name : **PT. Merapi Golf**

   Address : Jl. H.R.Rasuna Said Blik X-1 KAv.1-2, Kuningan Sub-District, Setiabudi District, South Jakarta

Hereinafter referred to as ..... **Petitioner VII**;

8. Name : **PT. Karawang Sport Center Indonesia**

Address : Karawang Regency, West Java

Hereinafter referred to as ..... **Petitioner VIII**;

9. Name : **PT. Damai Indah Golf Tbk**

Address : Jalan Bukit Golf I, Sektor IV, BSD City, Serpong, Tangerang.

Hereinafter referred to as ..... **Petitioner IX**;

Granting power to Denny kailimang, S.H., M.H., Harry Ponto, S.H., LL.M., Benny Ponto, S.H., M.H., Rendy A. Kailimang, S.H., M.H and Shinta A. Dailapasa, S.H, all of whom are Advocates at Advocate Office of Kailimang & Ponto, having its address at Menara Kuningan 14/A Floor, Jl. H.R. Rasuna Said Blok X-7 Kav. 5 Jakarta 12940, to act individually or jointly as attorney-at-law of the party granting power;

Hereinafter referred to as ---------- **the Petitioners**;

[1.3] Having read the petition of the Petitioners;

Having heard the statements of the Petitioners;

Having read and heard the written statements of the Government;

Having read the written statements of the People's Legislative Assembly;

Having heard the statements of the Petitioners' Experts and Witnesses;

Having heard the statements of the Government's Experts;

Having examined the written evidence of the Petitioners;

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

2. FACTS OF THE CASE

[2.1] Considering whereas the Petitioners filed a petition dated July 25, 2011 which was received and registered at the Registrar's Office of the Constitutional Court (hereinafter referred to as the Registrar's Office of the Court) on July 26, 2011 based on the Deed of Petition File Receipt Number 274/PAN.MK/2011 and recorded in the Registry of Constitutional Cases under Number 52/PUU-IX/2011 on August 4, 2011, which has been revised by petition dated September 21, 2011 and received at the Registrar's Office of the Court on September 21, 2011, which principally describes the following matters:

I. Authority of the Constitutional Court

1. Article 24 paragraph (2) of the Third Amendment to the 1945 Constitution of the State of the Republic of Indonesia ("**the 1945 Constitution**") states that *"Judicial power shall be exercised by a Supreme Court and its inferior courts and by a Constitutional Court."*

2. Article 24C paragraph (1) of the Third Amendment to the 1945 Constitution states that *"The Constitutional Court shall have the authority to hear cases at the first and final instance the decisions*

of which shall be final, to conduct judicial review on the conformity of laws to the Constitution, to decide disputes related to the powers of state institutions vested in them by the Constitution, to make decisions for the dissolution of political parties, and to decide disputes concerning the results of general elections."

3. Article 10 paragraph (1) sub-paragraph a of Law Number 24 Year 2003 concerning the Constitutional Court ("**the Constitutional Court Law**") states:

> *"The Constitutional Court shall have the authority to hear cases at the first and final level the decisions of which shall be final to:*
>
> *(a) conduct judicial review on laws against the 1945 Constitution of the State of the Republic of Indonesia."*

4. Authority of the Constitutional Court in reviewing a law under the 1945 Constitution includes review of the process of the formulation of law (Formal Review) and review of law (Constitutional Review) which are based on Article 51 paragraph (3) of the Constitutional Court Law, which states:

> *"In the petition as intended in paragraph (2), the petitioner shall be required to clearly describe that:*

a. *the formulation of a law does not meet the provisions under the 1945 Constitution of the State of the Republic of Indonesia; and/or*

b. *the material substance in a paragraph, article and/or part of a law is deemed to be inconsistent with the 1945 Constitution of the State of the Republic of Indonesia."*

5. The regulation being the object of Constitutional Review in the Petition *a quo* is Article 42 paragraph (2) sub-paragraph g of the Regional Taxes and Regional User Charges Law, therefore, it is in accordance with Article 50 of the Constitutional Court which states, *"The Laws which may be petitioned for review are the laws which have been enacted following the First Amendment to the 1945 Constitution"*, namely on October 19, 1999, accordingly, Article 42 paragraph (2) sub-paragraph g of the Regional Taxes and Regional User Charges Law has fulfilled the formal requirements for review by the Constitutional Court.

6. Based on the entire description above, the Constitutional Court has authority to conduct judicial review of Article 42 paragraph (2) sub-paragraph g of the Regional Taxes and Regional User Charges Law against Article 28D paragraph (1) and Article 28I paragraph (2) of the 1945 Constitution.

II. Legal Standing of the Petitioners

1. Article 51 paragraph (1) of the Constitutional Court Law regulates that:

> *"The Petitioner shall be the party who considers that his constitutional rights and/or authority are impaired by the coming into effect of the law, namely as follows:*
>
> *a. individual Indonesian citizens;*
>
> *b. customary law community groups insofar as they are still in existence and in line 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;"*

2. Elucidation of Article 51 paragraph (1) of the Constitutional Court Law states:

> *"Referred to as 'constitutional rights' shall be the rights provided for in the 1945 Constitution of the State of the Republic of Indonesia."*

3. Pursuant to the provisions of Article 51 paragraph (1) of the Constitutional Court Law, there are 2 (two) requirements which

must be fulfilled by the petitioners for the right of judicial review, namely (i) the petitioners must be categorized as the legal subjects as described in Article 51 paragraph (1) sub-paragraphs a up to and including d of the Constitutional Court Law; and (ii) the constitutional rights and/or authority of the petitioners are impaired by the coming into effect of a law.

4. The Petitioners in their capacity as legal entities consist of the element of business actors conducting their business activities in the field of the organization of golf sport and golf sport activists (engaging in the development and business of as well as conducting the business of golf course, its facilities and services, including golf course or equipments rental, golf education and exercise as well as golf tournament management and organization) whose constitutional rights to obtain equal treatment in the taxation sector (particularly the treatment equal to the treatment for business actors in other fields of sports in Indonesia) are impaired.

5. The constitutional rights and/or authority of the Petitioners are impaired by the coming into effect of Article 42 paragraph (2) sub-paragraph g of the Regional Taxes and Regional User Charges Law as described in the section below:

5.1 The Petitioners are legal entities incorporated under the laws of Indonesia which engage in the field of the provision of golf course services;

5.2 Prior to the coming into effect of Article 42 paragraph (2) sub-paragraph g of the Regional Taxes and Regional User Charges Law, the Petitioners have the legal standing as taxpayers which is equal to the legal standing of other sport field service providers or business actors in the field of provision of sport facilities.

5.3 With the coming into effect of Article 42 paragraph (2) sub-paragraph g of the Regional Taxes and Regional User Charges Law, the constitutional rights of the Petitioners have been impaired and lost, since the coming into effect of such article automatically removes the guarantee of certainty of equality before the law as protected by Article 28D paragraph (1) and Article 28I paragraph (2) of the 1945 Constitution.

5.3.1 Article 42 paragraph (2) sub-paragraph g of the Regional Taxes and Regional User Charges Law has caused the Petitioners to be categorized as entertainment service providers and require them to

bear additional taxes imposed by the regional government.

5.3.2 Under Law Number 3 Year 2005 concerning National Sports System ("**Sports System Law**"), golf is categorized as a sport. As a result of the coming into effect of Article 42 paragraph (2) sub-paragraph g of the Regional Taxes and Regional User Charges Law, in which the Petitioners are the only parties who are declared as business actors in the field of entertainment industry, **the legal standing of the Petitioners becomes unequal to the legal standing of the business actors in other fields of sports.**

5.3.3 Additional tax charge stipulated by Article 42 paragraph (2) sub-paragraph g of the Regional Taxes and Regional User Charges Law **is only imposed on the Petitioners**, while **other parties conducting similar activities and/or business activities** as those of the Petitioners **are not imposed with additional tax charge**, therefore, the Petitioners have obtained discriminatory treatment with respect to the imposition of tax obligation to the government.

6. Based on the entire description above, the Petitioners have legal standing to file a petition for judicial review pursuant to Article 51 paragraph (1) of the Constitutional Court Law.

III. Substance of the Petition

A. The categorization of a sport into the entertainment category has resulted in unequal treatment to the business actors of sport industry, and therefore, it is inconsistent with the constitution of the Republic of Indonesia which intends to provide protection, just legal certainty and equal treatment before the law.

1. The General Elucidation of the Sports System Law states that sports shall be part of the process and achievement of the objectives of the national development, therefore, the existence and role of sports in life as a community must be placed in a clear position in the national legal system. In addition to that, sports also constitute one of the aspects of life, which present the evidence of the existence of a nation as part of the global community, as indicated by the achievements in various sport competitions at the national, regional and international levels.

2. Achievement in sports does not consider the differences in the background of the athletes. On the contrary, the existing

differences are eliminated by the achievements made by the sports athletes. In fact, it has been proven in all parts of the world that sports may become a media which unites the various backgrounds of a nation or a group.

3. Golf is an activity recognized worldwide as a sport. The existence of golf as sports has been recognized by the global community and sport agencies, and also by the Indonesian sport committee which is established by virtue of the Decree of the President of the Republic of Indonesia, namely the Indonesian National Sports Committee (*Komite Olahraga Nasional Indonesia*/KONI).

   Article 9 sub-article 1 of the By-laws of KONI states that members of KONI shall consist of sports parent organizations, functional sport organizations and provincial sport committees. Furthermore, Article 9 sub-article 2 of the By-laws of KONI provides that the definition of sports parent organization shall be sports organization guiding, developing and coordinating a branch/type of sport or a group of organizations of a type of sport which is a member of an international federation of the relevant sport.

4. Based on the provisions of Article 9 sub-article 1 of the By-laws of KONI which provides that a member of KONI shall

be a sports parent organization, KONI Organization Division has published the 2nd Edition of "*Buku Daftar Pengurus KONI dan seluruh Anggotanya (*List of KONI Executive Board and its entire Members*)*" whereby such book states that the Indonesian Golf Association (*Persatuan Golf Indonesia*/PGI) is categorized as a member of KONI. PGI as a parent organization of golf sport is confirmed by KONI through its official website which can be found at www.koni.or.id. With the inclusion of the Indonesian Golf Association (*Persatuan Golf Indonesia*/PGI) as a parent organization of Golf sport, KONI has expressly stated that golf is a sport rather than an entertainment.

5. Furthermore, Article 43 of the Sports System Law provides that one of the events of sport championship shall include the national sports weeks or known as PON (*Pekan Olahraga Nasional*). Golf is one of the sports contested in at PON since PON VII in 1969 up to PON XVII in 2008 in East Kalimantan. In addition to that, the International Federation for Golf is part of the International Olympic Committee (IOC). This means that the existence of golf as a sport is recognized worldwide by competing golf in any international competitions, among other things, in the Olympics.

6. One of the recognition media of the existence of golf as a sport is through the holding of golf competition at the national level up to the international level. Similar recognition is also given to several other sports that use fields as the medium to conduct its sport activities, such as: tennis, football, badminton and swimming.

7. However, under Article 42 paragraph (2) sub-paragraph g of the Regional Taxes and Regional User Charges Law, such similar recognition to other sports is not received by golf. On the contrary, the position of golf as a sport is treated differently from other sports, namely by including golf as a type of entertainment.

8. Such significant difference substantiates that Article 42 paragraph (2) sub-paragraph g of the Regional Taxes and Regional User Charges Law is inconsistent with Article 28D of the 1945 Constitution which expressly provides that every person shall have the right to fair recognition, guarantee, protection and legal certainty as well as equal treatment before the law.

9. The phase “every person” in Article 28D paragraph (1) and Article 28I paragraph (2) of the 1945 Constitution means every legal subject. Based on legal theory, referred to as a

legal subject is an individual and a legal entity. Accordingly, the Petitioners who are legal subjects in the form of legal entities shall also have the right to fair recognition, guarantee, protection and legal certainty of just laws as well as equal treatment before the law as affirmed in the constitution.

10. The categorization of "golf" as an entertainment substantiates that there is a grammatical misunderstanding about the difference in the definition between "entertainment" and "sport" itself. Based on the Great Dictionary of the Indonesian Language (*Kamus Besar Bahasa Indonesia*), Third Edition, published by the National Education Department through a Publisher, namely Balai Pustaka, in 2005, the words "golf" and "entertainment" are defined respectively as follows:

> *"**golf** n cabang olahraga dng menggunakan bola kecil untuk dipukul dng tongkat pemukul ke dl tiap-tiap rentetan liang-liang (9 atau 18 liang berturut-turut) (*a sport using a small ball to be hit by a stick into every series of holes (9 or 18 consecutive holes)*);"*
>
> *"**hi.bur.an (*entertainment*)** n sesuatu atau perbuatan yg dapat menghibur hati (melupakan kesedihan dsb):*

*taman ~ rakyat (*something or an action which can entertain (to forget sadness, etc.): public ~ park*);"*

From the grammatical perspective, the drafters of Article 42 paragraph (2) sub-paragraph g of the Regional Taxes and Regional User Charges Law have erroneously placed golf in the entertainment category, this is because:

10.1 From the language perspective, golf has been recognized as a branch of sport and not an entertainment;

10.2 Golf indicates an active activity since the athletes play the sport, while entertainment is not played, but rather it is only watched, and therefore it indicates a passive activity.

11. Such misunderstanding has affected not only the Petitioners who are business actors engaging in the field of provision of golf course service, but also other individuals, in this case, the players/athletes of golf itself.

12. The categorization of golf as an entertainment in Article 42 paragraph (2) sub-paragraph g of the Regional Taxes and Regional User Charges Law has resulted in the different charging of taxes between the Petitioners and other sport actors who also engage in the field of the provision of sport

field services. Such charging certainly has adverse effects, not only to the Petitioners as taxpayers, but it will also adversely affect golf players/athletes as legal subjects who are being charged with entertainment tax when they perform the sport using the facility in the form of golf course.

13. Based on the above descriptions, it is clear and obvious that golf is a sport rather than an entertainment, therefore, golf players/athletes cannot be categorized as entertainers and business actors engaging in the field of the provision of golf course services cannot be categorized as business actors engaging in the field of entertainment.

14. Therefore, it has been substantiated that the use of the word “golf” in Article 42 paragraph (2) sub-paragraph g of the Regional Taxes and Regional User Charges Law has caused difference between the legal standing of the business actors engaging in the field of golf sport and the business actors engaging in the other fields of sports, and therefore, the said Article is inconsistent with Article 28D paragraph (1) and Article 28I paragraph (1) of the 1945 Constitution

B. The formation of Article 42 paragraph (2) sub-paragraph g of the Regional Taxes and Regional User Charges Law impairs the rights

of the legal subjects in golf sport and it is inconsistent with the government program through the Ministry for Youth and Sports of the Republic of Indonesia to promote Indonesia's sports.

1. Article 42 paragraph (2) of the Regional Taxes and Regional User Charges Law places golf in the same entertainment category as disco, karaoke, night club, massage parlor, reflexology parlor, spa, etc. Such categorization will change the image of golf as a sport to become an entertainment. It will lead to the public's misunderstanding, because the public may later assume that the activities of going to the disco, karaoke, night club, etc. are the same as performing sport activities.

2. The definition of sport in Article 1 sub-article 4 of the National Sports System Law is any systematic activities to encourage, improve and develop physical and spiritual as well as social potential. The systematic activities element contained therein cannot be found in an entertainment, since entertainment is passive in nature and aims at entertaining a sad heart. Based on the foregoing, one of the adverse effects that will be experienced by the Petitioners is the wrong public image with respect to the nature of golf as a sport rather than an entertainment.

3. In addition to that, if the players are charged entertainment tax when playing golf, the potential adverse effects which may arise can be described as follows:

   3.1. Golf players will have objection with respect to the charging of entertainment tax on golf because golf players have also been charged value added tax, whereby the amount of such entertainment tax is varied among regions, which will lead to the decrease in the number of golf players. If the golf players feel that the rental on golf course increases significantly as a result of the imposition of entertainment tax, golf players may, in fact, find a golf course overseas only to play golf. While so far, the fact is that there are many foreign tourists came to Indonesia only to play golf in Indonesia.

   3.2. The aforementioned decrease in the number of golf players will have the implication of the decrease in the income of business actors engaging in the field of the provision of golf course services, including the income of the workers, such as caddies, cooks, security officers, etc., who work in golf courses. Such decrease in income may have the implication of a downturn in the industry of golf course provision,

which will carry further implication of the closure of business activities of the golf course provision, and it may further result in the rising level of unemployment due to the closure of such business activities.

3.3. With the charging of entertainment tax on golf sport, another potential problem which may occur is the decline in the achievement of Indonesian athletes in golf competitions due to the lack of facilities and infrastructures to conduct training.

3.4. The decline in the public's interest in golf is a matter which is not in line with the desire of the government as set out in the consideration section of the National Sports System Law. Through sports, the government is intending to develop the intellectual life of the nation through an instrument of national development in the field of sports in order to improve the quality of life of the Indonesian people physically, spiritually and socially in materializing an advanced, just, prosperous, well-off and democratic society. In addition to that, it is also stated in the consideration section of the National Sports System Law that the guidance and development of national sports which can guarantee the equal distribution of access to

sports, improvement in health and fitness, improvement in sports achievement and sport management which can cope with the challenges as well as the demand for change in the national and global life shall require a national sports system.

4. Based on the above description, it has been substantiated that in addition to impairing the rights of legal subjects in golf sport, the formation of Article 42 paragraph (2) sub-paragraph g of the Regional Taxes and Regional User Charges Law is also inconsistent with the spirit of the government to promote national sports.

C. The Principles of Law in the Field of Taxation State That the Imposition of Double Tax on One Object is Erroneous Because It Poses More Burden to Taxpayers.

1. Article 42 paragraph (2) sub-paragraph g of the Regional Taxes and Regional User Charges Law has caused the Petitioners to be categorized as entertainment service providers and they must bear additional tax imposed by the regional government. This resulted in the excessive charging of tax on business actors of golf course service providers, and furthermore, to the players who wish to train by using

golf course since such players are ‘forced’ to also bear the entertainment tax which is actually applied incorrectly.

2. Under the tax law, there are principles of not applying discriminatory treatment and difference in taxpayers based on tax objects which have been confirmed by experts in the field of law, among others:

2.1 Adam Smith (1723-1790), a Scotland-born author and philosopher who is known as the pioneer of the classical economy school of thought, emphasized in his book entitled, An Inquiry into the Nature and Causes of the Wealth of Nations, on the importance of the application of the principles of efficiency, equality, certainty and convenience (or known as four maxims or four canons), namely as follows:

2.11 **Principle of Equality** (the principle of balance with ability or the principle of justice): namely the collection of tax from different persons in the same condition must be based on the same tax. For example, in income tax, the persons imposed by the same tax are the persons having equal taxable income, rather than the persons having equal income. The

state may not act in a discriminating manner to taxpayers.

2.2 W.J. Langen, in his book entitled, the Principles of Tax Collection, the principles of tax collection are as follows:

2.2.1 **Principle of similarity**: in the same condition between a taxpayer and other taxpayers, they must be imposed a tax in equal amount (treated equally).

2.2.2 **Principle of charge at the least minimum amount**: tax collection is attempted to be at the least minimum amount if compared to the value of the tax object, in order that it does not pose burden to the taxpayers.

2.3 Adolf Wagner defines the principle of tax collection as quoted in the book entitled, *Dasar-dasar Ilmu Keuangan Negara* (Principles of State Finance Science) written by Soetrisno, namely as follows:

2.3.1 **Principle of economy**: the determination of tax objects must be precise in order that tax collection does not hamper the production and the people's economy, for instance: income tax, tax on luxurious goods.

2.3.2 **Principle of justice**, namely that tax collection is generally applicable without discrimination, equal treatment for the same condition.

Based on various legal theories of experts in the field of law as mentioned above, it is clear and obvious that all of the principles of tax mention the existence of the principles of Equality, Similarity and Justice, which principally stating that there is no discrimination or difference between taxpayers with the tax objects being in the same condition.

3. Prior to the coming into effect of Article 42 paragraph (2) sub-paragraph g of the Regional Taxes and Regional User Charges Law, the Petitioners, as the parties managing golf courses, have the obligations to pay the following taxes, among other things:

a. Value Added Tax (VAT) which is imposed by 10% (ten percent) of the sales;

b. Corporate Income Tax which is imposed by 25% of the net profits;

c. Land and Building Tax which is imposed based on the rate and width of an area;

d. Development Tax 1 (PB1) which is imposed by 10% of the sales in restaurants.

e. In addition to the foregoing, the party managing a golf course deducts the income tax of the employees to be paid to the State Treasury Office, the rate of which is based on progressive rate according to the income of the employees.

In addition to that, in several regions, taxes or in the form of other user charges are also imposed, namely as follows:

a. Parking user charges;

b. Ground water user charges; and

c. Advertisement Tax

4. The inclusion of golf as entertainment as set out in Article 42 paragraph (2) sub-paragraph g of the Regional Taxes and Regional User Charges Law resulted in the charging of additional tax, namely Entertainment Tax, whereby golf is considered as an entertainment, which must be paid to the Regional Government in the amount based on the respective Regional Government Regulation.

Entertainment tax imposed on the Petitioners clearly violates the principles of taxation as explained in point 2 above since other sport actors who also engage in the field of provision of

sport field services are not charged entertainment tax. As a consequence, not only does such charging harm the Petitioners as taxpayers, it will also extremely harm golf players/athletes, as legal subjects, who are charged entertainment tax if they conduct training by using a facility in the form of golf course.

5. Furthermore, Muhammad Djafar Saidi, in his book entitled *"*Pembaruan Hukum Pajak *(Taxation Law Reform)",* Edition I-I, Jakarta: PT RajaGrafindo Persada, 2007, page 282, states as follows:

> *"National Double Tax is imposed due to the lack of thoroughness of the legislators' during the discussion of the draft law in the field of taxation, such that it became a law binding on the taxpayers and the tax officials. National Double Tax is a tax imposed by the State on the same tax objects with the same taxpayers as well.*
>
> *The imposition of National Double Tax places heavy burden on the taxpayers, although it has been affirmed that taxpayers have civil obligations and are required to participate in financing the implementation of State government administration."*

6. The imposition of Entertainment Tax under Article 42 paragraph (2) sub-paragraph g of the Regional Taxes and Regional User Charges Law and also Law Number 42 Year 2009 concerning Third Amendment to Law Number 8 Year 1983 concerning Value Added Tax of Goods and Services and Sale Tax of Luxurious Goods, in which there is tax charging to the same tax objects with the same taxpayers as well.

7. This resulted in the charging which places heavy burden on the taxpayers, in which the Petitioners who are supposed to have the legal standing as business actors in the field of sports are also considered as business actors in the field of entertainment. As a consequence, the Petitioners must bear tax charge which is not equal to the tax charge of the business actors in the other fields of sports with the same category as golf and also not equal to the tax charge of other sport field service providers.

8. Therefore, the imposition of double tax on the same tax object is a matter which is inconsistent with the spirit of the formation of the provisions of laws and regulations in the field of taxation.

D. The formation of Article 42 paragraph (2) sub-paragraph g of the Regional Taxes and Regional User Charges Law is not based on the constitution as the legal basis of the Republic of Indonesia since it is inconsistent with the principle of certainty and equality before law as protected by Article 28D and Article 28I paragraph (2) of the 1945 Constitution which is further regulated by Law Number 10 Year 2004 concerning the formation of laws and regulations.

1. The right of every person to obtain fair recognition, guarantee, protection and legal certainty as well as equal treatment before the law is protected by the constitution of the Republic of Indonesia as set out in Article 28D paragraph (1) of the 1945 Constitution which provided as follows:

> *"Every person shall have the right to fair recognition, guarantee, protection and legal certainty as well as equal treatment before the law*."

In addition to guaranteeing the right of every person to obtain fair recognition, guarantee, protection and legal certainty as well as equal treatment before the law, the constitution of the Republic of Indonesia also provides that every person shall have the right to be free from discriminatory treatment on any basis whatsoever as set out

in Article 28I paragraph (2) of the 1945 Constitution, namely as follows:

> *"Every person shall have the right to be free from discriminatory treatment on any basis whatsoever and shall have the right to obtain protection against any such discriminatory treatment."*

2. The position of the 1945 Constitution as the source of all legal sources or the fundamental law in the Republic of Indonesia is provided for by Article 3 of Law Number 10 Year 2004 concerning the Formation of Laws and Regulations ("**Formation of Laws and Regulations Law**") which states that "*The Constitution of the State of the Republic of Indonesia shall be the fundamental law in Laws and Regulations.*"

   Elucidation of Article 3 of the Formation of Laws and Regulations Law specifies that "*The 1945 Constitution of the State of the Republic of Indonesia containing the fundamental law of the State shall be the legal source of the Formation of Laws and Regulations subordinate to the Constitution.*"

3. Furthermore, Article 7 of the Formation of Laws and Regulations Law provides that the hierarchy of laws and regulations in Indonesia shall be as follows:

a. The 1945 Constitution;
b. Law/Government Regulation in lieu of Law
c. Government Regulation;
d. Presidential Regulation;
e. Regional Regulation.

In addition to being required to be based on the 1945 Constitution as the constitution of the state, the formation of laws and regulations in Indonesia must take into account the principles of the formation of laws and regulations as provided for in Article 6 paragraph (1) of the Formation of Laws and Regulations Law, among other things as follows:

a. Principle of Protection, namely that every material substance of laws and regulations must have the function of providing protection in the context of creating peace for the community;
b. Principle of Humanity, namely that every material substance of laws and regulations must reflect the protection and respect of human rights as well as the

status and dignity of every Indonesian citizen and people proportionally as a community;

c. Principle of Nation, namely that every material substance of laws and regulations must reflect the pluralistic (diversity) nature and characteristics of the Indonesian people by maintaining the principle of the unitary state of the Republic of Indonesia;

d. Principle of Family Aspect, namely that every material substance of laws and regulations must reflect deliberation to reach a consensus in every decision-making process;

e. Principle of Archipelago, namely that every material substance of laws and regulations must always take into account the interest of the entire territory of Indonesia and the material substance of laws and regulations formulated in regions constitutes part of the national legal system which is based on Pancasila;

f. Principle of *Bhinneka Tunggal Ika* (Unity in Diversity) , namely that every material substance of laws and regulations must take into account the diversity of population, religion, tribe and class, certain condition of a region, and culture, particularly in relation to

sensitive issues in life as a community, nation and state;

g. Principle of Justice, namely that every material substance of laws and regulations must reflect justice proportionately for every citizen of the State without exception;

h. Principle of Equality Before Law and Government, namely that every material substance of laws and regulations must reflect justice proportionately for every citizen of the state without exception;

i. Principle of Legal Order and Certainty, namely that every material of laws and regulations must be able to create order in the community through the guarantee of legal certainty;

j. Principle of Balance, Harmony and Conformity, namely that every material of laws and regulations must reflect balance, harmony and conformity between the interest of an individual and community and the interest of the nation and the state.

4. Under Articles 3 and 7 of the Formation of Laws and Regulation Law, it can be clearly seen that the 1945 Constitution is the *Grundnorm*, namely the highest laws and regulation. This means that the 1945 Constitution is the

source and basis for every form of other subordinate laws and regulations, such as laws, government regulations, regional regulations and presidential regulations. Considering that the 1945 Constitution is the *Grundnorm*, it has a juridical consequence that all types of laws and regulations which are subordinate to the 1945 Constitution may not be inconsistent with the mandate set out therein.

5. Principles of the formation of laws and regulation are the principles first set out in the constitution of the Republic of Indonesia. Accordingly, Article 6 paragraph (1) of the Formation of Laws and Regulations Law reminds the legislators to always form their laws and regulations based on the aforementioned principles. Ironically however, the formation of the Regional Taxes and Regional User Charges Law is not based on such principles. This is evident in the facts as described below:

   5.1. It does not comply with the **principle of protection** since the coming into effect of the provisions of Article 42 paragraph (2) sub-paragraph g of the Regional Taxes and Regional User Charges Law does not provide legal protection for the Petitioners. Instead, the coming into effect of the law has led to the

Petitioners seeking legal protection from the Constitutional Court of Indonesia;

5.2. It does not comply with the **principle of justice** since the coming into effect of the provisions does not reflect justice given proportionately to business actors in the field of provision of sport field services, but rather, the provisions are only applied to the Petitioners as business actors in the field of provision of golf course service, as described in letters A, B and C of the petition of the Petitioners above;

5.3. It does not comply with the **principle of legal order and certainty** since Article 42 paragraph (2) sub-paragraph g of the Regional Taxes and Regional User Charges Law is not specifically elaborated, and therefore, it creates legal uncertainty as explained in letter A point 10 up to and including point 14 of the petition of the Petitioners above;

5.4. It does not comply with the **principle of balance, harmony and conformity** since the aforementioned provisions have instead created conflict of interest between the interest of the Petitioners and the interest of the state as explained in letters B and C of the petition of the Petitioners above.

6. Based on the entire description above, that Article 42 paragraph (2) sub-paragraph g of the Regional Taxes and Regional User Charges Law is inconsistent with the legal source of Indonesia, namely the 1945 Constitution.

IV. *PETITUM*

Based on the above description, the Petitioners requested the Court to examine and decide the Petition for review of Article 42 paragraph (2) sub-paragraph g of Law Number 28 Year 2009 concerning Regional Taxes and Regional User Charges under Law of the Republic of Indonesia Number 3 Year 2005 concerning National Sports System against the Constitution of the Republic of Indonesia with the following decisions:

1. To accept and grant the Petitioner's Petition for Judicial Review;
2. To declare that Article 42 paragraph (2) sub-paragraph g of Law Number 28 Year 2009 in the word "golf" is inconsistent with Article 28D paragraph (1) and Article 28I paragraph (2) of the Constitution of the Republic of Indonesia.
3. To declare that Article 42 paragraph (2) sub-paragraph g of Law Number 28 Year 2009 in the word "golf" does not have binding legal force with all its legal consequences.

Or if the Court is of a different opinion, it is requested that the decisions are made by principles of what is fair and just (*ex aequo et bono*).

[2.2] Considering whereas in order to substantiate their arguments, the Petitioners have presented evidence in the form of letters or written evidence and compact discs which have been validated in the hearings on Wednesday, October 5, 2011 and on Wednesday November 23, 2011, marked as exhibits P-1 up to and including P-12b, namely as follows:

1. Exhibit P-1 : Photocopy of Law of the Republic of Indonesia Number 28 Year 2009 concerning Regional Taxes and Regional User Charges;
2. Exhibit P-2 : Photocopy of Law of the Republic of Indonesia Number 3 Year 2005 concerning National Sports System;
3. Exhibit P-3a : Photocopy of the Deed of Statement of the Resolutions of the General Meeting of National Members (*Rapat Umum Anggota Nasional*/RUANAS) of the Indonesian Golf Course Owners Association Number 10 dated May 16, 2008;

   Exhibit P-3b : Photocopy of the Articles of Association/By-laws of the Indonesian Golf Course Owners Association;

   Exhibit P-3c : Photocopy of Supplement Number 28470 to the Official Gazette of the Republic of Indonesia dated 19/12/2008 Number 102;

Exhibit P-3d : Photocopy of Supplement Number 655 to the Official Gazette of the Republic of Indonesia dated 22/1/2010 Number 7;

Exhibit P-3e : Photocopy of Supplement Number 25238 to the Official Gazette of the Republic of Indonesia dated 25/11/2008 Number 95;

Exhibit P-3f : Photocopy of the Deed of Establishment of the Limited Liability Company PT. Sentul Golf Utama Number 7 dated December 4, 2007 and Decree of the Minister of Law and Human Rights of the Republic of Indonesia Number AHU-04927.AH.01.01. Year 2008 concerning Ratification of Company Legal Entity dated January 31, 2008;

Exhibit P-3g : Photocopy of the Deed of Minutes of Extraordinary General Meeting of Shareholders of PT. Sentul Golf Utama, domiciled in Bogor Regency, West Java Province, Number 17 dated September 23, 2008 and Letter of the Department of Law and Human Rights of the Republic of Indonesia Number AHU-AH.01.10-23730 concerning Receipt of Notification of Amendment to Company Data dated November 19, 2008;

Exhibit P-3h : Photocopy of the Deed of Statement of the Resolutions of Shareholders of “Kerawang Sports Centre” Number 14 dated November 10, 2008 and Decree of the Minister of Law and Human Rights of the Republic of Indonesia Number AHU-98564.AH.01.02. Year 2008 concerning Ratification of Company Legal Entity dated December 22, 2008;

Exhibit P-3i : Photocopy of the Deed of Statement of the Resolutions of Shareholders of PT New Kuta Golf and Ocean View Number 88 dated January 30, 2009 and Decree of the Minister of Law and Human Rights of the Republic of Indonesia Number AHU-14266.AH.01.02. Year 2009 concerning Ratification of Company Legal Entity dated April 20, 2009;

Exhibit P-3j : Photocopy of Supplement Number 22230 to the Official Gazette of the Republic of Indonesia dated 18/8-2009 Number 66;

Exhibit P-3k : Photocopy of the Deed of Statement of the Resolutions of the Meeting of “PT Merapi Gelanggang Wisata” Number 04 dated January 29, 2010 and Decree of the Minister of Law and

Human Rights of the Republic of Indonesia Number AHU-16159.AH.01.02 Year 2010 concerning Ratification of Company Legal Entity dated March 30, 2010;

Exhibit P-3l : Photocopy of the Deed of Statement of the Resolutions of the Meeting Number 8 dated August 4, 1995;

4. Exhibit P-4a : Photocopy of Regional Regulation of Bogor Regency Number 12 Year 2010 concerning Entertainment Tax;

Exhibit P-4b : Photocopy of Regional Regulation of Tangerang City Number 07 Year 2010 concerning Regional Tax;

Exhibit P-4c : Photocopy of Regional Regulation of Depok City Number 07 Year 2010 concerning Regional Tax;

Exhibit P-4e : Photocopy of Regional Regulation of the Special Capital City Region of Jakarta Number 13 Year 2010 concerning Entertainment Tax;

5. Exhibit P-5a : Photocopy of the Articles of Association and By-laws of the Indonesian National Sports Committee (*Komite Olahraga Nasional Indonesia*/KONI) Year 2010 (3rd Edition);

	Exhibit P-5b	:	Photocopy of the List of KONI Executive Board and Its Entire Members published by KONI Organization Division Year 2010, 2nd Edition;
	Exhibit P-5c	:	Photocopy of the Articles of Association & By-laws of the Indonesian Golf Association, the results of Extraordinary National Discussion on April 14, 2010;
	Exhibit P-5d	:	Photocopy of the Articles of Association & By-laws of the Indonesian Professional Golf Association;
6.	Exhibit P-6	:	Photocopy of pages 367 and 398 of the Great Dictionary of the Indonesian Language (*Kamus Besar Bahasa Indonesia*), Third Edition, published by the National Education Department through the Publisher, Balai Pustaka, year 2005;
7.	Exhibit P-7a	:	Photocopy of the Letter from the International Golf Federation (Executive Director's Office) Ref. Number ABS/IGA071011 to the Minister for Youth and Sports of Indonesia, Mister Andi Mallarangeng;
	Exhibit P-7b	:	Photocopy of the Sworn Translation of the Letter from the International Golf Federation (Executive Director's Office) Ref. Number ABS/IGA071011 dated October 7, 2011 to the Minister for Youth

			and Sports of Indonesia, Mister Andi Mallarangeng;
8.	Exhibit P-8a	:	Photocopy of the Letter from the organization, the Royal & Ancient (R&A), dated October 6, 2011 to the Secretary General of Indonesian Golf Association, Mister Sudrajat;
	Exhibit P-8b	:	Photocopy of the Sworn Translation of the Letter from the organization, the Royal & Ancient (R&A), dated October 6, 2011 to the Secretary General of Indonesian Golf Association, Mister Sudrajat;
9.	Exhibit P-9	:	Photocopy of the Results of Research by IPB with regard to the Existence of Golf Courses in Indonesia;
11.	Exhibit P-10	:	Photocopy of the Letter from the State Minister for Youth and Sports of the Republic of Indonesia Number 3990A/MENPORA/12/2010 dated December 21, 2010 concerning *Recommendation* to the Minister of Home Affairs;
12.	Exhibit P-11	:	Photocopy of the Letter from the Association of Indonesian Senior Golfers (*Perhimpunan Pegolf Senior Indonesia*/PERPESI) to Petitioner I through letter Number PCJ/010/VII/11 dated July 14, 2011 concerning Request for a Meeting;

13. Exhibit P-12a : Photocopy of Letter of the Director General of Taxation Number S-48/PJ.322/1998 dated March 16, 1998, signed by the Director General of Taxation, Fuad Bawazier;

14. Exhibit P-12b : Photocopy of Letter of the Director General of Taxation Number S-708/PJ.322/1998 dated October 16, 2003, signed by the Director General of Taxation, Hadi Poernomo.

In addition to the above, the Petitioners also presented 4 (four) Experts and 4 (four) witnesses who have given their statements in the court hearings on Wednesday, November 10, 2011 and November 23, 2011, which principally explain as follows:

Witnesses of the Petitioners

1. Prof. Dr. Laica Marzuki, S.H.

- If there is a determination of tax object which is considered as incorrect or constitutionally erroneous in taxation Law, amendment may be made by legislators (*de wet gevers*) through legislative review, or the taxpayers may file petition through the effort of constitutional review with the Constitutional Court;
- Prof. Dr. P.J.A Adriani, a senior professor of taxation law in Amsterdam University (*Recht Universiteit van Amsterdam*) is of the opinion that tax (*belasting*) is a contribution for the state which may

be forced on taxpayers pursuant to the laws and regulations, in accordance with *algemene verbinde voorschriften* and generally without the receipt of a specific benefit;

- Tax levies must be based on correct legal principles. Almost all levies (*belasting*) are delegated from the constitution. It is similar to *in casu* Article 23 of the 1945 Constitution stating that tax is compulsory and generally without receipt of a specific benefit. However, norm regulation (*rechtsnorm*) and levy by the *fiscus* may not be inconsistent with the constitution (*tegengesteld met de constitutie*);
- If the Constitution stipulates that taxation is regulated by Law (*bij de wet geregel*), the norm of Law delegated from the constitution may not be inconsistent with the constitution. Norm of Law which is inconsistent with the constitution means that it is violating the constitution (*tegengesteld met de constitutie*).
- If the legal subjects, *subjectum*, of taxpayers are charged, as *tatbestand*, which means that the target of taxation of a tax object which should not be charged to the relevant taxpayer, this is inconsistent with the constitution, among other things, in relation to the protection of just legal certainty, equal treatment before law, freedom from discriminatory treatment which are guaranteed by the constitution;

- Placing entertainment tax object on golf as *tatbestand*, the target of taxation charging tax liability, tax payable to *subjectum* of golf activists and business actors as set out in Article 42 paragraph (2) sub-paragraph g of Law Number 28/2009 principally constitute as tax error (*belastingendwaling*) which may impair the constitutional rights of *subjectum* of taxpayers.
- Historically, Golf originated in Scotland around the year 1754. Golf entered Netherlands East Indies before 1872, brought by the English;
- The Great Dictionary of the Indonesian Language published in 1997 page 332 formulated the definition of the term *golf* as a sport using a small ball to be hit by a stick into every series of holes, nine or eighteen consecutive holes;
- The New Webster's Dictionary formulates golf as a game played with clubs and a small ball on a grassy course with nine or eighteen holes. The word *game* means competition, such as the Olympic Games;
- Under the National Sports System Law, golf is categorized as a sport. The Indonesian Golf Association, as a golf parent organization, is categorized as a member of KONI;
- Golf is one of the sports contested in the National Sports Weeks since PON VII in 1969 up to PON XVII in 2008 in East Kalimantan. Golf is also contested in SEA GAMES XXVI in Palembang. The

International Federation of Golf is part of the International Olympic Committee, which means that golf as a sport has been contested in the international level;

- Additional tax charge stipulated in Article 42 paragraph (2) sub-paragraph g of Law Number 28/2009 is only imposed on the Petitioners, while other parties having activities in other sports are not being imposed additional tax charge. As a result, the Petitioners experienced fair legal uncertainty, as well as unequal treatment before law, discriminatory treatment with regard to the imposition of tax. Constitutionally, Article 28D paragraph (1) of the 1945 Constitution prohibits discriminatory treatment to every person, to every legal subject;
- Double tax is prohibited by law since it has the potential of creating injustice and discrimination. Double tax occurs in an overlapped manner due to injustice of legislators (*de wetgever*);
- Discrimination is not only occurring through the difference in treatment on the same thing, but also through treating different things as the same. "*Discrimination happens when someone is treated worse ("less favorably" in legal terms) than another person and the same situation*," quoted from Community Legal Service, London, June 2001;
- The expert is of the opinion that Article 42 paragraph (2) sub-paragraph g of Law Number 28 Year 2009 concerning Regional

Taxes and Regional User Charges is inconsistent with Article 28D paragraph (1) and Article 28I paragraph (2) of the 1945 Constitution.

2. Prof. Yusril Ihza Mahendra

- The Petitioners in this case are public and private legal entities incorporated under the laws of Indonesia as referred to in Article 51 paragraph (1) sub-paragraph b of Law Number 24 Year 2003 concerning the Constitutional Court having the constitutional rights granted by the 1945 Constitution, particularly the right to fair recognition, guarantee, protection and legal certainty as well as equal treatment before the law as provided for in Article 28D paragraph (1) of the 1945 Constitution and the right to be free from discriminatory treatment on any basis whatsoever and the right to obtain protection against any such discriminatory treatment, as provided for in Article 28I paragraph (2) of the 1945 Constitution;
- The Petitioners consider that their constitutional rights granted by the 1945 Constitution have been impaired by the categorization of the Petitioners as service providers in the field of entertainment rather than sport. Therefore, the tax imposed on the Petitioners is higher than the tax imposed on other sport facilities service providers due to the coming into effect of a norm of Law, namely the norm contained in Article 42 paragraph (2) sub-paragraph g of Law Number 28/2009. Prior to the coming into effect of this norm of

law, the constitutional rights of the Petitioners as golf course service providers are equal to the constitutional rights of other sport facilities and infrastructures service providers;

- Whereas the constitutional impairment of the Petitioners have factually, specifically and obviously occurred. It is factual since the Petitioners which provide, manage and operate facilities and infrastructures of golf activities are categorized as entertainment service providers. This is inconsistent with the general provisions of sport as provided for in Law Number 3 Year 2005 concerning National Sports System and the provisions on sport activities provided for in the By-laws of the Indonesian National Sports Committee which categorized golf as a sport;
- With the categorization of golf as entertainment, as provided for in the norm of Article 42 paragraph (2) sub-paragraph g of Law Number 28/2009, the tax payable by golf facilities and infrastructures service providers is different and higher than the tax payable by other sport facilities service providers;
- Such impairment is stated to be specific because there has been unequal and discriminatory treatment of the Petitioners compared to the treatment of other sport facilities service providers. With this petition being granted, it is expected that the constitutional impairment of the Petitioners will not or will no longer occur;

- The impairment experienced by the Petitioners has met the elements of constitutional impairment, as formulated in the jurisprudence of the Constitutional Court, namely Decision Number 006/PUU-III/2005 and Decision Number 11/PUU-V/2007 and the decisions made following the aforementioned decisions, which have become permanent jurisprudence of the Constitutional Court;
- The Petitioners, all of which are public and private legal entities incorporated under the laws of Indonesia, have legal standing to file this petition for the review of law;
- Whereas the matters related to sport activities have been specifically provided for in the National Sports System Law. Under this law, the types of sports are not specifically provided for. However, this law asserts the responsibility of the Central Government and the Regional Government in developing sports and providing the widest opportunities possible to the community to participate in developing sport activities, including providing sport services, facilities and infrastructures;
- The matters related to taxation under the National Sports System Law are only related to sport championship organization and sport activities services as provided for in Article 51 paragraph (6) stating that the value added tax treatment of sport organizations and activities services is implemented pursuant to the provisions of laws and regulations in the field of taxation;

- Whereas in line with the principle of regional autonomy, law regulating tax on sports organizations and activity services shall be Law No. 28/99;
- Tax and user charge imposed on sports championship organizations and sports activity services shall be regarded as regional own-source revenues;
- Law No. 28/2009 contains the general regulation on the types of tax and user charges for which the regional government shall be authorized to collect, while the region shall be authorized to determine the rates of tax and user charge which shall then be regulated in a regional regulation by taking into account the limits specified in Law No. 28/2009;
- Whereas a legal entity providing sports facilities and infrastructure is a lawful business activity, based on the perspectives of Law Number 40 Year 2007 concerning Limited Liability Company and Law Number 3 Year 2005 concerning National Sports System, as the form of active public participation in promoting national sports;
- Pursuant to Law Number 40 Year 2007, all corporate legal entities shall have equal position and shall be entitled to receive equal treatment. Similarly, business entities providing sports facilities and infrastructure shall have equal position before the law and shall be entitled to be treated equally regardless of the facilities and infrastructure which they provide for the purpose of sports activities.

This is consistent with the principles of sports organization as regulated in Article 5 sub-article a of Law Number 3 Year 2005 which states that sports shall be organized according to the principles of democratic, non-discriminatory, and upholding religious values, cultural values and national diversity. These principles are in line with the constitutional rights of every person as provided by Article 28D paragraph (1) and Article 28I paragraph (2) of the 1945 Constitution;

- Whereas based on the democratic and non-discriminatory principles in sports organization, the imposition of tax and user charge on business entities providing sports facilities and infrastructure should also not be treated in a non-democratic and discriminatory manner, clearly by taking into account the principles of justice and proportionality.
- The provision of section nine of Law Number 28/2009 entitled entertainment tax defines entertainment tax as the provision of entertainment services which charges fees, and categorizes billiards, golf and bowling as sports games;
- Article 42 paragraph (2) sub-paragraphs g and j which consider them as entertainment activities is a mistake if it is related to an order of law which has been previously introduced, namely Article 51 paragraph (6) of National Sports System Law which states that the imposition of value added tax on sports championship

organizations and sports activities services shall be in line with Article 10 paragraph (1) sub-paragraph b of Law Number 12 Year 2011 concerning Formation of Laws and Regulations;

- One of the reasons for the introduction of a law is, among other things, the existence of an order from other existing laws. The matter which should be regulated in the Regional Taxes and Regional User Charges Law is value added tax on the organization of sports championship and sport activities which must be regulated individually rather than categorizing particular type of sports and organization of sport championship into the category of entertainment related to taxable show;
- Whereas golf is a sport, which can be proven by the organization of golf competition in the national sports week, regional sports week, and in the Olympics. The Indonesian golf association is the parent organization of golf which is recognized by KONI, similar to PSSI for football and PBSI for badminton,;
- Whereas for particular sports requiring facilities and infrastructure, whereby an investment may be made either for the building, operation and/or maintenance thereof, in line with the principle of freedom to conduct a business which is guaranteed by the 1945 Constitution, a private legal entity may build and operate a golf course, football field, etc., with the purpose of promoting sports and

as a business activity in the field of sports facilities and infrastructure provision services;

- Whereas all legal entities, having the activities of providing sports facilities and infrastructure services in line with the norm provided for by Article 28D paragraph (1) and Article 28I paragraph (2) of the 1945 Constitution, must receive equal rights and treatment and they must not be discriminated, including in the imposition of regional tax and user charge;
- The provision of Article 42 paragraph (2) sub-paragraph g which places golf as an entertainment in the same category as movie theater, disco, karaoke, massage parlor, etc., instead as a sport, is a logical fallacy of the legislators as they failed to carefully take into account the provisions on sports as provided for in the National Sports System Law;
- Such logical fallacy also lead to a discriminatory tax regulation against golf and other sports facilities and infrastructure providers;
- Whereas the formulation of norm provided for in Article 42 paragraph (2) sub-paragraph g of Law No. 28/2009, particularly in word, *golf*, which categorizes golf as an entertainment in the context of imposition of regional tax is not in line with the order of laws, particularly Article 51 paragraph (6) of the National Sports System Law;

- The categorization of golf as an entertainment and therefore placing it in the taxable show category has led to the different tax imposition between the business entities providing golf facilities and infrastructure and the business entities providing other sports facilities and infrastructure, which causes unequal and discriminatory treatment. The coming into effect of the Law is clearly inconsistent with the norm of constitution as provided for in Article 28D paragraph (1) and Article 28I paragraph (2) of the 1945 Constitution.

3. Dr. Ir. Irawan M.S.

- Golf course is a green open space among its surroundings, in which a green open space, according to the regulation concerning spatial layout, is an area generally used for open area, consisting of vegetation having ecological and environmental functions;
- Vegetation constitutes the lungs of the city, because vegetation produce oxygen and absorb CO2. Human produce CO2, and with the absence of vegetation, CO2 will be released to the air, becoming emissions. However, with the existence of open green space such as golf courses, vegetation will absorb CO2 and produce oxygen;
- Golf course has ecological and socio-economic advantages, such as the conservation of water, soil and biological resources diversity.

One of the socio-economic advantages is absorbing the workforce in its surrounding areas.

- Golf course can attract tourists who are golfers, which may generate foreign exchange. For example, international competitions have been held several times in Indonesian golf courses, they can generate foreign exchange for the state;
- Golf course may be reviewed by its multiple functions, from the socio-economic-cultural aspect and its multiple functions from the ecological aspect. From the socio-economic-cultural aspect, it has the function as sport facility and infrastructure and it provides employment opportunities, and in some places, a golf course also becomes cultural conservation. From the ecological aspect, a golf course may serve as a habitat for biological resources diversity, ranging from small plants, grass, up to trees. For example, Rawamangun Golf Course, it has tall trees which are in the age of probably over 100 years, in addition to bushes and grass;
- Golf course may mitigate or reduce flood risk, for example, if it rains in an area and the rain water flows into a field like a golf course, the rain water will be contained instead of flowing straight downstream;
- A golf course consisting of several vegetation canopies may absorb carbon instead of releasing it to the air. On the other hand, it is true that there is a function which may pollute water resources if the

fertilizer used by the management of golf course exceeds the quantity required;

- If the soil erosion rate is calculated, golf course will have a lower rate than in sloping agricultural areas or in agricultural areas which do not have bench terrace, etc.;
- Water buffering capacity is the land's capability to store water before it flows downstream or evaporates in the sky. If it rains in a plain area consisting of concretes or waterproof constructions, the water will quickly flow downstream or evaporate up away as well. Water buffering capacity in golf course is greater than mixed-use land, cropland, dryland, settlement and/or industrial area as well. For BSD case, it is true that water buffering capacity for golf course is smaller than forest and also mixed-use land. However, it is still better than dryland, settlement and/or industrial area;
- From the biological aspect, if the golf course is very isolated, it will attract other animals or animals in the surrounding areas;
- From the perspective of ecological aesthetics, the existence of golf course has environmental aesthetic value. The landscape of golf course is fascinating. In BSD, there are lakes in the golf course which serve as water containers and constitute sources of water needed by the golf course itself and for the absorption for a relatively long time;

- It is true that compared to industrial forest, the carbon absorption of golf course is much lower. However, compared to food crop agriculture which is very weak or considered to be zero, golf course can absorb carbon;
- As a contradiction, if compared to an industrial estate, a golf course area highly absorbs carbon, instead of being the source of emission. Meanwhile, industrial estates are sources of carbon emission since they burn fuel. If we compare it to agricultural lands, such as food crop in rice fields in which they will be harvested every six months, or three months, or four months, their carbon absorption is not stable compared to grass or trees.
- The advantages of golf course are its capability to keep the balance of life, both onshore biotic and abiotic components, and its greater value of diversity compared to housing or industrial areas;
- From the aesthetical aspect, a golf course has scenic beauty while from the educational and research aspects, it is an object in the development of science, education as well as knowledge, and it also has future benefits. Thus, the existing biological resources diversity may in the future serve as important sources for herbs, etc.;
- Every golf course already has environmental reports. One of the data in 2007 stated that there is no strong indication that particular

nutrients, either heavy metal or other nutrients has exceeded the threshold according to the applicable provisions;

- If compared to the land use for instance, in annual cropland, biannual cropland, dryland, biannual dryland, vegetable dryland, mixed-use land, it is true that the absorption of workforce in a golf course with only caddies or a golf course with caddies and maintenance staff, who are gardeners or grass keepers, etc., is higher compared to the use of similar lands;
- The result of economic evaluation shows that the environmental service value of golf course reaches Rp1.171 billion for Rawamangun and Rp1.8 billion for DIG or approximately Rp22,000,000.00 to Rp34,000,000.00 per hectare. The environmental service value is based on the benefits of water conservation, flood mitigation, glasshouse gas mitigation and workforce absorption services;

4. H. TB. Eddy Mangkuprawira

- Legal basis for tax collection is the 1945 Constitution as the fundamental law in laws and regulations, Article 23A provides that statutory taxes and other levies for state needs shall be stipulated by law;
- Pancasila as the source of all state legal sources and the 1945 Constitution, as the fundamental law, order that the formation of taxation law must take into account every person’s constitutional

rights, namely the protection of human rights and maintaining the existence of indisputable law which guarantees the achievement of justice;

- Law Number 12 Year 2011 concerning Formation of Laws and Regulations provides that material substance of laws and regulations must reflect 11 principles, among other things, the principles of justice, equal position before the law and government, and legal order and certainty;
- According to the tax collection principles in the State Policy Guidelines and according to the taxation experts who principally hold the same opinion, the most fundamental principle in taxation policy or Law is that they must be consistent with the principles of equality, justice and parity;
- The State Policy Guidelines of 1999 explains several principles, namely transparency, discipline, justice or equality, efficiency and effectiveness principles. Meanwhile, according to experts or scholars, among others, Adam Smith, they are equality, parity or justice, certainty, convenience and efficiency principles, and several other scholars basically suggest similar principles. A German tax expert, Reds Nomat, suggest the existence of the principles of reyenew productivity, social justice, economic goals and east of industrian of complaints;

- The establishment of Taxation Law should take into account the principle of social justice, which is described by new Marx, consisting of the following elements:
    1. The universality principles, people who are able to pay tax must be taxed universally. This means that the same tax burden is imposed on those people;
    2. The equality principle, people who are in the same economic position must also bear the same tax payable;
    3. The ability to pay principle, tax burden is borne by individuals relative to the capability to bear the burden by taking into account all characteristics of the relevant individuals in such a way that the losses arising from tax burden will be equal. Progressive rate is applied to income tax;
    4. The principle of redistribution, tax burden distribution among the population must have an effect to reduce differences in income and assets caused by the mechanism of free market. Here, progressive rate applies;
- Prof. Mr. Hofstra, a Senior Professor of Dutch Taxation Law, quoting Agustinus' words, a taxation expert in the Roman era, suggests that collecting high tax, even higher than demand for just

tax collection, is none other than a large-scale robbery committed by the state;

- If there are provisions on taxation without justice, particularly if the implementation of collection is inconsistent with the principle of with governance, John Marshall's warning that the power to take is the power to destroy, will become reality;
- Prof. Dr. Husein Djajadiningrat, a Senior Professor of Taxation Law from Universitas Indonesia suggests that he is hoping that in the future, tax collection should be made based on human dignity and the magnitude of public interest as properly made in an independent state. The law is a system to solve a problem of community, maintaining the sense of justice living in the inner heart of the people. Tax collection is a very great power in the hand of the state. Taxation law must contain material substance accompanied by dedication to the people and public welfare, in order that it is transformed into justice;
- With regard to the prevention of double tax collection. In the general principle of taxation, double tax is highly prevented, either in national tax law or international tax law;
- In accordance with national tax law and even in Emergency Law Number 11 Year 1957 concerning Common Rules on Regional Tax, it is explicitly stated that a field of tax which has been levied by the state shall not be levied again by the regional government;

- Law Number 11 that has been amended by Law Number 18 and most recently amended by Law Number 28 Year 2009 basically adopts the principle that there shall not be double tax;
- In accordance with international tax, prevention of double tax is regulated in both the United Nation Model and the OECD Model. In order to prevent double tax imposition on the subject and object by two countries, both countries shall enter into a bilateral agreement in the form of tax treaty, namely on the prevention of double tax;
- In the International Tax Glossary, International Bureau of Fiscal Documentation, it is described about the authority to collect tax by regional government. It is a general fact that local authorities, either state, province, country, municipality or regency, are excluded from the tax imposed by the central or federal government authority if the regional government is given the authority to collect tax;
- With regard to revenue sharing. Whereas in case regional government needs funding from sources collected by the central government, revenue sharing shall be allowed, which means that a higher level of government unit shall collect its own tax and then distribute several parts of such income or revenue to the lower governmental level.
- Under Emergency Law Number 11, it is known as obtaining. Hence, it is not double tax by obtaining but being added. It is a particular presentation of central tax that has been collected.

Therefore, although the collector is the central tax office, the object remains the same.

- Entertainment tax is imposed on golf game while the same is not imposed on horse riding, parachuting, shooting, futsal, tennis, badminton, etc. This is certainly a discriminatory treatment, therefore, it is inconsistent with Article 28I of the 1945 Constitution;
- The provision is also inconsistent with the principles of equality, parity and justice in tax collection because not all tax subjects and tax objects are equal, but they are not subject to entertainment tax.
- The provision is inconsistent with the general principle of tax collection which must prevent double tax imposition as the entertainment tax object has been subject to value added tax by the central government;
- The violation of provision in the fundamental law, namely the 1945 Constitution and Law Number 12 Year 2011 concerning Formation of Laws and Regulations shall lead to the introduction of Taxation Law having the potential of causing abuse of power in the implementation of tax collection.
- The condition arising from the abuse of power shall carry a stigma that power to tax is the power to destroy, as suggested by John Marshal, an American Supreme Court Justice in 1755-1835.

Witness of the Petitioners

1. Faisal Abdullah (Ministry for Youth and Sports)

- The Minister of Sports of the Republic of Indonesia shall be responsible as the organizer of governmental affairs in the field of sports, in accordance with the authority held under the principles as provided for in Article 5 of Law Number 3 Year 2005 concerning National Sports System;
- As provided for in Article 13 paragraph (1) of Law Number 3 Year 2005 concerning National Sports System, the government has the authority to regulate, develop, improve, implement and supervise the organization of sports nationally. Certainly, the authority provided by law in the implementation of the development and improvement of sports system shall refer to Article 17 which reads, “Educational sport, recreational sport and professional sport.” The definitions of the three sports categories are as follows, education sport is the physical and sport education implemented as part of the regular and continuous educational process to obtain knowledge about personality, skills, health and physical fitness.
- Recreational sport is the sport played by the community with an interest and capability which grows and improves in accordance with the local community’s cultural conditions and values in order to gain health, fitness and joy. Meanwhile, achievement sport is the sport which develops and improves an athlete in a planned, gradual

and continuous manner through competition in order to achieve accomplishment, supported by sport science and technologies.

- If we observe the substance of judicial review of Article 42 paragraph (2) sub-paragraph g of Law Number 28/2009 concerning Regional Taxes and Regional User Charges against the 1945 Constitution, it is stated that, among other things, billiards, golf and bowling games are categorized as entertainment tax objects, which caused unequal treatment of the actors in the sports industry, in which the Government actually have the obligation to develop, encourage and improve the industry of sports facilities, as regulated in the provision of Article 6 sub-paragraph f of National Sports System Law which reads, “Every citizen has the equal right to improve sports industry.” *juncto* Article 68 which reads, “the Government shall develop and encourage the improvement of the domestic industry of sport facilities.” *juncto* Article 78 which reads, “Every sports industry implemented by the Government, regional government or the community must take into account the objectives of national citizenship and the principles of sports organization.”;
- Accordingly, the categorization of billiards, bowling and golf games as the object of entertainment tax may factually impair the athletes as legal object when they perform the sports. This is because with the imposition of entertainment tax on billiards, golf and bowling infrastructures, the infrastructure rent will become high and not

affordable for the athletes when they try to make development and improvement in achieving accomplishment, both at the national and international levels.

- Whereas billiards, golf and bowling associations are members of the National Sport Committee in Indonesia, having the duties and responsibilities for making development and improvement of the athletes of billiards, gold and bowling, which are achievement sports, to achieve accomplishment. This is in accordance with Article 27 of the National Sports System Law, namely the development and improvement of professional sports are made by sports parent organization, both at the central and regional levels.
- The Government welcomes the community's initiatives and participation in assisting the Government to provide sports infrastructure which has been limited to particular matters. The participation of sports actors is a mandate of Law as regulated in the provisions of Article 10 of the National Sports System Law which reads, "The community shall be entitled to participate in the planning, improvement, implementation and supervision of sports activities. The community is responsible to provide support of resources in the organization of sports.", article 67 of the National Sports System Law reads, "The government, regional government and community are responsible for the planning, management, utilization, maintenance and supervision of sports infrastructure.",

juncto Article 75 of the National Sports System Law which reads, “The community has equal and ample opportunity to participate in sports activities. The community’s participation as intended in paragraph (1) can be made in individual, group, family, organization, profession, legal entity, business entity or community organization in accordance with the principles of transparency and partnership.”

- From the perspective of Law Number 3 concerning National Sports System, billiards, golf and bowling may be categorized into the scope of professional sports rather than into a type of entertainment due to the establishment of All Indonesian Billiards Association (*Persatuan Olahraga Biliar Seluruh Indonesia*/POBSI) on October 9, 1953, Indonesian Golf Association (*Persatuan Golf Indonesia*/PGI) on April 1966 and the Indonesian Bowling Association (*Persatuan Bowling Indonesia*/PBI) on November 19, 1970. Accordingly, POBSI, PGI and PBI constitute sports parent organizations having responsibility in the improvement and development of billiards, golf and bowling. This is consistent with the provisions of Article 27 which reads, “Professional sports shall be developed and improved by empowering sport associations, enhancing national and regional sport development centers, and organizing competition gradually and continuously.” The improvement made by the sport associations must follow the

technical standards of the relevant sport. This is a mandate provided for in Article 68 which reads, “The government, regional government and the community are responsible for the planning, procurement, utilization, maintenance and supervision of sports infrastructure. The government and regional government shall guarantee the availability of sports infrastructure which meets the standards of the Government and regional government’s requirements.”

- In a *de facto* manner, billiards, gold and bowling are categorized as achievement sports rather than a type of entertainment since POBSI, PGI and PBI, as sports parent organization, have been affiliated with the relevant international sports federations, namely the World Pool Billiards Association, the International Golf Federation and the International Bowling Federation. This is consistent with Article 1 sub-article 25, “Sports parent organization shall be a sports parent organization developing, improving and coordinating a type of sport or a joint sports organization of a type of sport constituting a member of the relevant international sport federation.”
- By taking into account the letter of the Minister for Youth and Sports Number 3990 regarding Recommendation of Government Policy on Billiards, Golf, Horse Riding and Motorcycle Race, it is suggested that the Government may agree to exclude the sports intended

from the category of entertainment tax object through its arrangement in a regional regulation.

- Whereas by taking into account the recommendation above, a seminar formulating taxation policies supporting the improvement of national sports accomplishment has been held by the State Ministry for Youth and Sports on March 23, 2011. The seminar has determined matters which require special attention to grow and develop sports accomplishment and the stimulus for the athletes achieving accomplishment, such as the exemption of tax on prizes. The tax on donation from the parties who wish to help the development of sports will be relieved, and if possible, the tax on prizes will be exempted from Income Tax and VAT, exemption of import duty, training equipment imported from overseas which have been charged income tax and value added tax, donation of infrastructure and facilities, and athlete achievement bonuses, and exempted from VAT.
- Whereas the results of investigation team is increasingly complex, especially appreciation for athletes. It is also requested that the taxation policy should allow the growth and development of every person’s interest in sports throughout their lifetime. In order to create stimulus, sports must receive special treatment, for which the duty is fully assigned to the Government, as mandated in Article 22 of the National Sports System Law that the Government shall

make sports development and improvement through the stipulation of policy, upgrading, training, coordination, consultation, communication, counseling, dissemination, pioneering, research, pilot testing, competition, assistance, facilitation, permission and supervision.

- The efforts worthy to be considered in providing incentives are consistent with the fundamentals, functions and objectives of the development of the Indonesian people in the field of sports. Many efforts have been made to obtain the treatment, however, until today the special treatment still requires a long struggle. The special treatment in taxation which actually and greatly helps the sports world and the benefits of which can be enjoyed is the regulation of the Minister of Finance concerning the exemption of import duty for sports requirement imported by national sports parent organizations.
- The aforementioned Ministry of Finance of the Republic of Indonesia and the Ministry for Youth and Sports of the Republic of Indonesia have one objective, namely to assist the government in organizing governmental affairs in different authority. With regard to the programs of the Ministry for Youth and Sports in growing and developing the accomplishment and recreation of the community, especially in the field of sports shall require a separate policy regulating in a specific manner. Tax incentive in the sports world is

still low and it requires special treatment to guarantee that the athletes can continue to improve their achievement without being bound by the charging of expensive infrastructure rent due to land possession, due to entertainment tax, which resulted in the expensive infrastructure rent for athletes. In order to perform the development, the Government joins with the sports actors who have been assisting the Government which has not been able to maximally provide the infrastructure, as provided for in Article 80 of the National Sports System Law which reads, “The development and improvement of sports industry are made through mutual partnership to realize independent and professional sports activities.” The government and regional government provide facility to establish sports industry development and improvement centers.

- Several laws and regulations which principally have positioned and treated sports as a matter that must receive priority for support, wish, relief and exemption from tax collection, among other things, are:

  1). Law Number 17 Year 2006 concerning Amendment to Law Number 10 Year 1995 concerning Customs, which provides special facility for the import duty of imported goods insofar as they are used for the interest of sports.

  2). Law Number 36 concerning the Fourth Amendment to Law Number 7 Year 1983 concerning Income Tax, which

provides special treatment for the interest of sports allowing income tax subjects to deduct their revenue for the interest of donation to sports improvement.

3). Article 1 sub-paragraph d of Government Regulation Number 93 Year 2010 concerning Contribution to Disaster Mitigation, Contribution to Research and Development, Contribution to Education Facilities, Contribution to Sports Improvement, and Infrastructure Development Costs Minus Gross Income which reads, *Contribution and/or costs which can be deducted up to a certain amount from gross income in the context of income accounting as tax on taxpayer consists of contribution in the context of sports development constituting contribution to develop, improve and coordinate an achievement sports organization or joint achievement sports organization given through sports development institution*.

- The categorization of billiards, golf and bowling in the formulation of Article 42 paragraph (2) sub-paragraph g of Law Number 28 Year 2009 concerning Regional Taxes and Regional User Charges as a type of entertainment tax object must receive special attention, considering that in a *de jure* and *de facto* manner, billiards, golf and bowling are achievement sports. Therefore, the exclusion of entertainment tax imposition on the interests of sports development

and improvement is highly needed, similar to several laws and regulations that have provided facility in the form of tax object exclusion;

- The preparation of material substance of draft Law Number 28 Year 2009 concerning Regional Taxes and Regional User Charges, from the technical aspect, is regulated in the provisions of Law Number 12 Year 2011 concerning Formation of Laws and Regulations. The Ministry for Youth and Sports was not involved in the discussion among the ministries which constitutes precondition for preparing a draft law. As there is material substance related to the arrangement of sector interest, similar to the categorization of billiards, golf and bowling which actually constitutes the authorization of the State Ministry for Youth and Sports of the Republic of Indonesia, the ministry should be involved, in order that it can provide suggestion and consideration during the discussion about formulating and categorizing sports as entertainment tax object into legislations.

Conclusions of the written statement of the Minister for Youth and Sports:

1). The provision of Article 42 paragraph (2) sub-paragraph g shall be reviewed as it has incorrectly categorized billiards, golf and bowling as objects of entertainment tax, which are supposed to be the objects of achievement sports pursuant to Law Number 3 Year 2005 concerning National Sports System;

2). Synergy of efforts and support among all groups in trying to develop and improve sports is required, considering the government's limitation in terms of funding, the active participation of all components, including the business community, constitutes a positive step. Therefore, the government must pay special attention to the community contributing to the improvement and development of sports through the provision of facilities, insofar as it is not inconsistent with laws and regulations, including the exclusion of tax which places heavy burden on sports facilities and infrastructure;

3). Several sectoral laws and regulations have provided facilities in the form of support for sports developers. Therefore, it must be considered that the categorization of billiards, golf and bowling as tax object can place heavy burden on athletes, since golf, billiards and bowling constitute achievement sports which can raise the value and dignity of the people at the international level.

2. Ngatino

- Under Presidential Decree Number 72 Year 2001 concerning National Sport Committee, KONI is the sole organization coordinating achievement sports activities in Indonesia;
- Currently, Indonesian Golf Association, Indonesian Bowling Association and All Indonesian Billiards Association are members of KONI, in which they are sports parent organizations;

- The Indonesian Golf Association (PGI) has the requirements which are set out in its articles of associations/by-laws which have met the requirements and gained recognition at the national and international levels.
- Golf has been held in national games since 1969 until today. The PON which have been held which include golf competition are the 7th PON in 1969 in Surabaya, the 1973 PON, the 1977 PON, the 1981 PON, and the 2008 PON in East Kalimantan, and including the 18th PON in 2012 in Riau which still held golf competition as a branch of achievement sport;
- KONI supports the recommendation in a collective seminar entitled, "Formulating Taxation Policy Supporting the Improvement of National Sports Accomplishment" held by the Ministry for Youth and Sports and KONI on March 23, 2001, during which the matters requiring special attention to grow and develop sports achievements and stimulus for athletes and business actors in the improvement of sports achievements have been determined, which include the following matters:

  1). Price Tax, Income Tax and VAT on prizes awarded to athletes shall be relieved or, where possible, exempted;

  2). Price Tax, Income Tax and VAT on donation from parties willing to assist the development of sports shall be relieved or, where possible, exempted;

3). Tax or import duty exemption for training equipment imported from overseas. This policy has been adopted,

4). Income Tax and other taxes on the donation of sports facilities and infrastructure shall be exempted;

5). VAT on bonuses for athletes achievements shall be exempted;

6). KONI has never been invited to state its opinion in the discussion of Draft Law concerning Regional Taxes and Regional User Charges;

3. Ray Hendarto

- PGI is under KONI and for problems related to golf regulations.
- Golf players consist of amateur golfers and professional golfers. In fact, 95% of the members of Indonesian Professional Golf Association (PGPI) come from middle-class families who depend their lives on their profession as professional golfers;
- PGI is concerned to improve golf domestically and to successfully compete with other countries. Actually, more golfers means more benefits for the development of golf;
- Tax increase will make golf to become less affordable for the public and it will lead to the exclusivity of golf domestically, which will lead to the poor achievement in golf sport;
- PGI has never received invitation to discuss Draft Law concerning Regional Taxes and User Regional Charges;

4. Syafei Asnaf

- The witness is a representative of PGPI and also the President Director of PT Sana Graha Adi Sentosa, a golf course management company;
- Professional golf is sport activities conducted with an objective to obtain revenue in the form of money or other forms, based on the skills in golf;
- Professional golfers are people conducting golf activities with an objective to obtain revenue in the form of money or other forms and conducting the activities based on the skills in golf;
- The activities of professional golf are golf competition and tournament held under the provisions of applicable regulations;
- Recently, golf lovers extend into various circles ranging from males, females and children. Golf has increased the positive impacts on the industry and increased tourist visits in Indonesia;
- The Indonesian Professional Golf Association coordinates and cooperates with the government, under the aegis of the Indonesian Professional Sports Association (BOPI) of the Ministry of Sports and Tourism;
- The members of the witness' club in average come from middle-class families, whose parents are caddies or professional golfers;
- Whereas the witnesses have never been invited for Draft Law discussion or from the Government;

[2.3] Whereas with regard to the Petitioners' petition, the Government conveyed opening statement in verbal in the hearing on October 19, 2011 and submitted the written statement received by the Registrar Office of the Court on November 23, 2011, which principally explains as follows:

In their petition, the Petitioners petitioned for judicial review of the provisions of Article 42 paragraph (2) sub-paragraph g of Law No. 28/99 which reads:

> *"Entertainment as intended in paragraph (1) shall be: g. billiards,* ***golf*** *and bowling."*

According to the Petitioners, the provisions of Article *a quo* is inconsistent with the provisions of Article 28D paragraph (1) and Article 28I paragraph (2) of the 1945 Constitution as the Petitioners consider that the inclusion of golf as entertainment tax object into the provisions of Article 42 paragraph (2) sub-paragraph g of Law No. 28/99 has impaired the constitutional rights and/or authority of the Petitioners. The Petitioners also stated a reason that as a sport, golf should not be subject to entertainment tax and the imposition of golf as entertainment tax object constitutes discriminatory treatment and provides unequal treatment before the law to the Petitioners.

The Government is of the opinion that the Petitioners do not have legal standing to file the petition *a quo* due to the following reasons:

1. The Government is of the opinion that Article 28D paragraph (1) and Article 28I paragraph (2) of the 1945 Constitution which are placed as the touchstone in the petition *a quo* do not provide the constitutional rights and/or authority to the Petitioners as both articles regulate the protection of Human Right as the constitutional rights and/or authority of individual citizens while the Petitioners constitute an entity, therefore, the Petitioners do not have the constitutional rights and/or authority under the aforementioned Article 28D paragraph (1) and Article 28I paragraph (2) of the 1945 Constitution.

2. According to the Government, even if the Petitioners are considered to have the constitutional rights and/or authority under Article 28D paragraph (1) and Article 28I paragraph (2) of the 1945 Constitution, the coming into effect of the provisions of Article 42 paragraph (2) sub-paragraph g of Law No. 28/99 as the article petitioned for review still does not impair the Petitioners. This is because although the taxpayer of the entertainment tax on golf as regulated in Article 42 paragraph (2) sub-paragraph g of Law No. 28/99 is the organizer of golf (in this matter, the Petitioners), principally however, the tax subjects who actually bear/pay the burden of Entertainment Tax on golf is the persons playing golf as the Tax Bearers, while the Petitioners in a formal and juridical manner are merely the party paying the Entertainment Tax on the game of golf.

3. The Government is of the opinion that even if it is true (*quod non*) that the constitutional impairment as argued by the Petitioners occurred by the categorization of golf as sport into entertainment tax object, it is not caused by the norm contained in the provisions of Article 42 paragraph (2) sub-paragraph g of Law No. 28/99 as it has clearly been mentioned that the matter being subject to entertainment tax in the provisions of Article 42 paragraph (2) sub-paragraph g of Law No. 28/99 is “the game of golf” instead of/not “the golf sport”. Therefore, the Government is of the opinion that even if it is true (*quod non*) that the imposition of “the golf sport” as an entertainment tax object has impaired the Petitioners, this is related to the problems of norm implementation, not the constitutionality of the provisions of Article 42 paragraph (2) sub-paragraph g of Law No. 28/99 at all.

Based on the descriptions above, the Government is of the opinion that the Petitioners do not suffer constitutional impairment, therefore, the Government requests the Court to declare that the Petitioners do not have legal standing in filing the petition *a quo*, and according to the Government, it is appropriate for the Court to declare the Petitioners’ petition inadmissible.

Substance of the Petition

In accordance with the mandate of the 1945 Constitution, regional government shall be authorized to regulate and manage its own governmental affairs according to the principle of autonomy and duty of assistance. The

granting of high level autonomy to regional government is aimed at accelerating the realization of community welfare through the improvement in service, empowerment and participation of the community. Through the high level autonomy, regional government is expected to be able to increase competitiveness by taking into account the principles of democracy, parity, justice, exclusivity and specialty, as well as regional potential and diversity within the system of the Unitary State of the Republic of Indonesia. The 1945 Constitution mandates that the arrangement of authority, finance, public service, natural and other resources utilization relationship between the central and regional governments is regulated and implemented in a just and harmonious manner as well as taking into account special characteristics and diversity of the regions. One of the 1945 Constitution mandates to regulate financial relationship between the central and regional governments has been implemented by the issuance of Law No. 28/99 in order to regulate financial relationship between the central and regional governments, especially in the field of revenue (taxation).

Regional Tax constitutes a form of fiscal decentralization policy. By decentralization, it is expected that a governmental system which better reflect the democratic values would exist, considering that the closest governmental level to the people is the regency/city government, therefore, the existence of regional government is highly needed in providing services to the community. In addition to that, the argumentation serving as the basis of the implementation of fiscal decentralization is that regional governments have better understanding and comprehension of the requirements in providing the public service level

suitable to the capability that they have and the regional governments are the parties which have the best knowledge on all potentials within their territory, therefore, it is expected that regional governments can optimize the activities of tax collection in each region.

The taxation policy in the context of fiscal decentralization serving as an important indicator for democracy is the presence of taxing power sharing which consists of expenditure assignment and revenue assignment aspects with the main objective to achieve the increase of community welfare in general. Substantive taxing power sharing contains meaning and objective as the form of taxing power sharing contains to develop the independency of regional government in case of fiscal, as the most important part in revenue assignment is taxation authority. The taxing power sharing is intended to provide more maximum authority for the regional government with an objective to decrease the dependence upon the central government. Therefore, fiscal decentralization is accompanied by the shift of taxing power from national government to regional government, as the policy of fiscal decentralization does not only relate to the problems of budget allocation authority (regional budgeting), but also covers revenue assignment, particularly taxing power.

Regional Tax is an obligatory and compulsory contribution under Law for private person or entity owing to the regional government, by not receiving direct reward and used for the Regional requirement for the community welfare at large. Regional tax constitutes regional own-source revenue and should serve as

the main funding resources for the continuity of regional development in the framework of regional autonomy, as well as minimizes the dependence of regional government upon the central government. Therefore, the tax under regional government authority is mainly taxes that its data and information are obtained easily, tax that its object is relatively fixed or has low mobility, as well as tax that has no problems related to boundary (no cross boundary). The types of Regional Taxes stipulated in Law No. 28/2009 are Provincial Tax and Regency/City Tax.

Whereas the issuance of Law No. 28/99, which is the law replacing Law Number 18 Year 1997 amended by Law Number 34 Year 2000 concerning Regional Taxes and Regional User Charges, constitutes a strategic and monumental step in strengthening fiscal decentralization policy, especially in the context of building a more ideal financial relationship between the central and regional governments. As one of continuous improvement parts, Law No. 28/99 has at least revised the 3 (three) main matters, namely the perfection of regional taxes and regional user charges collection system, the granting of greater authority to the regional government in the field of taxation (local tax empowerment) and the increase of supervision effectiveness.

The perfection of regional taxes and regional user charges collection system is made by changing open-list system to be closed-list system, so that the types of taxes available to be collected by the regional government are the types of taxes that have been stipulated under Law Number 28/99 intended. The

regional government shall not be authorized and allowed to stipulate new types of taxes beyond those have been determined by Law.

While the strengthening of local taxing power is made by, among other things, adding new types of regional taxes and regional user charges, expanding the basis of regional taxes and regional user charges existing, transferring several types of central taxes to regional taxes and giving discretion to the regional government to set out the tariff. In addition, Law No. 28/99 has also stipulated maximum tariffs for regional taxes and the maximum tariffs of several regional taxes have been increased to provide more flexibility to the regional government in collecting regional taxes in accordance with its regional policy and condition.

Under Law No. 28/299, there has been relatively effective supervision instrument which has been used in preventive and corrective manners, namely that every Draft Regional Regulation concerning regional taxes shall be evaluated first by the Government, and regional government violating the higher level provisions of laws and regulations in determining policy in the field of regional taxes shall be subject to sanction.

Under Law No. 28/99, it is also regulated that the Regional Government may not collect a type of taxes as stipulated thereunder in the event that its tax potential is in fact insufficient and/or for adjustment to Regional policy stipulated by Regional Regulation. Meanwhile, to ensure that the use of regional taxes is beneficial for taxpayer and all classes of the community, under Law No. 28/99, it

is also regulated that the acquisition of several types of regional taxes is earmarked to fund expenses related to taxes collected, among other things, allocated to fund road construction and maintenance, public transportation improvement, health services and road lighting.

Similar to state taxes (central taxes), whereas in accordance with the basis of tax burden distribution which has been received and implemented universally, the just distribution of tax burden is based on the bearing power/ability to pay of tax subject. The greater someone's ability to pay, the greater rate of taxes should be imposed. This has been consistent with the principle of Indonesian economy based on kinship basis and solidarity principle as stated in Article 33 of the 1945 Constitution. Principally, the burden of government expense must be borne by all groups in the community relative to the assets and abilities of each group. This kind of concept constitutes the concept of social justice widely adopted by almost all governments. In addition, a requirement which also enables to demonstrate that the tax imposed has been justly implemented is the bases of equality and equity. According to these bases, the distribution of tax pressure among tax subjects shall be made in proportional by providing equal treatment to persons being under the same condition.

It has been common fact (*notor feiten*) that the persons playing golf are from middle-high economic level. The exclusivity of golf is indicated from its greatly high costs, such as course rent/membership costs and other equipment costs, so that golf may only be played by certain group of people with high

income. Golf constitutes a very exclusive game played by moneybags, as golf principally and actually requires great costs, either for equipment or the provision of facilities used, including spacious course. In the fixed and limited area of land, the requirement of golf course facility causes the availability of land facility for other community groups is also limited. Whereas, at the same time, land use for activities other than golf may be more productive, has high economic value and beneficial for wider community groups. The “opportunity cost” of land use for golf is relatively high as land use for the others is not only reviewed from economic aspect but also social aspect. In this matter, land use for golf may only be enjoyed by small community group (the rich), so that the opportunity cost of land use for public community and/or other productive activities becomes very high.

The Government makes a comparison that under Law No. 28/99, bird nest subject to tax is only swallow nest, namely on Swallow Nest Tax. Subsequently, tax on Land and Building Title Transfer Fee (*Bea Perolehan Hak atas Tanah dan Bangunan*/BPHTB) shall be only imposed on transaction over Rp60,000,000.- (sixty million Rupiah). It is because swallow nest has high economic value and meets criteria to be tax object. Meanwhile, tax on BPHTB with transaction over Rp60,000,000.- (sixty million Rupiah) shall be imposed in the consideration of providing facilities to the poor to have a shelter. Therefore, it is very reasonable if Entertainment Tax is only imposed on golf, billiards and bowling. It is conducted based on consideration that golf, billiards and bowling has high economic value, ability to pay tax for eligible taxpayer and meet the criteria stipulated to be regional tax object. Therefore, in accordance with the principle of justice in tax

collection, namely based on bearing power/ability to pay, it is very reasonable that if golf is subject to tax. According to the Government, such matter also constitutes reflection of substantive justice principle that same matter/condition shall be treated equally, while different matter/condition shall be treated differently. In fact, it will be unjust to assume that if golf is subject to tax, other types of games must be necessarily subject to tax while bearing power/ability to pay of person playing golf is clearly different from persons playing other games. Persons playing golf have higher bearing power/ability to pay, so that they cannot be treated equally with persons playing other games with weaker/lower bearing power/ability to pay. According to the Government, this has also been in line with the function of tax, namely to perform budgeter function (funding source for government organization) and regulator. In this case, tax can be the most proper instrument to handle with conflict of interest between the rich and the poor. In addition, it is also because tax constitutes instrument to guarantee the performance of government basic roles in the form of allocation, distribution and stabilization. Tax has been placed by the government to perform distribution (equalization), similar to tax proceeds used to provide subsidy to the community with weak economy. According to the Government, this has been also in line with the solidarity principle and kinship basis of Indonesian economy.

Entertainment tax on golf as regional tax has been consistent with the principle of regional tax in local nature, namely the tax object is available in a particular area and in “immobile” nature. Entertainment tax collection on golf is “local” as the location of activities in which the tax is collected is permanent and

found in a particular area. This characteristic is consistent with the principle and criteria of regional tax so that the categorization of tax on golf as regional tax or regency/city tax has been proper. In addition, the main factor serving as a reason that golf is categorized as entertainment tax object is because the golf itself is **charged**. In increasing fiscal decentralization and taxation democracy, one of efforts made is extending the basis of regional taxes. Therefore, the determination of golf as regional tax object (entertainment tax) constitutes one of policies in extending the basis of regional taxes intended, made in consideration that the taxpayer's ability to pay is eligible. In addition, the determination of golf as regional tax object (entertainment tax) is also intended to increase local taxing power in the effort of increasing Regional Own-Source Revenue. Based on such matters, the Government suggests that entertainment tax on golf (as regional tax) has been very proper.

Entertainment tax object under the provisions of Article 42 paragraph (2) sub-paragraph g of Law No. 28/99 shall be golf as **entertainment** not golf as **sport** as argued by the Petitioners in their petition. In case that the Petitioners question the imposition of golf on entertainment tax, as if it was true (*quod non*), the Petitioners consider that the categorization of golf as entertainment tax object is unconstitutional, it is not caused by the norm contained in the provisions of Article 42 paragraph (2) sub-paragraph g of Law No. 28/99 at all, but it is only related to the problem of norm implementation. However, even though golf can be specified as sport, it is undeniable that most people playing golf for joy/entertainment of a game, in other words, golf is not constantly considered as

sport in absolute, but also as a game/entertainment. Referring to the definition of sport under the provisions of Article 1 paragraph 4 of Law Number 3 Year 2005 concerning National Sports System, sports shall mean all systematic activities to encourage, develop and improve physical, spiritual and social potentials, it has been clear that golf cannot be constantly considered as sport, but also as a game/entertainment, so that according to the Government the categorization of golf as entertainment tax object under the provisions of Article 42 paragraph (2) sub-paragraph g of Law No. 28/99 has been very proper.

In other countries, golf is also subject to regional tax, such as in India in which golf subject to entertainment tax on golf and in Canada in which the tax is referred to as sales tax, include golf and veterinary service. Because basically, consistent with the criteria of regional tax, all types of sports are proper to be stipulated as tax object, however the tax imposition shall be based on the tax subject's ability to pay. Whereas under the 1945 Constitution, there are no provisions which state that sports cannot be subject to tax, the 1945 Constitution actually provides opened legal policy options for legislators to stipulate a tax. Therefore, the Petitioners' reason stating that sports cannot be necessary subject to tax is not valid.

The Government suggest that the categorization of golf as entertainment tax object as regulated in the provisions of Article 42 paragraph (2) sub-paragraph g of Law No. 28/99 is not inconsistent with Article 28D paragraph (1) of the 1945 Constitution at all, as the arrangement of golf as entertainment tax

object has been made based on the recognition, guarantee, protection, just legal certainty and equal treatment before the law, for both the Petitioners and the community as tax subject in general. Whereas under Law No. 28/99, legal certainty concerning golf as entertainment tax object (regional tax) has been regulated and provided, namely Entertainment Tax subject for golf is private person or entity enjoying the entertainment, while the Taxpayer is private person or entity organizing the entertainment of golf intended. Subsequently, the basic rate of entertainment tax imposition on golf have been also regulated, that is the amount of money received or should be received by the organizer of golf, while the entertainment tax tariff on golf has been fixed of 35% (thirty-five percent) at the maximum, so that the principal amount of entertainment tax on golf payable shall be accounted by multiplying the tariff fixed by the basic rate of tax imposition. Subsequently, it has been also determined that entertainment tax tariff must be fixed by each Regional Regulation as the entertainment tax payable is collected in the area of entertainment organized. Based on matters above, it is clear that entertainment tax imposition on golf has been based on recognition, guarantee, protection, just legal certainty and equal treatment before the law for every person, so that it is not inconsistent with Article 28D paragraph (1) of the 1945 Constitution at all.

The Government is of the opinion that there is no violation of constitutional rights of the Petitioners as the entertainment tax imposition on golf (regional tax) as regulated in the provisions of Article 42 paragraph (2) sub-paragraph g of Law No. 28/99 is not discriminatory treatment at all. Therefore, there is no

differentiation having discriminatory nature for the determination of golf as regional tax object (entertainment tax), according to the Government, the provisions of Article 42 paragraph (2) sub-paragraph g of Law No. 28/99 are clearly not inconsistent with Article 28I paragraph (2) of the 1945 Constitution.

Based on the explanation above, the Government concludes that the Petitioners have erroneously understood Article 42 paragraph (2) sub-paragraph g of Law No. 20/2009 petitioned for substantive review. In line with that, the Petitioners' *petitum* requesting for the deletion of the word "golf" in the provision of Article 42 paragraph (2) sub-paragraph g of Law No. 20/2009 is groundless because the substance of the norm *a quo* is not inconsistent with the 1945 Constitution at all.

Until now, the contribution of Regional Original Revenue (PAD) in the Regional Revenues and Expenditures Budget (APBD) in the majority of regions in Indonesia is still very small (7% - 8%). In an administration system applying regional autonomy and in the context of fiscal decentralization policy, regions are expected to be able to seek financial independence of their regions, so that they can finance their own expenses and that regional government can be implemented optimally. In addition, granting the Petitioners' petition will lead to the reduction of local government revenue sources, inhibition of the process of fiscal decentralization, non-implementation of the principle of fairness in the distribution of the tax burden, inhibition of the process distribution of public welfare in regions, as well as increased dependence of the regions on fund

transfer from the central government, which is tantamount to reducing the level of regional independence.

With all the descriptions above, the Government states that there is no reason to doubt the constitutionality of Article 42 paragraph (2) sub-paragraph g of Law No. 20/2009 since it is not proven to be inconsistent with Article 28D paragraph (1) and Article 28I paragraph (2) of the 1945 Constitution,

Therefore, the Government requests the Court to pass a decision declaring that the Petitioners' petition for Judicial Review of Article 42 paragraph (2) sub-paragraph g of Law No. 20/2009 against the 1945 Constitution shall be rejected or at least declaring that it is inadmissible.

In addition, the Petitioners have presented 2 (two) Experts whose statements were heard at the hearing on November 10, 2011, principally as follows:

1. Machfud Sidik

- Decentralization means transferring fiscal, political and administrative functions from a higher government level to a lower government level. The forms may vary, depending on the extent of freedom obtained by the relevant regional government to perform its functions.
- The implementation of fiscal decentralization is a problem not only to newly-independent or developing states, but even to advanced

states as well. The approach and level of problems faced as well as policy orientation are sought by each state in the context of reforming the relationship structure of its government levels to be more harmonious, especially the states which have performed the so-called postwar estate condition. Meanwhile, developing states direct decentralization to overcome the crisis of ineffective and inefficient governance.

- The fiscal sector is expected to increase efficiency and effectiveness of government administration, provide better services, increase the quality of government administration which encourage the improvement and increase of public welfare. The government's function felt by regional governments can be implemented and achieved efficiently and effectively based on their rights and obligations in performing their affairs, which we call *money follow function.*
- The taxation decentralization and transfer to lower government levels are important elements in fiscal reform in advanced as well as developing states. The Central Government often fails to increase fiscal efficiency because it often ignores the local demands in terms of culture, environment, assets, natural resources, and so on. Making the government function closer to the community should increase accountability in providing services

which also increases efficiency in the allocation by covering the gap between expenses and income.

- Basically, the Principles of justice in taxation, as conveyed by many experts, including Smith and Stiglits, can be seen from four aspects, namely fairness, and one which is most popular and most-frequently quoted by experts, called the ability to pay principle which was for the first time introduced by Adam Smith 200 years ago.
- *Benefit receipt criterion* is the ability to pay tax levies. Put simply, a fair taxation system in its implementation should not require excessive costs and time, and should not interfere with the community's goal to achieve optimal use of economic resources.
- Whereas Law No. 28 Year 2009 concerning Regional Taxes and User Charges supports decentralization reform, with features that empower Regional Governments through the research on regional autonomy with high accountability. This Law adopts the open list becoming closed list, which means that in addition to being granted with discretion, regions are also limited in regional levies, namely that only those included in the law may be levied.
- Whereas Law Number 28 Year 2009, Law Number 28 Year 2009 concerning Regional Taxes and Regional User Charges allow the exploration of sources of regional revenues meeting the criteria mentioned by the expert in the previous explanation. Therefore, the

entertainment tax which gives an explicit definition, concept, and the definition of regional tax. In taxation provisions, such definition is the definition of tax base, which is not always in line with the definition commonly known by the public.

- The expert's study states that the object of entertainment tax on golf, viewed from the good regional tax requirements, canon of equality, based on both the principle of ability to pay and the principle of benefit receipt criteria as well as the legality aspect, meets the requirements as one of good types of tax.
- Whereas as to golf, the ultimate taxpayers, the ultimate tax incidence are people with extraordinary income or the haves. From the economic aspect, the demand for such goods is very inelastic, so that even higher prices will not change or slightly affect the amount of demand for such goods.
- Whereas the object, subject of entertainment tax have been based on the correct definition. Based on such considerations, it shall not violate the philosophical and constitutional foundations, including the principles of regional autonomy and fiscal definition policies, including also the basis for tax imposition and good taxation principles. It is necessary to expand the basis of tax including regional user charges.

2. Budi Sitepu

Definition

The definition of regional tax is regulated in Article 1 sub-article 10 of Law Number 28 Year 2009 which reads as follows:

"*Regional Tax shall be mandatory contribution to the region owed by individuals or entities which is compulsory in nature based on law, without obtaining any direct reward and which is used for the needs of the region for the greatest prosperity of the people*".

Based on the aforementioned definition, there are several important elements which must be understood with respect to regional tax:

1. Regional tax is levied based on Law which shall be implemented by a regional regulation in the region.
2. Regional tax imposition may be forced;
3. There is no direct reward for the payment of regional taxes;
4. Regional taxes are used for financing services and development;

General Principles

In implementation, several general principles should be observed in the stipulation of a regional tax, namely :

1. Equity

Tax imposition shall be adjusted to the ability to pay. The community's ability varies with different contributions (being adjusted to the ability of each);

2. Certainty

   Taxation provisions must be made clearly so as to give certainty for the relevant parties such as tax officers and taxpayers. Therefore, they will have no hesitation in performing their respective obligations;

3. Convenience

   Tax collection is conducted when taxpayers are capable of paying the tax;

4. Efficiency

   The cost incurred for tax collection shall not exceed the amount of tax which can be collected;

Functions

Regional taxes have 2 (two) functions, namely:

1. Budgetary function (*budgetair*)

   Tax serves as the instrument to raise funds used for financing services and development;

2. Regulatory function (*regulerend*)

Tax serves as the instrument to achieve specific purposes, by affecting the level of consumption of certain goods and services;

Criteria

The criteria of Regional Tax:

1. Levies are tax in nature, not user charges;
2. The object and basis for tax imposition shall not contravene public interests;
3. The tax object is located or exists in the relevant area and has low mobility and only serves the community in the relevant area of the region;
4. The aspects of justice and the community's ability are observed;
5. The tax potentials are relatively sufficient;
6. Preserving the environment.

Law Number 28 Year 2009 concerning Regional Taxes and Regional User Charges:

The characteristics of regional tax based on Law Number 28 Year 2009:

1. Closed-list system

   A region may only collect regional taxes included in Law;
2. Local taxing power

Regions are granted with greater authority in the field of regional tax, through the expansion of tax object, increased number of tax types and increase of maximum tariff;

3. Preventive supervision

   Before being applied as a Regional Regulation, a Draft Regional Regulation shall first be evaluated by the government (Draft Regional Regulation of province shall be evaluated by the Minister of Home Affairs and Draft Regional Regulation of Regency/City shall be evaluated by the Governor; and in coordination with the Minister of Finance);

4. More strict management of regional tax

   The use of revenues of several types of taxes as well as the distribution of tax revenues of province to Regencies/Cities shall be strictly regulated.

Based on Article 2 of Law Number 28 Year 2009, there are five types of Provincial taxes and eleven types of Regency/City taxes, namely:

Provincial Taxes	**Regency/City Taxes**
1. Motor Vehicle Tax	1. Hotel Tax;
2. Fees for Change of Name for Motor Vehicle;	2. Restaurant Tax;
3. Motor Vehicle Fuel Tax;	3. Entertainment Tax;
4. Surface Water Tax	4. Advertisement Tax;
5. Cigarette Tax;	5. Road Lighting Tax;
	6. Tax on Non-Metal Mineral and Rocks

Provincial Taxes	Regency/City Taxes
	7. Parking Tax; 8. Ground Water Tax 9. Swiftlets nest tax; *10.* Urban and Rural Land and Building Tax (*PBB-P2*)*;* 11. Fees of the Acquisition of Land and Building Rights (*BPHTB*)*;*

Entertainment Tax

Entertainment tax shall be the tax on the provision of entertainment with the following provisions:

1. Object of entertainment tax is the entertainment provision service charged with payment;
2. Entertainment shall be all types of spectacle, shows, games, and/or gatherings, enjoyed with payment being charged, including:
    a. film show;
    b. performance of arts, music, dance, and/or fashion;
    c. beauty context, body building, similar types of events;
    d. Exhibition;
    e. Disco, karaoke, night club, and similar types of entertainment;
    f. circus, acrobatics, and magic show;

g. billiards, golf, and bowling games;

h. horserace, motor race, and arcade games;

i. massage parlor, reflection massage, spa, and fitness center;

j. sports game;

3. Subject of entertainment tax shall be an individual person or an entity enjoying entertainment (those enjoying entertainment may be the players or the spectators);

4. Entertainment taxpayer shall be an individual person or an entity providing entertainment;

5. The basis for entertainment tax imposition shall be the amount of money received or which should be received by the entertainment provider;

6. The maximum tariff of entertainment tax shall be 35% and up to 75% for certain entertainment and the maximum tariff for people's entertainment/traditional arts entertainment shall be 10%;

Golf as the Object of Entertainment Tax

In Law Number 28 Year 2009, golf is categorized as a game imposed with entertainment tax, just like billiards and bowling;

Opinion

The inclusion of golf as an object of entertainment tax as regulated in Article 42 paragraph (2) sub-paragraph g of Law Number 28 Year 2009 is not inconsistent with the principles of regional taxation, with the following considerations:

- Meeting the criteria of good regional taxation (the object is local and immobile in nature);
- Having multiple functions, as an instrument for obtaining income and as a regulatory instrument;
- The provisions on the objects, subjects and tariffs of entertainment are clearly regulated in Law;
- If necessary, the objects of entertainment tax can be adjusted (increased or reduced) in accordance with the development of the economy and the goals to be achieved by amending the Law;

Process of Formulation of Law Number 28 Year 2009

1. Academic Script

   For the purpose of strengthening regional authority in the field of regional tax, tax objects are expanded for, among other things, entertainment tax which also includes golf game;

2. Draft Law on Regional Taxes and Regional User Charges

   The Draft Law on Regional Taxes and Regional User Charges submitted by the government to the People's Legislative Assembly (DPR) has included golf as one of the objects of entertainment tax;

2. Solicitation of Community Aspirations by the People's Legislative Assembly (DPR);

   Prior to the discussion of the Draft Law on Regional Taxes and Regional User Charges, the People's Legislative Assembly (DPR) solicited the aspirations of the community. In meetings with various community groups, they have been informed about the expansion of entertainment objects and the tariff increase;

4. Discussion of the People's Legislative Assembly (DPR)

   In the Problem Inventory List (DIM) for the discussion of materials on entertainment tax, there is no problem with the inclusion of golf as an object of entertainment tax;

5. Dissemination of Law Number 28 Year 2009

   In the dissemination of Law Number 28 Year 2009, it has been explained that golf is categorized as an object of entertainment tax which can be levied by the region as from January 1, 2010 by issuing a Regional Regulation.

[2.4] Whereas with respect to the Petitioners' petition, the People's Legislative Assembly (DPR) has submitted its written statement received at the Court's Registrar Office on November 24, 2011 which principally states as follows:

A. THE PROVISIONS OF THE REGIONAL GOVERNMENT LAW PETITIONED FOR REVIEW AGAINST THE 1945 CONSTITUTION

In its petition *a quo,* the Petitioners petition for review of article 42 paragraph (2) sub-paragraph g of the Law concerning Regional Taxes and Regional User Charges against the 1945 Constitution, namely:

Article 42 paragraph (2) sub-paragraph g which reads:

"Entertainment as intended in paragraph (1) shall be:

a. …;

g. billiards, **golf** and bowling games;

h. …"

B. CONSTITUTIONAL RIGHTS CONSIDERED BY THE PETITIONERS TO HAVE BEEN IMPAIRED BY THE COMING INTO EFFECT OF ARTICLE 42 PARAGRAPH (1) SUB-PARAGRAPH G OF THE LAW CONCERNING REGIONAL TAXES AND REGIONAL USER CHARGES

In the petition *a quo,* the Petitioners convey that their constitutional rights have been impaired by the coming into effect of Article 42 paragraph (1) sub-paragraph g of the Law concerning Regional Taxes and Regional User Charges, as follows:

1. Golf is an activity which has been recognized throughout the world as sports and also by the Indonesian sports committee formed through the Decree of the President of the Republic of Indonesia, namely the Indonesian National Sports Committee (KONI). The Indonesian Golf Association (PGI) is categorized as a member of KONI. By including the Indonesian Golf Association (PGI) as the

parent organization of Golf sports branch, KONI has expressly stated that golf is categorized as a sport rather than entertainment;

2. Golf is a sport contested in the National Sports Week (PON) since the holding of the PON VII in 1969 up to the holding of the PON XVII in 2008 in East Kalimantan. Moreover, the International Federation for Golf is a part of the International Olympic Committee (IOC) which represents the world's recognition of golf as a sport by having golf contested in world level matches, namely, among other things, in the Olympics;
3. However, golf does not obtain the same recognition like other branches of sports in Article 42 paragraph (2) sub-paragraph g of the Law on Regional Taxes and Regional User Charges. On the contrary, the position of golf as a sport is discriminated from other branches of sports, namely with the inclusion of golf as a type of entertainment along with disco, karaoke, night club, massage parlor, reelection massage, spa, and so on.
4. Article 42 paragraph (2) sub-paragraph g has caused the Petitioners to be categorized as entertainment service providers who have to bear additional taxes imposed by the region. This has created excessive tax burden posed to golf course provision business actors;
5. Considering the fact that golf has been recognized as a sport, according to the Petitioners, the status of business actors in the

field of golf sports shall be equal to the status of business actors in other branches of sports, in this case in the context of “tax objects”. Therefore, business actors in the field of golf sports shall not be treated discriminately with business actors in other branches of sports as they are equal as certain tax objects;

6. The euphoria in the government, particularly the regional government in seeking revenues through the law concerning regional taxes and regional user charges has positioned golf as an additional tax object, namely by the imposition of entertainment tax by the Regional Government;
7. The tax is imposed only on 3 branches of sports, namely golf, billiards and bowling sports. Entertainment tax is not imposed on other types of sports such as football, futsal, badminton, etc.;
8. Following the coming into effect of Article 42 paragraph (2) sub-paragraph g of Law Number 28 Year 2009 concerning Regional Taxes and Regional User Charges, the Petitioners have been categorized as entertainment service providers which must bear additional taxes imposed by the region and stipulated in the Regional Regulation on entertainment taxes. The examples are the entertainment taxes stipulated in Regional Regulations in several regions such as the Regional Regulation of Tangerang City, Regional Regulation of Bogor Regency, Regional Regulation of

Depok City, and Regional Regulation of the Special Capital Province (DKI).

Based on the description above, the Petitioners consider Article 42 paragraph (2) sub-paragraph g of Law Number 28 Year 2009 concerning Regional Taxes and Regional User Charges inconsistent with Article 28D paragraph (1) and Article 28I paragraph (2) of the 1945 Constitution, which read as follows:

- Article 28D paragraph (1)

  "Every person shall have the right to the recognition, the guarantee, the protection and the legal certainty of just laws as well as equal treatment before the law"

- Article 28I paragraph (2)

  "Every person shall have the right to be free from discriminatory treatment on any basis whatsoever and shall have the right to obtain protection against any such discriminatory treatment".

C. STATEMENT OF THE PEOPLE'S LEGISLATIVE ASSEMBLY OF THE REPUBLIC OF INDONESIA (DPR RI)

With respect to the Petitioners' petition as described the Petition *a quo,* DPR presents its statement as follows:

1. Legal Standing of the Petitioners

The qualification which must be fulfilled by the Petitioners as parties has been regulated in the provision of Article 51 paragraph (1) of Law Number 24 Year 2003 concerning the Constitutional Court (hereinafter briefly referred to as the Constitutional Court Law) stating that “The Petitioners shall be the parties considering that their constitutional rights and/or authority are impaired by the coming into effect of a Law, namely:

a. individual Indonesian citizens;
b. customary law community groups insofar as they are still in existence and in line with the development of the communities and the principle of the Unitary State of Republic of Indonesia as regulated in Law;
c. public or private legal entities, or;
d. state institutions.

The constitutional rights and/or authority intended in the provision of Article 51 paragraph (1) is confirmed in its elucidation, namely that referred to as “constitutional rights” shall be the rights regulated in the 1945 Constitution of the State of the Republic of Indonesia. The provision in the Elucidation of this Article 51 paragraph (1) confirms that only the rights explicitly regulated in the 1945

Constitution of the Republic of Indonesia are categorized as “constitutional rights”.

Therefore, pursuant to the Constitutional Court Law, for persons or parties to be eligible as Petitioners having legal standing in a petition for judicial review of a Law against the 1945 Constitution of the Republic Indonesia, they must first explain and substantiate:

a. their qualification as Petitioners in the petition *a quo* as intended in Article 51 paragraph (1) of Law Number 24 Year 2003 concerning the Constitutional Court;
b. their constitutional rights and/or authority as intended in the “Elucidation of Article 51 paragraph (1)” considered to have been impaired by the coming into effect of a Law;

As to the parameters of constitutional impairment, the Constitutional Court has provided the meaning and definition of constitutional impairment due to the coming into effect of a law which must meet 5 (five) requirements (*vide* Decision on Case Number 006/PUU-III/2005 and Decision on Case Number 002/PUU-V/2007), namely as follows:

a. the existence of constitutional rights and/or authority of the Petitioners granted by the 1945 Constitution;

b. the Petitioners consider that such 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, can be assured of occurring;

d. there is a causal relationship (*causal verband*) between the intended impairment of constitutional rights and/or authority and the Law petitioned for review;

e. the possibility that with the granting of the Petitioner's petition, the impairment of such constitutional rights and/or authority argued by the Petitioner will not or will no longer occur

If the aforementioned five requirements are not fulfilled by the Petitioners in the case of judicial review of the law *a quo,* then the Petitioners will not have the qualification of legal standing as Petitioners.

In response to the petition of the Petitioners *a quo,* DPR views that the Petitioners must be able to first evidence that they really are the parties who consider that their constitutional rights and/or authority are impaired by the coming into effect of the provision petitioned for

review, particularly in construing the existence of impairment of their constitutional rights and/or authority as an impact of the application of the provisions petitioned for review.

With respect to the Petitioners' legal standing, DPR fully leaves it to the Panel of Constitutional Court Justices to judge whether the Petitioners meet the legal standing requirements as regulated in the provision of Article 51 paragraph (1) of the Constitutional Court Law and Decisions of the Constitutional Court on Case Number 006/PUU-III/2005 and Case Number 011/PUU-V/2007.

2. Review of Article 42 paragraph (2) sub-paragraph g of the Law concerning Regional Taxes and Regional User Charges

With respect to the petition for review of Article 42 paragraph (2) sub-paragraph g of the Law concerning Regional Taxes and Regional User Charges filed by the Petitioners, DPR RI presents the following statement:

1) In the context of government administration, the state is divided into regions of Province and regions of Regency/City. Each region has the right and obligation to regulate and manage its own government affairs. To administer government, regions have the right to impose

levies to the people to the extent it meets the provisions regulated in law;

2) Based on the 1945 Constitution, tax constitutes one of the sources for the needs of the state for government administration. Imposition of taxes and other levies posing a burden to the community must be based on Law. The Law *a quo* regulates entertainment tax. Pursuant to Article 1 sub-article 24 and sub-article 25, entertainment tax shall be the tax for the provision of entertainment including all types of spectacle, shows, games, and/or gatherings, enjoyed with payment being charged;

3) Article 42 of the Law *a quo* describes in more detail that the objects of entertainment tax shall all types of spectacle, shows, games, and/or gatherings, enjoyed with payment being charged, including:

   a. film show;

   b. performance of arts, music, dance, and/or fashion;

   c. beauty context, body building, similar types of events;

   d. Exhibition;

   e. Disco, karaoke, night club, and similar types of entertainment;

   f. circus, acrobatics, and magic show;

   g. billiards, golf, and bowling games;

h. horserace, motor race, and arcade games;

i. massage parlor, reflection massage, spa, and fitness center;

j. sports game;

4) The inclusion of billiards, golf and bowling games in the details of Article 42 paragraph (2) sub-paragraph g of the Law *a quo* should be understood from the aspect of type of the game specifically requiring special place and equipment with payment being charged. Sports specifically mentioned are not only billiards, golf and bowling but also bodybuilding, horserace, motor race and arcade games, while other sports not detailed in the article *a quo* are also charged with payment. Therefore, all types of sports should imposed with entertainment tax under Article 42 paragraph (2) sub-paragraph g of the Law *a quo* if the implementation is charged with payment, so as to prevent discrimination against types of sports;

5) Subsequently, another issue which needs to be observed is that under Article 4 paragraph 1 of Law Number 28 Year 2009 concerning Regional Taxes and Regional User Charges, the parties designated as subjects of entertainment tax shall be the persons or entities enjoying entertainment so that golf course entrepreneurs are not burdened with

entertainment tax but every person or entity conducing golf sports activities.

Subsequently, the People's Legislative Assembly (DPR) requests the Constitutional Court to pass the following decisions:

1. To accept the Statement of DPR in its entirety;
2. To declare Article 42 paragraph (2) sub-paragraph g of the Law concerning Regional Taxes and Regional User Charges not inconsistent with Article 28D paragraph (1) and Article 28I paragraph (2) of the 1945 Constitution;
3. To declare that Article 42 paragraph (2) sub-paragraph g of the Law concerning Regional Taxes and Regional User Charges still have binding legal effect;

[2.5] Whereas the Petitioners and the Government have submitted their written conclusions, each received at the Registrar's Office of the Court on November 30, 2011, principally to the effect that they are consistent with their stand;

[2.6] Whereas to shorten the description of this decision, all that happened at the hearings shall be sufficiently referred to in the minutes of hearing, which constitutes an inseparable part of the decision;

3. LEGAL CONSIDERATIONS

[3.1] Whereas the purpose and objective of the Petitioner's petition are to conduct substantive review of Article 42 paragraph (2) sub-paragraph g to the extent of the word "golf" of Law umber 28 Year 2009 concerning Regional Taxes and Regional User Charges (State Gazette of the Republic of Indonesia Year 2009 Number 130, Supplement to the State Gazette of the Republic of Indonesia Number 5049, hereinafter referred to as Law No. 28/2009) against Article 28D paragraph (1) and Article 28I paragraph (2) of the 1945 Constitution of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution);

[3.2] Whereas before considering the substance of the petition, the Constitutional Court (hereinafter referred to as the Court) shall first consider the following matters:

a. authority of the Court to hear the petition *a quo;*
b. legal standing of the Petitioners to act as Petitioner in the petition *a quo;*

Authorities of the Court

[3.3] Whereas based on Article 24C paragraph (1) of the 1945 Constitution and Article 10 paragraph (1) sub-paragraph a of the Constitutional Court Law as amended by Law Number 8 Year 2011 concerning Amendment to Law Number 24 Year 2003 concerning the Constitutional Court (State Gazette of the Republic of Indonesia Year 2011 Number 70, Supplement to the State Gazette of the Republic of Indonesia Number 5226, hereinafter referred to as the Constitutional Court Law) as well as Article 29 paragraph (1) sub-paragraph a of Law Number

48 Year 2009 concerning Judicial Power (State Gazette of the Republic of Indonesia Year 2009 Number 157, Supplement to the State Gazette of the Republic of Indonesia Number 5076, hereinafter referred to as Law No. 48/2009), one of the authorities of the Court shall be to hear at the first and final levels, the decisions of which shall be final to: review laws against the 1945 Constitution;

[3.4] Whereas the Petitioners' petition is intended for reviewing the constitutionality of the norm contained in the word "golf" in Article 42 paragraph (2) sub-paragraph g of Law No. 28/2009 against the 1945 Constitution, so that the Constitutional Court has authority to hear the petition *a quo;*

Legal Standing of the Petitioner

[3.5] Whereas based on Article 51 paragraph (1) of the Constitutional Court Law along with its Elucidation, the parties eligible to file a petition for judicial review of a Law against the 1945 Constitution shall be those considering that their constitutional rights and/or authority granted by the 1945 Constitution are impaired by the coming into effect of the Law petitioned for review, namely*:*

a. individual Indonesian citizens (including groups of people having a common interest);
b. customary law community groups insofar as they are still in existence and in line with the development of the communities and the principle of the Unitary State of Republic of Indonesia as regulated in Law;
c. public or private legal entities; or

d. state institutions;

Hence, in the judicial review of a Law against the 1945 Constitution, the Petitioners must first explain and substantiate:

a. their qualification as Petitioners as intended in Article 51 paragraph (1) of the Constitutional Court Law;
b. the impairment of their constitutional rights and/or authority granted by the 1945 Constitution due to the coming into effect of the law being petitioned for review;

[3.6] Whereas following its Decision Number 006/PUU-III/2005 dated May 31, 2005 and Decision Number 11/PUU-V/2007 dated September 20, 2007, as well as subsequent Decisions, the Court is of the opinion that the impairment of constitutional rights and/or authority as intended in Article 51 paragraph (1) of the Constitutional Court Law must meet five requirements, namely:

a. the existence of constitutional rights and/or authority of the Petitioner granted by the 1945 Constitution;
b. the Petitioner considers that such 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, can be assured of occurring;

d. there is a causal relationship (*causal verband*) between the intended impairment of constitutional rights and/or authority and the Law petitioned for review;

e. the possibility that with the granting of the Petitioner's petition, the impairment of such constitutional rights and/or authority argued by the Petitioner will not or will no longer occur;

[3.7] Whereas Petitioner I is the Indonesian Association of Golf Course Owners. According to the Court, Petitioner I meets the qualification as a group of people having a common interest – namely business activities in the field of golf sports implementation – as intended in Article 51 paragraph (1) sub-paragraph a of the Constitutional Court Law to file the petition *a quo;*

[3.8] Whereas Petitioner II up to Petitioner IX qualify their standing as legal entities (each evidenced by the a deed of establishment of legal entity) consisting of the elements of business actors engaging in the implementation of golf sports and golf sports activists whose constitutional rights are impaired by the coming into effect of Article 42 paragraph (2) sub-paragraph g of Law No. 28/2009. According to the Court, Petitioner II up to Petitioner IX meet the qualification as legal entities as provided for by Article 51 paragraph (1) sub-paragraph c of the Constitutional Court Law to file the petitioner *a quo;*

[3.9] Whereas according to the Petitioners, they have been harmed by the coming into effect of Article 42 paragraph (2) sub-paragraph g of Law No. 28/2009 as they obtain unfair legal treatment, namely that they must bear the

entertainment tax imposed by the region, not being imposed to business actors in other sports;

[3.10] Whereas based on the considerations described above, according to the Court, since there is a causal relationship between the constitutional impairment argued and the existence of Article 42 paragraph (2) sub-paragraph g of Law No. 28/2009, particularly the word “golf”, the Petitioners have legal standing to file the petition *a quo;*

[3.11] Whereas since the Court has authority to hear the petition *a quo* and the Petitioners have legal standing, the Court shall subsequently consider the substance of the petition;

Substance of the Petitioner

[3.12] Whereas in substance, the Petitioners argue that the inclusion of golf in the category of entertainment and thus being imposed with entertainment tax as regulated in Article 42 paragraph (2) sub-paragraph g of Law No. 28/2009 have created unequal treatment in taxation between providers of golf sports facilities and providers of other sports facilities. In addition, due to the application of the entertainment tax, providers of golf sports facilities shall be imposed with double taxes in violation of the principles of justice in taxation, thus inconsistent with the 1945 Constitution which guarantees the protection and certainty of just laws as well as equal treatment before the law. According to the Petitioners, Article 42 paragraph (2) sub-paragraph g of Law No. 28/2009 also impairs the rights of

players of golf sports and it is inconsistent with the program of the government through the Ministry for Youth and Sports of the Republic of Indonesia to advance golf sports in Indonesia. In addition, the Petitioners also argue that Article 42 paragraph (2) sub-paragraph g of Law No. 28/2009 is not based on the 1945 Constitution as the legal basis of the Republic of Indonesia, as it is inconsistent with the principles of certainty and equality before the law which have been protected by Article 28D paragraph (1) and Article 28I paragraph (2) of the 1945 Constitution, as further regulated through Law Number 12 concerning the Formulation of Laws and Regulations;

[3.13] Whereas to evidence their arguments, the Petitioners have presented exhibits P-1 through P-12b and presented experts and witnesses who were heard by the Court at the hearings on November 10, 2011 and on November 23, 2011, principally describing as follows:

Experts:

1. Prof. Dr. H.M. Laica Marzuki, S.H.

   - Article 42 paragraph (2) sub-paragraph g of Law No. 28/2009 which makes golf an object of entertainment tax is a tax error (*belastingendwaling*). The entertainment being imposed only on certain types of sports has led to uncertainty of just laws, unequal treatment in the field of law, as well as discriminatory treatment in tax imposition;

- Double tax is prohibited by law, as it potentially creates injustice and discrimination. Double tax occurs in an overlapped manner due to the lawmakers' inaccuracy;

2. Prof. Dr. Yusril Ihza Mahendra, S.H., M.Sc.

Article 42 paragraph (2) sub-paragraph g of Law No. 28/2009 which includes golf in the category of entertainment, rather than a sport, is an ambiguity in the way of thinking of the lawmakers for not considering the provisions on sports as regulated in the National Sports System Law. Categorizing golf as entertainment has led to the imposition of different taxes between golf sports facility providers and other sports facility providers, resulting in unequal and discriminatory treatment inconsistent with Article 28D paragraph (1) and Article 28I paragraph (2) of the 1945 Constitution;

3. Dr. Ir. Irawan M. S.

A golf course is a green open space having vegetation which will produce oxygen and absorb CO2. A golf course can also serve multiple functions, from the socio-economic, cultural and ecological aspects, as sports facility and infrastructure, as provider of employment, and also, in some places, as cultural heritage;

4. H. TB. Eddy Mangkuprawira

Imposition of entertainment tax on golf sports game, while it is not imposed on other sports games, is a discriminatory treatment, so that it is inconsistent with Article 28I of the 1945 Constitution. The aforementioned provision is also inconsistent with the principles of equality, equality and justice in tax imposition because not all similar tax subjects and objects are imposed with entertainment tax. Such provision is also inconsistent with the general principle of tax imposition which must prevent double tax imposition because the entertainment tax objects have been imposed with value added tax by the central government.

Witnesses:

1. Faisal Abdullah

From the perspective of the National Sports System Law, billiards, golf and bowling can be categorized as achievement sports and not as types of entertainment because with the establishment of the All Indonesian Billiards Sports Association (POBSI), the Indonesian Golf Association (PGI), and the Indonesian Bowling Association (PBI), then POBSI, PGI and PBI constitute the parent organizations of sports branches having responsibility in the development and guidance of billiards, golf and bowling sports, in accordance with the provision of Article 27 of the National Sports System Law, namely that the guidance and development of achievement sports shall be implemented by empowering sports associations, to grow and develop national and

regional sports development centers, and organizing competitions in a hierarchical and sustainable manner.

2. Ngatino

- Currently, the Indonesian Golf Association is a member of KONI as the parent of achievement sports branches;
- KONI supports the recommendations in a joint seminar titled "*Merumuskan Kebijakan Perpajakan yang Mendukung Peningkatan Prestasi Olahraga Nasional* (Formulating Taxation Policies Supporting the Improvement of the National Sports Achievement)" organized by the Ministry for Youth and Sports with KONI, which have determined the matters requiring special attention for growing and developing sporting achievements, requiring the stimulus for athletes and sports players in developing sporting achievements.

3. Ray Hendarto

- The majority of the members of the Indonesian Professional Golf Association (PGPI) come from poor families relying on being professional golfers for their life.
- Increasing tax will make golf sports become increasingly unaffordable by the public and will support and encourage the increasingly exclusive golf sports in the country. Therefore, the achievements in golf sports will drop;

4. Syafe'i Asnaf

Golf sports lovers come from various circles from men, women, and children. Golf sports have had a positive impact on the sports industry and increased tourist visits to Indonesia.

[3.14] Whereas the Court has heard the verbal statements and read the written statements of the Government and the People's Legislative Assembly (DPR) principally stating that Article 42 paragraph (2) sub-paragraph g of Law No. 28/2009 is constitutional and has provided legal certainty;

[3.15] Whereas the Court has heard and read the statements of Experts presented by the Government at the hearing on November 10, 2011, principally describing as follows:

Experts:

1. Machfud Sidik:

- The entertainment tax on golf as a tax object, viewed from the requirements of good regional taxation, based on both the ability to pay principle and the principle of benefit receipt criteria, and the legality aspect, meets the requirements as one of good types of tax;
- Whereas as to golf, the ultimate taxpayers, the ultimate tax incidence are people with extraordinary income or the haves. Fromm the economic aspect, the demand for such goods is very

inelastic, so that even higher prices will not change or slightly affect the amount of demand for such goods.

2. Budi Sitepu

The inclusion of golf as an object of entertainment tax as regulated in Article 42 paragraph (2) sub-paragraph g of Law Number 28 Year 2009 is not inconsistent with the principles of regional taxation, with the considerations that firs, the taxation meets the criteria of good regional taxation. Second, it serves multiple functions, namely as an instrument for obtaining income for the purpose of supporting regional finances and as a regulatory instrument through tariff mechanism. Third, the provisions on the objects, subjects and tariffs of entertainment are clearly regulated in Law. If necessary, the objects of entertainment tax can be adjusted (increased or reduced) in accordance with the development of the economy and the goals to be achieved by amending the Law;

[3.16] Whereas after thoroughly examining the Petitioners' petition, statements of Experts, and statements of witnesses as well as the evidence of the Petitioners, statement of the Government, statements of Experts of the Government, statement of DPR, the Court shall give the following considerations:

[3.17] Whereas the constitutionality issue questioned by the Petitioners is the imposition of entertainment tax on golf sports as regulated in Article 42 paragraph (2) sub-paragraph g of Law No. 28/2009 which, according to the

Petitioners, is inconsistent with the principle of fair and non-discriminatory treatment guaranteed and protected by the 1945 Constitution.

Whereas before examining the constitutionality of the aforementioned norm, the Court shall first give the following considerations:

- Whereas tax is specifically regulated in Article 23A of the 1945 Constitution which provides that all compulsory taxes and other levies for the needs of the state shall be regulated by law. Therefore, the 1945 Constitution delegates the authority to the Law to regulate compulsory taxes and levies. Although Article 23A of the 1945 Constitution does not provide for the principles of tax imposition, the state's authority collect taxes from its citizens shall not be inconsistent with the principles adhered to by the 1945 Constitution in any other articles, namely, among other things: the principles of justices, legal certainty and equal status in law. These principles in the 1945 Constitution are in line with the principles adhered to in the taxation theory that tax imposition must be in accordance with the principles of transparency, discipline, justice or equality, efficiency and effectiveness;
- Whereas in the context of regional government administration, each region has the right and obligation to regulate and manage its own government affairs and the services to the community, For that purpose, financing is needed from the sources, one of which being from the local community through regional taxes and other levies. Law No. 28/2009

constitutes a further regulation of Article 23A of the 1945 Constitution providing that all taxes and levies shall be based on Law. One of the types of regional taxes regulated in Law No. 28/2009 is the entertainment tax. Article 42 paragraph (2) sub-paragraph g of Law No. 28/2009 regulates that the objects of entertainment tax are the service of entertainment provision charged with payment, namely, among other things, billiards, golf and bowling games [*vide* Article 42 paragraph (2) sub-paragraph g of Law No. 28/2009]. Therefore, the Law *a quo* has categorized as entertainment to be imposed with regional tax. The maximum tax tariff stipulated by Law No. 28/2009 is 35% [*vide* Article 45 paragraph (1) of Law No. 28/2009]. Such entertainment tax tariff must be stipulated in a Regional Regulation. In other words, each region may collect a maximum entertainment tax of 35% of the money received or which should be received by the providers of entertainment as taxpayers, and the parties to be burdened with the imposed with entertainment tax are individual persons or Entities enjoying entertainment as tax subjects [*vide* Article 43 of Law No. 28/2009];

- Whereas pursuant to Law Number 3 Year 2005 concerning the National Sports System (hereinafter referred to as Law No. 3/2005), sports shall be all systematic activities to encourage, guide as well as develop physical, mental and social potentials. According to the Indonesian Dictionary, golf is a sport using a small ball struck with a club into a series of nine or eighteen in a row. Therefore, according to the Court, golf is a physical

activity which can encourage, guide as well as develop physical, mental and social potentials like other branches of sports. Golf is an institutionalized sports, under the International Golf Federation (IGF) for amateur golf, and the Professional Golf Association (PGA) for professional golf. In Indonesia, amateur golf sports is under the Indonesian Golf Association (PGI) which has been affiliated with IGF, and the Indonesian Professional Golf Association (PGPI) in charge of professional golf sports which has been affiliated with PGA. As an institutionalized sports, golf is also contested in the Olympic Games, Sea Games, and even in the National Sports Week (PON), golf has been contested in PON VII in Surabaya. This is in accordance with the written statement submitted by the Minister for Youth and Sports stating that golf constitutes one of the branches of achievement sports guided by KONI. In is further stated by the Head of Organization Division of KONI at the Court hearing that golf constitutes on the branches of achievement sports guided by KONI. Therefore, it is evidenced that golf constitutes one of the branches of achievement sports;

[3.18] Whereas according to the Court, every sport is indeed entertaining in nature, both to the players and the spectators. Therefore, the entertaining nature of sports is no limited to the golf sport, as regulated in Article 42 paragraph (2) sub-paragraph g of Law No. 28/2009, but it is also the nature of all branches of sports. Therefore, all types of sports have entertaining nature and all which are entertaining in nature must be imposed with entertainment tax, and therefore, all

types of sports shall also be imposed with entertainment tax. Based on the statement of the government and the statements of experts presented by the government, the imposition of entertainment tax has been not only due not to the entertaining nature, but also due to the adjustment with the ability to pay of the entertainment tax subject (in this case golf players). Golf is a game played by the well-to-do people having the ability to pay. In addition, the imposition of entertainment tax is also required for giving the opportunity to regions to collect taxes for financing the implementation of regional autonomy;

[3.19] Whereas according to the Court, the basis for the imposition of taxes, including regional taxes, cannot be implemented only due to the needs of development for public benefit, thus targeting people or service sectors having the ability to pay. Tax imposition must consider all aspects, including the types of taxable business or activities as well as the aspect of justice for taxpayers. As described above, golf is a type of achievement sports contested at both the national and international levels. In addition, it must also be admitted that some people play golf not for the purpose of achievement but for the purpose of health, recreation, etc. Therefore, golf cannot be classified merely as entertainment so that it can be imposed with entertainment tax. Imposition of tax on golf game can lead to the loss of this sports enthusiasts, thus there will be no achievement to encourage and to be the national pride of a nation. In addition it also hampers those playing golf for health, recreation and other purposes. Golf sports can be seen not only from the aspect of being a sport game played by well-to-do people, because this game is also played by various circles with different level of

economic capability. Imposition of the entertainment tax on golf sports also leads to unfair treatment between golf sports and other sports, because being entertaining is the nature of not only golf but also of all types of sports. Similarly, as an achievement sports, golf sports is also an achievement sports just like other sports. For providers of golf sports facilities, the imposition of the entertainment tax will increase the burden because the procurement as well as maintenance of a golf course are very expensive plus the higher land and building taxes paid to the state, while on the other hand, providers of golf sports facilities are also imposed with other taxes such as restaurant tax and parking tax which also contribute to the regional treasury;

[3.20] Whereas according to the Court, the imposition of double tax is the imposition of tax on the same tax object to one tax subject by the tax collector (*fiscus*). Based on Article 42 paragraph (1) of Law No. 28/2009, referred to as entertainment tax object shall be the service of entertainment provision charged with payment, while the subject of Entertainment Tax shall be an individual person or an Entity enjoying the entertainment. Therefore, the tax object in golf sports is the service of golf sports facility provision and the tax subject is an individual person or an Entity playing golf, collected by the regional government in each regency/city. On the other hand, pursuant to Law Number 42 Year 2009 concerning the Third Amendment to Law Number 18 Year 1083 concerning Value Added Tax and Tax on the Sale of Luxurious Goods (hereinafter referred to as the PPN Law and the PPnBM Law), the objects and subjects of VAT shall be regulated in a Government Regulation. Until now, Government Regulation

Number 144 Year 2000 concerning the Types of Goods and Services Not Imposed With Value Added Tax (hereinafter referred to as Government Regulation No. 144/2000). Which stipulates the VAT Negative List (list of goods and services not imposed with VAT) details the types of goods and services excluded from VAT imposition. The principle is that any goods and service shall be imposed with VAT except for those included in the VAT negative list, or as stipulated by the tax collector to be exempted from VAT. Government Regulation No. 144/2000 does not mention any service of golf sports implementation as services exempted from the imposition of VAT. Services in the field of entertainment excluded by Government Regulation No. 144/2000 are services in the field of entertainment already imposed with, while golf game as intended by Law No. 28/2009 is not a spectacle, but a game. Therefore, the event of golf sports is not included in the VAT negative list, and thus it is a VAT object. Based on the aforementioned fact, according to the Court, double tax arrangement has occurred for the same tax object namely the provision of golf sports facilities, being a VAT object, while on the other hand, it is also an object of Entertainment Tax. Therefore, the Court agrees with Expert T.B Eddy Mangkuprawira explaining that overlapped imposition of taxes by two different Laws on one tax object potentially leads to the abuse of power in the implementation of tax collection giving birth to the stigma of *power to tax is the power to destroy.* Regardless of whether the practice of double tax imposition occurs or not, as the Court does not hear norm application, based on the aforementioned provision, the imposition of entertainment tax on the tax object of the service of golf sports

facility provision is potential to be imposed with double tax which is inconsistent with the principles of certainty of just laws as well as equal treatment before the law being guaranteed by the constitution;

[3.21] Whereas based on the above explanations, according to nine Constitutional Court Justices except for Constitutional Court Justice Achmad Sodiki, the imposition of entertainment tax on golf as a sport is inconsistent with the principles of protection and guaranteed certainty of just laws as well as equal treatment before the law guaranteed by Article 28D paragraph (1) of the 1945 Constitution;

[3.22] Whereas based on the considerations above, according to the Court, the Petitioners' petition has legal grounds;

4. CONCLUSION

Based on the assessment of facts and laws as described above, the Court concludes that:

[4.1] The Court has authority to hear the petition *a quo;*

[4.2] The Petitioners have legal standing to file the petition *a quo;*

[4.3] The Petitioners' petition has legal grounds;

Based on the 1945 Constitution of the State of the Republic of Indonesia, Law Number 24 Year 2003 concerning the Constitutional Court as amended by Law

Number 8 Year 2011 concerning the Amendment to Law Number 24 Year 2003 concerning the Constitutional Court (State Gazette of the Republic of Indonesia Year 2011 Number 70, Supplement to the State Gazette of the Republic of Indonesia Number 5226) as well as Law Number 48 Year 2009 concerning Judicial Power (State Gazette of the Republic of Indonesia Year 2009 Number 157, Supplement to the State Gazette of the Republic of Indonesia Number 5076);

5. INJUNCTION OF DECISION

Passing the Decision,

To declare:

- To grant the Petitioners' petition in its entirety;
- The word "golf" in Article 42 paragraph (2) sub-paragraph g of Law No. 28/2009 concerning Regional Taxes and Regional User Charges (State Gazette of the Republic of Indonesia Year 2009 Number 130, Supplement to the State Gazette of the Republic of Indonesia Number 5049) inconsistent with the 1945 Constitution of the State of the Republic of Indonesia;
- That the word "golf" in Article 42 paragraph (2) sub-paragraph g of Law No. 28/2009 concerning Regional Taxes and Regional User Charges (State Gazette of the Republic of Indonesia Year 2009 Number 130, Supplement to the State Gazette of the Republic of Indonesia Number 5049) has no binding legal effect;

- To order the publication of this decision properly in the Official Gazette of the Republic of Indonesia;
- To reject the remaining and other parts of the Petitioner's petition.

In witness whereof, this decision was made in the Consultative Meeting of Justices by nine Constitutional Court Justices, namely Moh. Mahfud MD., as Chairperson and concurrent Member, Achmad Sodiki, Anwar Usman, M. Akil Mochtar, Hamdan Zoelva, Harjono, Ahmad Fadlil Sumadi, Maria Farida Indrati, and Muhammad Alim, respectively as Members, on **Tuesday, July the tenth two thousand and twelve,** and was pronounced in the Plenary Session open for the public on **Wednesday**, **July the eighteenth two thousand and twelve**, by seven Constitutional Court Justices namely Achmad Sodiki, as Chairperson and concurrent Member, Anwar Usman, M. Akil Mochtar, Hamdan Zoelva, Harjono, Ahmad Fadlil Sumadi, and Maria Farida Indrati, respectively as Members, assisted by Yunita Rhamadani as Substitute Registrar, in the presence of the Petitioners/their attorneys, the Government or its representative, and the People's Legislative Assembly or its representative.

CHAIRPERSON,

Sgd.

Achmad Sodiki

JUSTICES,

Sgd.	**Sgd.**
Anwar Usman	**Harjono**
Sgd.	**Sgd.**
Ahmad Fadlil Sumadi	**Maria Farida Indrati**

6. DISSENTING OPINION

With respect to the decision, Constitutional Court Justice Achmad Sodiki presents a dissenting opinion, as follows:

The difference between the Petitioners and the Government in respect of golf is based on first the definition of golf itself. The Petitioners refer to the basis of classification of golf as sports not required to be taxed based on the practical definition rather than from Law Number 3 Year 2005 concerning the National Sports System, namely the article on sports and golf as a sport contested in the National Sports Week, as well as to differentiate it, the definition of entertainment from the Indonesian Standard Dictionary. Meanwhile, the Government views golf as entertainment based on Article 42 paragraph (2) sub-paragraph g of Law No. 28/2009 concerning Regional Taxes and Regional User Charges which reads "*Entertainment as intended in paragraph (1) shall be billiards, golf and bowling games*". Article 1 sub-article 25 states that "*Entertainment shall be all types of spectacle, shows, games, and/or gatherings, enjoyed with payment being charged*". Meanwhile, *Entertainment Tax shall be the tax for the provision of*

entertainment including (vide Article 1 sub-article 24). With the inclusion of golf in the category entertainment, the Petitioners object to the imposition of text on it;

In my opinion, golf is an entertainment having an element of sports. Golf cannot be viewed in a black-or-white manner. Many people who like golf as weekend entertainment and recreation which also have an element of image to enable them to enter the segment of respectable socio-economic system and also as a means or media of communication to make friends and to do businesses with a group of elite people in the community. Therefore, the unavoidable impression is that golf is an exclusive game;

By drawing conclusions from the practice that golf is contested in the National Sports Week rather than from an express norm (*expressis verbis*) from the definition of golf in Law Number 3 Year 2005 as a sport and then comparing it with Article 42 paragraph (2) sub-paragraph g of Law No. 28/2009 as **entertainment** --- which, according to the Petitioners, are subsequently imposed with tax --- then the Petitioners consider it inconsistent with Article 28D paragraph (1) and Article 28I paragraph (2) of the 1945 Constitution. This is, of course, incorrect, because if the same term is positioned in the domain of a different science, it will have a different meaning. This is due to the difference in emphasis. In the history of law, the definition of human being can be different between one and another. Is a human being a person? The answer is, a human being may not be a person, because during the Roman age, a person could be a legal subject or a legal object. A human being not being a legal subject was a

slave who could be traded. Only the persons having rights and obligations are called legal subjects. This is also the case with the term "*zina*". In the Western Private Law (*Boergerlijk Wetboek*), zina is defined as a sexual intercourse between 2 (two) persons not bound by a legal marriage, with either of them has had a wife or a husband. In Islamic Law, zina is defined as an intercourse between two persons, a man and a woman, not bound by a legal marriage. Similarly, the term "manipulation" in accounting science cannot be equated with the definition of "manipulation" in penal law, and that this cannot be contrasted;

Similarly, the term golf being concluded from practice and the term golf in Law Number 28 Year 2009 cannot be contrasted because each of them has its own perspective according to the system of each. Thus, golf must be viewed from the perspective of tax law, rather than from the perspective of sports law (Law Number 3 Year 2005).

Whereas golf is mostly played by certain well-to-do people, and therefore, golf is properly in accordance with fair distribution of burden and weight based on the ability to pay of tax subjects. The greater the ability to pay is, the greater the load is imposed to someone. All these constitute the efforts for even distribution of social justice. Viewed from the aspect of proportionality principle, this is proportional. The proportionality principle contains three sub-principles. First, suitability, second, necessity, and third, proportionality in the narrow sense of the term).

The principles of suitability and necessity are related to the factually possible. Suitability also means that a principle can affect the possibility of realization of other principles. For example, it brings us closer to the principle of social justice. Whereas the proportionality principle in the narrow sense of the term means that such matter is legally possible. The imposition of tax on golf game is possible only up to a maximum of 35% to be paid not be the owner of the golf course but the player because the player is the one enjoying the entertainment of the golf game, while the taxpayer is an individual person or an Entity providing the entertainment of golf game;

According to the World Bank, with an economic growth of 6.3%, Indonesian middle-class economic group has grown significantly. More than 50 (fifty) million of Indonesian population belong to the middle-class economic group. Their demands will also increase including the entertainment sector and it is not unlikely that golf courses will obtain the positive impacts. So far, no golf course entrepreneur is heard to have gone bankrupt and closed down due to the imposition of such entertainment tax;

The Petitioners have drawn their conclusion from the practice that golf is contested in the sports event but they do not explicitly refer to any article on golf from the National Sports System Law, because actually, Article 1 paragraph (4) of the National Sports System Law does not mention the word golf. Article 11 sub-article 12, sub-article 13, sub-article 14, sub-article 15 and sub-article 16 of the National Sports System Law classifies sports into education sports,

recreation sports, achievement sports, amateur sports, professional sports and sports for the disabled. However, such practice-based argument has contested the classification of golf as entertainment in Article 42 paragraph (2) sub-paragraph g, **so that the issue is in the domain of legality rather than being a constitutionality issue.** The Petitioners do not explain that Article 42 paragraph (2) sub-paragraph g classifying golf as entertainment is inconsistent with Article 28D paragraph (1) and Article 28I paragraph (2) of the 1945 Constitution. Article 1 classifying sports into 6 (six) groups does not mention any type of entertainment sport. Therefore, it is not wrong that Article 42 paragraph (2) sub-paragraph g of the Law *a quo* categorizes golf into a type of entertainment, especially as it is clear that a golf player is charged with payment, and therefore, he/she becomes an object of entertainment tax on the service of entertainment provision charged with payment. Whereas ultimately, tax will be left to the people as the manifestation of the social function for the creation of social justice based on the proportionality principle, so that the Petitioners' petition should have been rejected.

SUBSTITUTE REGISTRAR,

Sgd.

Yunita Rhamadani