



THE CONSTITUTIONAL COURT OF
THE REPUBLIC OF INDONESIA

THE SUMMARY OF DECISION
CASE NUMBER 39/PUU-XIV/2016

Concerning

**"Basic Needs Commodities Needed by the People Are Not Subject to
VAT"**

- Petitioner** : Dolly Hutari P, S.E dan Sutejo
- Type of Case** : Law Number 42 of 2009 concerning the Third Amendment to Law Number 8 of 1983 concerning Value Added Tax on Goods and Services and Sales Tax on Luxury Goods (UU 42/2009) against the Constitution of the Republic of Indonesia of 1945 (1945 Constitution).
- Subject Matter** : Elucidation of Article 4A paragraph (2) letter b of Law 42/2009 is contrary to Article 28C paragraph (1) and Article 28H paragraph (1) of the 1945 Constitution.
- Verdict** : To grant the petition of the Petitioners in part.
- Date of Decision** : Tuesday, February 28th, 2017

Overview of Decision :

The Petitioners are individual Indonesian citizens. The Petitioners submit a petition, in relation to the basic necessities that are directly correlated with the fulfilment of basic needs which are the constitutional rights of citizens so that all citizens have an interest in state policy regarding this issue, which in this case is stated in the form of a Law.

The Petitioners' petition is a constitutional review of Law Number 42 of 2009 concerning the Third Amendment to Law Number 8 of 1983 concerning Value Added Tax on Goods and Services and Sales Tax on Luxury Goods (hereinafter referred to as Law 42/2009) against the 1945 Constitution, the Court has the jurisdiction to adjudicate the petition *a quo*.

Whereas in relation to legal standing, the Petitioners explain their qualifications in the petition *a quo* as individual Indonesian citizens, Petitioner I is a housewife who declares herself to be a consumer of food commodities and Petitioner II is a food commodity trader. The Petitioners consider the enactment of the Elucidation of Article 4A paragraph (2) of Law 42/2009, has harmed her constitutional rights, including as a housewife, Petitioner I feels that the provisions in the Elucidation of Article 4A paragraph (2) of Law 42/2009 are quite burdensome in the effort to fulfil any family's nutritional adequacy for Indonesian people, most of whom are below the poverty line and low purchasing power, restrictions on the types of basic necessities are obstacles in meeting

their basic needs, and for Petitioner II, as a local food commodity trader, he feels discriminated against by the provisions in the Elucidation of Article 4A paragraph (2) of Law 42/2009 because there are differences in the prices of local food commodities that are not included in the eleven types of food commodities as stipulated in the provisions *a quo* due to the imposition of VAT on it resulting in price differences.

Whereas in relation to the legal standing of the Petitioners the Court stated that it could accept the explanation of Petitioner I regarding her assumption about the loss of the relevant constitutional rights caused by the enactment of the Elucidation of Article 4A paragraph (2) Law 42/2009 and in relation to Petitioner II, even with the explanation of Petitioner II in his petition, it cannot be said that discrimination has occurred but with that explanation there is sufficient reason for the Court to accept the reasoning of Petitioner II, Petitioner II has indirectly been harmed of his constitutional right to fulfil his basic needs due to the different treatment of food commodities which are both categorized as basic necessities. Based on all the considerations above, the Court is of the opinion that the Petitioners have legal standing to act as Petitioners in the petition *a quo*.

According to the Court, that the fulfilment of basic necessities, especially those that are urgently needed by the people, is an inseparable part of efforts to promote public welfare which is the constitutional obligation of the state (Government) to make it happen, as confirmed in the fourth paragraph of the Preamble to the 1945 Constitution, which in the end it boils down to efforts to realize social justice for all Indonesian people which is one of the fundamental ideals of the establishment of the Indonesian state and nation as an independent and sovereign state and nation, as stated in the Pancasila as state foundation. Furthermore, when the fulfilment of basic necessities is further emphasized as constitutional right – in this case the right to the fulfilment of basic needs which are part of the right to self-development and the right to live in physical and spiritual prosperity, as regulated in Article 28C paragraph (1) and Article 28H paragraph (1) of the 1945 Constitution - the constitutional obligations of the state are further emphasized.

Whereas, furthermore, from the perspective of Indonesia's existence as part of the international community, Indonesia has ratified International Covenant on Economic, Social and Cultural Rights through Law Number 11 of 2005 concerning Ratification International Covenant on Economic, Social and Cultural Rights (CESCR), so there are international legal obligation for Indonesia to respect, protect and fulfil the economic, social and cultural rights stipulated in such Covenant. The scope of rights included in economic, social and cultural rights includes (but is not limited to) the rights to decent work, an adequate standard of living, housing, food, water and sanitation, social security, health, and education [see further Articles 7 to 15 CESCR). Therefore, the obligation to fulfil basic necessities, in this case the need for adequate and affordable food is now not only a constitutional obligation but also an international legal obligation that requires the seriousness and hard work of the state (through the Government) to ensure its respect, protection and fulfilment.

Whereas it is different from civil and political rights which respect, protect. and fulfilment requires as little intervention as possible from the state, the respect, protection, and fulfilment of economic, social and cultural rights actually requires a lot of state intervention, in this case including the right to food or basic necessities. Therefore, in particular, the fulfilment of these economic, social and cultural rights is highly dependent on the capacity of the state. However, the reason for this ability cannot and should not be used as an excuse to free the state from its obligation to fulfil these rights, but it must be understood and placed within the framework of tolerance in the sense that the fulfilment of economic, social and cultural rights cannot and shall be implemented immediately. The efforts, hard work, and sincerity of the state to respect, protect and fulfil these economic, social and cultural rights, especially in the context of the petition *a quo*, the right to the fulfilment of the need for food, must be seen among others in its legislative policies in the

context of implementing national development, especially legislative policies as outlined in the law, including (but not limited to) the law in the field of taxation.

Whereas, on the other hand, the ability of the state to carry out national development, including in order to fulfil its constitutional obligations to fulfil the rights of citizens to the need for food, arises the need to collect taxes and this is justified both doctrinally and constitutionally. Even though it is theoretically possible for the state not to collect taxes if state revenues from other sectors allow for it, this is not realistic, and the fact is that until today the taxes are still the first and foremost source of state financing [see further Court Decision No. 57/PUU-XIV/2016 in the examination of the Tax Amnesty Act). Therefore, the promulgation and enactment of Law 42/2009 must be placed within this framework of thinking.

Whereas although the issues relating to the doctrinal and constitutional basis of the state's authority to collect taxes are no longer a constitutional issue that contains debate, but in relation to Value Added Tax (VAT), although doctrinally and practically, other countries have accepted the general principle that basically any goods or services shall be subject to tax unless it is stipulated otherwise by law, the question is why the "basic goods that are urgently needed by the people" need to be exempted from VAT? To this question, the Court considers the following:

- a. as explained in the considerations above, the fulfilment of basic needs is part of the effort to promote the general welfare and therefore it is the constitutional obligation of the state to ensure its fulfilment in accordance with its capabilities. This was also acknowledged by the President (Government) as stated in his statement at the trial on June 22nd, 2016, which stated, among other things, *"Basic needs are goods that relate to the lives of many people with a high scale of fulfilment and are the factors that support people's welfare. The basis for not imposing VAT on goods as mentioned above is to ensure that the community obtains basic needs, which are expected to support the nutritional needs of the community."* In another part of his statement, the President (Government) emphasized, *"To ensure a sense of justice for the whole community and protect the general welfare by encouraging the fulfilment of the basic needs of the community as a whole, the Government provides exemptions from being subject to VAT on foods which, according to the government, are staple foods that are urgently needed by the public in general."*
- b. factually-sociologically, some of the population or citizens are still below the poverty line so that, according to reasonable reasoning, it can be concluded that those who belong to the population group or poor citizens really need exemption from VAT on the said basic goods considering that VAT is an objective tax whose imposition is determined by the object of the tax, so that if VAT is imposed on basic necessities, the poor are also charged with VAT when they buy these goods for consumption purposes;
- c. In parallel to the considerations in letter b above, the expert from the Petitioner, Yustinus Prastowo, SE, M.Hum, MA, in a statement at the trial on July 18th, 2016, stated that as an objective tax, VAT has a regressive impact, namely the higher the consumer's ability, the lighter the tax burden borne, while the lower the consumer's ability, the heavier the tax burden borne. Therefore, if VAT is imposed on basic necessities in connection with the state's obligation to meet the basic needs of the people, it would be contrary to one of the important principles in taxation, namely the principle of proportionality, which among other things implies that the allocation of the tax burden to citizens must be in accordance with the principle of proportionality, equality and ability to pay so that the distribution of the tax burden must be carried out proportionally.

Furthermore, if the reason or rationale for VAT exemption on "basic goods that are urgently needed by the people" is already in accordance with the mandate of the 1945

Constitution, the Court considers that in factual-sociological terms, based on the statement of the Petitioner's expert, Prof. Dr. Ir. Hardinsyah, M.S., as testified in the trial on July 18th, 2016, it can be concluded that the types of food grown and consumed by the Indonesian population which are included in the basic needs of the Indonesian population are very diverse and are not limited to 11 (eleven) types as stated in the Elucidation of Article 4A paragraph (2) letter b of Law 42/2009. This diversity is influenced by ecological factors (physical, social and cultural environment, as well as food availability), economic factors, especially purchasing power (food prices and income), and knowledge factors and partiality or preferences. Meanwhile, to meet the nutritional adequacy, 33 nutrients must be met by everyone for a healthy life which includes energy, protein, fat, carbohydrates, fibre, water, 14 types of vitamins, and 13 types of minerals. Therefore, in order to meet the nutritional adequacy of one food group, it is not enough, especially if it is limited to only 11 types of basic goods as regulated in the Elucidation of Article 4A paragraph (2) letter b of Law 42/2009 [see further expert statement by Prof. . Dr. Ir. Hardinsyah, M.S., page 4 and so on]. Based on the expert's testimony, the Court may accept the Petitioners' argument that the Elucidation of Article 4A paragraph (2) letter b of Law 42/2009 has come out of or is not in line with the spirit contained in the norms of the Law it described, namely Article 4A paragraph (2) letter b of Law 42/2009.

Whereas based on all the considerations above, the Court states that:

- a. The Elucidation of Article 4A paragraph (2) letter b of Law 42/2009 is contrary to the meaning of Article 4A paragraph (2) letter b of Law 42/2009 which seeks to exempt from the imposition of VAT on "basic necessities that are needed by many people";
- b. The explanation of Article 4A paragraph (2) letter b of Law 42/2009 is contrary to the understanding and rationale of VAT as regulated in Law 42/2009 itself where, according to its terminology and character as a tax on added value, VAT is only imposed on goods that have been experience added value, namely those that have been processed by manufacturing. This is supported by the statements of the legislators themselves, both the President (Government) and the House of Representatives, as well as experts proposed by the President (Government) although the House of Representatives' statement in this regards shall not be taken into consideration that would bind the Court [vide the President's expert testimony Prof. Dr. Gunadi and the Elucidation of Law Number 8 of 1983]. This means that all basic necessities, because they have not undergone any manufacturing process, should not be subject to VAT. However, due to the limitative formulation in the Elucidation of Article 4A paragraph (2) letter b of Law 42/2009, logically, the goods which, although classified as basic necessities, are not explicitly listed in the Elucidation of Article 4A paragraph (2) letter b of Law 42 /2009 could be subject to VAT;
- c. The elucidation of Article 4A paragraph (2) letter b of Law 42/2009 is also unfair because, according to Article 4A paragraph (2) of Law 42/2009, mining products or drilling products are taken directly from the source [Article 4A paragraph (2) letter a Law 42/2009], the foods and beverages served in hotels, restaurants, eatery, stalls and similar places, including the food and drinks, whether consumed on the premises or not, including the foods and beverages delivered by food delivery or catering businesses [Article 4A paragraph (2) letter c of Law 42/2009], money, gold bullion, and securities [Article 4A paragraph (2) letter d of Law 42/2009] are not subject to VAT, while basic necessities which are factually-sociologically very needed by the people are subject to VAT solely because these goods are not included in the eleven types of basic necessities that are urgently needed by the people according to the Elucidation of Article 4A paragraph (2) letter b of Law 42/2009;
- d. The elucidation of Article 4A paragraph (2) letter b of Law 42/2009 has the potential to cause legal uncertainty because although there is a possibility that in practice the goods that do not fall into the 11 (eleven) types as mentioned in Explanation of Article 4A paragraph (2) letter b Law 42/2009 is not subject to VAT, but if the goods are

subject to VAT, it also cannot be regarded as inappropriate. Therefore, it is possible that in a certain place and at a certain time, a basic need item that is very much needed by the people is exempted from the imposition of VAT, while in other places and at different times the same item is subject to VAT.

- e. The Court is of the opinion that although it is not appropriate to say discriminatory, as argued by the Petitioners, the Elucidation of Article 4A paragraph (2) letter b of Law 42/2009 is contrary to the 1945 Constitution because it hinders the fulfilment of the rights to basic needs of citizens, hinders the fulfilment of the rights of citizens to live in physical and spiritual prosperity, and does not provide legal certainty, as referred to in Article 28C paragraph (1), Article 28H paragraph (1), and Article 28D paragraph (1) of the 1945 Constitution, respectively, as long as the basic necessities that are urgently needed by the people as contained in the Elucidation of Article 4A paragraph (2) letter b of Law 42/2009 are not construed as just examples, and not limitative details.

Whereas the Court could understand the difficulties faced by the legislators in detailing all types of basic necessities that are urgently needed by the people if the details contained in the Elucidation of Article 4A paragraph (2) letter b of Law 42/2009 are only intended as examples. If this is the case, actually the legislators have a justifiable choice from the perspective of statutory science, namely by regulating further details regarding the types of basic necessities that are urgently needed by the people in a Government Regulation and this shall not be contrary to the 1945 Constitution. However, the formulation that uses the word "including" in the Elucidation of Article 4A paragraph (2) letter b of Law 42/2009, there is no other meaning that could be raised by such formulation except the definition of limiting. Therefore, the provision referred to is contrary to the 1945 Constitution as considered in point 8 above.

Based on all of the above considerations, the Court is of the opinion that the Petitioners' petition is partially grounded so that the Elucidation of Article 4A paragraph (2) letter b of Law 42/2009 must be declared conditionally unconstitutional, that is as long as the details of the type of "Basic goods that are urgently needed by the people" as regulated in the Elucidation of Article 4A paragraph (2) letter b of Law 42/2009 shall not be construed as not limited to 11 (eleven) types mentioned in the Elucidation of Article 4A paragraph (2) letter b of Law 42/2009.

Therefore, the Court subsequently rendered the verdicts with the following decision, to grant the Petition of the Petitioners in part; to state that the Elucidation of Article 4A paragraph (2) letter b of Law Number 42 of 2009 concerning the Third Amendment to Law Number 8 of 1983 concerning Value Added Tax on Goods and Services and Sales Tax on Luxury Goods (State Gazette of the Republic of Indonesia Year 2009 Number 150, Supplement to the State Gazette of the Republic of Indonesia Number 5069) is conditionally contrary to the 1945 Constitution of the Republic of Indonesia and does not have binding legal force as long as the details of "basic goods that are urgently needed by the people" as contained in the Elucidation of Article 4A paragraph (2) letter b of Law Number 42 of 2009 concerning the Third Amendment to Law Number 8 of 1983 concerning Value Added Tax of Goods and Services and Sales Tax of Luxury Goods (State Gazette of the Republic of Indonesia of 2009 Number 150, Supplement to the State Gazette of the Republic of Indonesia Number 5069) is defined as limitative; to dismiss the rest of the petition of the Petitioners.