



**JUDGMENT**  
**Number 39/PUU-XIV/2016**

**FOR THE SAKE OF JUSTICE BASED ON THE ONE AND ONLY GOD**  
**THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA**

[1. 1] Adjudicating the constitutional case at the first and final instance, handed its decision in the case of Review on the Law Number 42 of 2009 regarding the Third Amendment to the Law Number 8 of 1983 regarding Value Added Tax on Goods and Services and the Sales Tax on Luxury Goods against the Constitution of the Republic of Indonesia of 1945, submitted by:

1. Name: **Dolly Hutari P, S. E**

Occupation: Private Person

Address: Jalan Lohan 3, Blok B5/15, Villa Mutiara Bogor, RT 001, RW 011, Village (*Kelurahan/Desa*) Mekarwangi, Sub-regency (*Kecamatan*) Tanah Sareal, the City of Bogor  
as the **Petitioner I;**

2. Name: **Sutejo**

Occupation: Merchant

Address: Jalan Ancol Selatan, RT 001, RW 007, Village (*Kelurahan/Desa*) Sunter Agung, Sub-regency (*Kecamatan*) Tanjung Priok, North Jakarta  
as the **Petitioner II;**

In this matter based on a special power of attorney dated 04 February 2016 grant a power of attorney to **Edu Hardi Ginting, S. H., Robertus Ori Setianto, S. H., M. H., Shilviana, S. H., S. E., M. Kn., Farrengga Aceng Supriyatna, S. H., Emanuel Bani, S. H., M. H., Erlan Agustian Pancaputra, S. H., Hendrawan Agusta, S. H., Putu Bravo Timothy, S. H., M. H., and Lolita Citta Nirmala, S. H.,** all are Advocates jointly in the Team of Fighters of the People's Right of Food, Advocates with the Law Office Edu Ginting and Associates and SS. co Advocates, having its address at The Boulevard Office Tower, Lantai 3, D1, Jalan Fachrudin Raya Number 5, Jakarta Pusat, acting for and on behalf of the Principal;

Hereinafter referred to as **the Petitioners;**

[1. 2] Reading the petition of the Petitioners;

Listening to the testimony of the Petitioners;

Listening to and reading the testimony of the President;

Listening to and reading the testimony of the witnesses and experts of the Petitioners;

Listening to and reading the testimony of the expert of the President;

Examining evidences submitted by the Petitioners;

Reading the conclusion of the Petitioners;

**2. STATE OF THE CASE**

[2. 1] Considering that the Petitioners have proposed a petition by the application letter dated 1 March 2016 received at the Office of the Clerk of the Constitutional Court (hereinafter referred to as the Office of the Clerk of the Court) on the date 1 March 2016, based on the Deed of Receipt of Dossier of the

Case Number 58/PAN. The Constitutional Court/III/2016 and registered in the Book of Registry of Constitutional Cases under Number 39/PUU-XIV/2016 on the date 28 April 2016, which has been corrected by the application dated 27 May 2016 and received at the Office of the Clerk of the Court on the date 27 May 2016, describing the following matters:

## I. FORMAL REQUIREMENTS FOR SUBMITTING A PETITION

### A. AUTHORITY OF THE CONSTITUTIONAL COURT

1. Based on the opinion of Prof. Dr. Sri Soemantri, in his book: “*Hak Uji Materiil di Indonesia, 1997*” (The Right of Material Review in Indonesia, 1997), there are two kinds of material review on laws and regulations, namely the right of formal review and the right of material review. In his view, the right of formal review is “the authority to assess, whether a legislative product, like a Law, for example, has been embodied through a procedure as has been determined/regulated in the applicable laws and regulations” (page 6). Furthermore, he interpreted the Right of Material Review as “the authority to investigate and afterward to assess, whether the content of the laws and regulations corresponds with or contravenes a regulation of higher level, as well as whether a certain power (Dutch: *verordenende macht*) is entitled to issue a certain regulation.”

(Source: Sri Soemantri M. 2007, *Hak Uji Material in Indonesia* (The Right of Material Review in Indonesia), Bandung: Publisher Alumni, page 6 up to 11.)

2. The Amendment to the Constitution of 1945 has created a new institution functioning as the single guardian and interpreter of the Constitution, namely the Constitutional Court, hereinafter referred to as “the Constitutional Court,” as contained in Article 7B, Article 24 section (1) and section (2), as well as Article 24C of the Constitution of 1945, which is further regulated in the Law Number 24 of 2003 regarding the Constitutional Court as has been amended several times, the last time by the Law Number 4 of 2014 regarding the Enactment of the Government Regulation in Lieu of Law Number 1 of 2013 regarding the Second Amendment to the Law Number 24 of 2003 regarding the Constitutional Court to become a Law (State Gazette of the Republic of Indonesia of 2013 Number 167, Supplement to the State Gazette of the Republic of Indonesia Number 5456), hereinafter referred to as “the Constitutional Court Law”;

3. Based on the provision of the applicable laws and regulations in Indonesia, the authority of the right to review a Law against the Constitution of 1945 is manifestly possessed by the Constitutional Court, as it appears in:

- Article 24C section (1) of the Constitution of 1945 states, “*The Constitutional Court is authorized to adjudicate at the first and final instance, the decision of, which is final to review a Law against the Constitution, to decide on disputes on the constitutional authority of the state institutions, whose authority is granted by the Constitution, to decide on the dissolution of a political party, and decide on disputes on the result of General Elections.*”
- Article 10 section (1) letter a of the Law Number 24 of 2003 regarding the Constitutional Court as has been amended by the Law Number 8 of 2011 regarding the Amendment to the Law Number 24 of 2003 regarding the Constitutional Court and has been reamended by the Government Regulation in Lieu of Law Number 1 of 2013 regarding the Second Amendment to the Law Number 24 of 2003 states, “*The Constitutional Court is authorized to adjudicate at the first and final instance, the decision of, which is final to review a Law against the Constitution of the Republic of Indonesia of 1945.*”
- Article 57 of the Law Number 24 of 2003 regarding the Constitutional Court states, “*A Judgment of the Constitutional Court, which verdict of its judgment states that the material content of any section, article, and or part of the Law contravenes the Constitution of the Republic of Indonesia of 1945, the mentioned material content of*

*such section, article, and or part of the Law has no binding legal force.”*

- Article 29 section (1) letter a of the Law Number 48 of 2009 regarding Judicial Powers states, *“One of the authorities of the Constitutional Court is the authority to adjudicate at the first and final instance, the decision of, which is final to review a Law against the Constitution.”*
  - Article 9 section (1) of the Law Number 12 of 2011 regarding the Formation of Laws and Regulations states, *“In case a Law is assumed to contravene with the Constitution of the Republic of Indonesia of 1945, its review is conducted by the Constitutional Court.”*
4. Referring to the above-mentioned provision, the Constitutional Court is authorized to conduct review on the constitutionality of a Law against the Constitution of 1945.
  5. In this case, the Petitioners appeal that the Constitutional Court conducts a review against the Elucidation to Article 4A section (2) letter b of the Law regarding VAT because it contravenes the Constitution of 1945.

Article 4A section (2) letter b of the Law regarding VAT reads:

(2) *“Kinds of the goods not subjected to Value Added Tax are certain goods in the following category of goods:*

*a. . .*

*b. Basic needed commodities, which are indispensable for the people at large.”*

Furthermore, the Elucidation to Article 4A section (2) letter b of the Law regarding VAT reads:

*“Basic needed commodities, which are indispensable for the people at large comprise:*

*a. Rice;*

*b. Unhulled Rice;*

*c. Corn;*

*d. Sagoo;*

*e. Soybean;*

*f. Salt, either containing or not containing iodine;*

*g. Meat, namely fresh meat without processing, but has gone through slaughter process, skinned, cut, cooled, frozen, packed or not packed, salted, limed, acidified, preserved by other means, and/or boiled;*

*h. Eggs, namely unprocessed eggs, including cleaned eggs, salted, or packed;*

*i. Milk, namely dairy milk either having gone through cooling process or heated, not containing added sugar or other materials, and/or packed or not packed;*

*j. Fruits, namely plucked fresh fruits, either having gone through the process of washing, sorted, shelled, cut, sliced, graded, and/or packed or not packed; and*

*k. Vegetables, namely plucked fresh vegetables, washed, drained, and/or stored at low temperature, including minced fresh vegetables.”*

## **B. THE LEGAL STANDING OF THE PETITIONERS**

6. Article 51 section (1) letter c of the Constitutional Court Law states, *“the Petitioners are a party having assumed their constitutional rights and/or authorities to have been harmed by the applicability of a Law, namely:*
  - a. Indonesian individual citizens;*
  - b. unities of the adat law societies to the extent that they are still alive and corresponds with the development of its society and the principle of the Unitary State of the Republic of Indonesia as is regulated in Laws;*
  - c. public or private legal entities; or*
  - d. state institutions.”*
7. Whereas in the Elucidation to the mentioned Article, it has been described again regarding what is meant by Constitutional Rights, namely as rights regulated in the Constitution of 1945., so

that based on the provision of Article 51 section (1) of the Constitutional Court Law, there are two requirements to be complied with to review whether the Petitioners have legal standing in a case of Law review, namely:

- i. Fulfillment of the qualification to act as Petitioners, and
- ii. There are rights and/or Constitutional Rights of the Petitioners harmed by the applicability of a Law.

#### **B. 1. DESCRIPTION ON THE LEGAL STANDING OF THE PETITIONERS**

8. Whereas therefore, the Petitioners describe their legal standing when submitting this petition, as follows:

1. Qualification as Petitioners

The Qualification of the Petitioner I and Petitioner II are Indonesian individual citizens:

- a. The Petitioner I as an Indonesian individual citizen in her position as a consumer of food commodities; and
- b. The Petitioner II as an Indonesian individual citizen in his position as a small-scale merchant of food commodities in a traditional market.

2. The Constitutional Loss of the Petitioners.

The Constitutional Court has rendered its explanation regarding the parameter of Constitutional loss in Article 51 section (1) of the Constitutional Court Law in its Jurisprudence of the Constitutional Court by virtue of its Judgment Number 006/PUU-III/2005 and further judgments, namely:

- a. there are constitutional rights and/or authorities of the Petitioners granted by the Constitution of 1945;
- b. the Petitioners have assumed that those constitutional rights and/or authorities have been harmed by the applicability of a Law;
- c. the loss of those constitutional rights and/or authorities are specific and actual, or at least bears the potential, which according to normal reasoning it can be ascertained that it will happen;
- d. there is a causal relationship (Dutch: *causal verband*) between the loss of constitutional rights and/or authorities with a Law pleaded for review;
- e. there is the possibility that by granting the petition, that loss of constitutional rights and/or authorities will not or will not happen again.

9. Whereas the Petitioners in the case as such (*a quo*) have constitutional rights that have been violated by the enactment of the Elucidation to Article 4A section (2) letter b of the Law regarding VAT, because it contravenes the Constitution of 1945:

a. The right to self-development through the fulfillment of basic needs, for the sake of quality of life improvement and the welfare of mankind:

Article 28C section (1) of the Constitution of 1945 states, “*Each person is entitled to self-development through the fulfillment of basic needs, is entitled to obtain education and to gain the benefit of science and technology, art and culture, for the sake of quality of life improvement and for the sake of the welfare of mankind.*”

b. The right to be free from discriminative treatment and protection against discriminative treatment:

Article 28I section (2) of the Constitution of 1945 states, “*Each person is entitled to be free from discriminative treatment based on whatsoever and is entitled to obtain protection against discriminative treatment as such*”;

#### **B. 2. DESCRIPTION ON THE CONSTITUTIONAL LOSS OF THE PETITIONERS**

10. Whereas the Petitioner I as an Indonesian individual citizen in her capacity as a consumer of food commodities and the Petitioner II in his capacity as an Indonesian individual citizen having the profession of a small merchant of food commodities, have been constitutionally harmed in the fulfillment of their constitutional rights, because:

B. 2. 1. Petitioner I Suffers Constitutional Loss due to Difficulty in Fulfilling Basic Needs and Discriminative Treatment

Petitioner I in her capacity as housewife as a final consumer of food commodities has the right to suffice nutritional needs of her family by consuming various kinds of food commodities. not only the 11 kinds of always the same commodity.

But the fulfillment of the constitutional rights of the Petitioner I for the variety of the basic needs of the daily food has become “expensive” and has become “burdensome” for fulfillment due to the issuance of the Elucidation to Article 4A section (2) letter b of the Law regarding VAT, which regulates those basic needs of food commodities being consumed daily by the family of the Petitioner I (beyond the 11 (eleven) kinds of commodities gaining preferential treatment) to become subject to VAT, so that the price have become more expensive.

Whereas for the children and the family of the Petitioner I to grow up healthy and to become qualified Indonesians, they need to consume a variety of the staple food material (not only limited to the 11 kinds of commodities as limited by the Elucidation to Article 4A section (2) letter b of the Law regarding VAT), like:

- a. Source of energy/carbohydrate (other than rice, corresponding with the Non-Rice Food Resilience Program as planned by the Government), like: tuber (cassava, sweet potato, taro, potato, etc.) and wheat;
- b. Source of Protein:
  - i Animal protein (other than meat, corresponding with the Campaign “Let’s Consume fish” from the Ministry of Maritime Affairs and Fisheries): fish, shrimp, squid, fowl, etc.;
  - ii Vegetable protein: various kinds of beans, like green beans, red beans, and peanuts, which nutritional contents are very high (no less than meat);
- c. Spice/kitchen flavorings being typical characteristic, identity and routine basic needs of the Indonesian people, like chili (fresh chili as well as dried chili), onion, pepper, galangal (*lengkuas*), ginger, coriander (*ketumbar*), candlenut (*kemiri*), nutmeg, cloves, etc. It is impossible for Indonesians to cook each day only with salt.

Article 28C section (1) of the Constitution of 1945 states, “*Each person is entitled to the fulfillment of basic needs, for the sake of quality of life improvement.*” The most basic need of life of humans is food and drink, therefore, the State through all its instruments is obliged to ensure the fulfillment of those basic needs.

For most of the Indonesian population, whereby 60,4% is still below the poverty line (World Bank Data, 2014), the price factor is still a very crucial consideration in deciding what kinds of food material to purchase for daily consumption. With limited amount of money in hand, where the price is more expensive, then the nutritional factor will be ignored. To eat will become just to become saturated only. Whereas nutritional sufficiency is an important component in the quality of life improvement.

Basically, the function of regulation by the State in the fulfillment of the right of food as such (*a quo*) has been accommodated by the Law regarding VAT by its Article 4A section (2) letter b:

- (2) “*The kinds of the goods not subjected to Value Added Tax are certain goods in the category of the goods as follows:*
- a. ...etc.;
  - b. *Basic needed commodities, which are indispensable for the people at large.*”

Nevertheless, unfortunately, contravening therewith, the Elucidation to Article 4A section (2) letter b limits “basic commodities, which are indispensable for the

people at large” as such (*a quo*) to only the 11 kinds of food commodities, without a clear parameter, turning that provision discriminative.

Examples of discriminative treatment caused thereby:

- a. Meat is not subject to VAT, while fish, squid, shrimp, etc. are subject to VAT. Whereas both are equally source of protein. Fish, which is healthier as well as highly nutritious and should be more affordable for the people at grassroot for daily need becomes instead subjected to VAT, while it is not so with meat;
- b. Soybean is not subject to VAT, while various kinds of beans, which protein content and are not less nutritious are subject to VAT. *Gado-gado* (peanut salad), *pecel* (Javanese salad), *karedok* (Sundanese raw salad), *lotek* (Sundanese cooked salad), *ketoprak* (soybean cake and rice cubes with peanut sauce), *kupat tahu* (soybean cake and rice cubes) are the Indonesian people’s daily food. Green beans are also since long a main seed of additional nutrition for the Under Five Years Old (*Bawah Lima Tahun*, Balita) at the many Center for Family Planning Services - Integrated Health (*Pos Pelayanan Keluarga Berencana - Kesehatan Terpadu*, Posyandu) because its price, which should be affordable for the people at the grassroot and are highly nutritious, but are instead subject to VAT.

The Elucidation to Article 4A section (2) letter b of the Law regarding VAT has been made without a base of clear parameter why certain food material “are favored” and not made subject to VAT, while other food materials are made subject to VAT, so that it has led to discrimination that violates Article 28I section (2) of the Constitution of 1945.

Therefore, the legal standing of the Petitioner I as a consumer of food commodities is fulfilled.

- B. 2. 2. The Petitioner II Suffers Constitutional Loss in the Sense that He Does Not Obtain Protection against Discriminative Treatment:

11. The applicability of the Elucidation to Article 4A section (2) letter b of the Law regarding VAT, has harmed the Constitutional Rights of the Petitioner II to obtain protection against discriminative treatment.

Whereas the Petitioner II as a local food commodities merchant in a traditional market suffers discriminative treatment from the State due to the difference in local food commodities prices, which do not include the 11 kinds of food commodities regulated in the Elucidation to an article as such (*a quo*), with the price of food commodities, which are included in the 11 kinds of food commodities as determined in the Elucidation to an article as such (*a quo*) as well as with the illegally imported food commodities entering the country without being subject to VAT.

The need and market demand in Indonesia for daily food commodities is very high, while purchasing power is low (World Bank Data 2014: percentage of poor residents earning below USD 2,5/day is 60,4% or around 149 million of the Indonesian population is still poor).

Besides, the divers culture of the Indonesian people affects the culinary variety. The staple food of the Indonesian communities of the Western part is rice, while of the Eastern part are corn, sago, sweet potato and cassava. The coastal communities prefer fish as side dish, while the urban communities prefer meat as side dish.

The Elucidation to Article 4A section (2) letter b of the Law regarding VAT “favors” only 11 food commodities, which are not subjected to VAT, while other commodities are subjected to VAT, causing food commodities prices burdened by VAT to have become higher and access of the public to those commodities becoming limited.

Because the need factor of inexpensive food is urgent, this policy affects the booming of smuggling practice leading to price discrimination in the markets, between the legal commodities products of local farmers, which are subject to VAT on the one hand, against imported smuggled products on the other hand not paying VAT.

(Source: Berita Internet, Kompas Online, “*Harga Picu Penyelundupan*” (Price Triggers Smuggling). Hen/Mas. <http://print.kompas.com/baca/2016/02/01/Harga-Picu-Smuggling> dated 1 February 2016 accessed dated 26 February 2016.)

To access various food commodities, which are equally staple food material indispensable for the people at large, the Elucidation to Article 4A section (2) letter b of the Law regarding VAT as such (*a quo*) imposes two different rules: to render privilege only to the certain 11 kinds of commodities and discrimination against the other food commodities, so that there is no protection nor legal certainty;

Such discrimination is also incriminating for merchants because prices of the merchandise of the Petitioner II in terms of food commodities from legal sources (products of local farmers or official imports) have become more expensive because they are subjected to VAT, while more inexpensive illegally imported products are widely circulating in the markets because of not paying VAT.

Whereas a price difference of 10% (ten percent), although appearing as a small figure, it has nevertheless a very big impact for the purchasing power of the society and the absorption of commodities in the realm of trade.

Whereas the enactment of the Elucidation to Article 4A section (2) letter b of the Law regarding VAT as such (*a quo*) gives birth to different treatments of the state against food commodities as explained hereinabove, where there are food commodities imposed on VAT and those not imposed on VAT, the Petitioner II as a merchant suffers an obstacle in selling food commodities being his merchandise.

Consumer’s preference to look for what is less expensive, tends to cause merchandise goods subjected to VAT to become not sold. This causes the Petitioner II as a small merchant suffers discrimination in his daily livelihood business. The Petitioner II has been indirectly treated differently by the state being the party who makes and validates the Elucidation to an article as such (*a quo*). The Petitioner II has no equal opportunity in the access to his economic rights to sell food commodities equitably and reasonably due to price disparity caused by the enactment of the Elucidation to an article as such (*a quo*), which directly regulates food commodities he sells daily. The Petitioner II has not obtained state protection in the fulfillment of his right not to be treated discriminatively.

Consideration is to be had deeply:

- i Why the communities who eat sweet potato, cassava and fish are discriminated and shall pay for their food more expensive due to VAT compared to communities who eat rice and meat?, while they are equally basic needs;
- ii Why products of local farmers and merchants of legal commodities are not protected by the state and become instead subjected to VAT, while illegally imported products without paying VAT circulate vividly in the markets?  
Therefore, the legal standing of the Petitioner II as a merchant of food commodities is fulfilled.

12. As has been explained hereinabove, there has been a linkage between the 5 matters, which refer to the Jurisprudence of the Constitutional Court in its Judgment Number 006/PUU-III/2005 and further judgments, which rendered an interpretation against Article 51 section (1) of the Law Number 24 of 2003 related to constitutional rights. Therefore, the Petitioners have fulfilled legal standing to submit a petition for this material review.

## I. TESTSTONE

Whereas the Petitioners in a case as such (*a quo*) possess constitutional rights that have been violated by the enactment of the Elucidation to Article 4A section (2) letter b of the Law regarding VAT, because it contravenes the Constitution of 1945:

- a. The right to self-development through the fulfillment of basic needs, for the sake of quality of

life improvement and the welfare of mankind:

Article 28C section (1) of the Constitution of 1945 states, “*Each person is entitled to self-development through the fulfillment of basic needs, is entitled to obtain education and to gain the benefit of science and technology, art and culture, for the sake of quality of life improvement and for the sake of the welfare of mankind.*”

- b. That right to be free from discriminative treatment and protection against discriminative treatment:

Article 28I section (2) of the Constitution of 1945 states, “*Each person is entitled to be free from discriminative treatment based on whatsoever and is entitled to obtain protection against discriminative treatment as such.*”

## **II. REASONS FOR THE PETITION TO REVIEW THE ELUCIDATION TO ARTICLE 4A SECTION (2) LETTER B OF THE LAW REGARDING VAT THE PEOPLE ARE ENTITLED TO INEXPENSIVE, AFFORDABLE, AND NOTRITIOUS FOOD**

13. According to Abraham Maslow, humans have five levels of needs of life, which humans will always strive to fulfill in their whole life (arranged from the lowest):
- a. The physiological need
  - b. The security and safety need
  - c. The social needs
  - d. The need for appreciation
  - e. The need of self-actualization
- (**Source:** *Psikologi Kepribadian* (Psychology of the Personality), Alwisol, UMM PRESS, Malang, 2014, page 200.)
14. The physiological need is the most basic, which shall be sufficed, namely the need to eat, to drink, place to live, sex, sleep, and oxygen.
15. The Constitution protects that basic need: Article 28C section (1) of the Constitution of 1945, which states, “*Each person is entitled to self-development through the fulfillment of basic needs, is entitled to obtain education and to gain the benefit of science and technology, art and culture, for the sake of quality of life improvement and for the sake of the welfare of mankind.*”
16. That right of basic need is also accommodated in its implementation by the Law regarding VAT: Article 4A section (2) letter b of the Law regarding VAT reads, “*Kinds of the goods not subjected to Value Added Tax are certain goods in the category of the following goods*”:
- a. ...
  - b. *Basic needed commodities, which are indispensable for the people at large.*”
17. But the Elucidation to Article 4A section (2) letter b of the Law regarding VAT interpreted “basic commodities” as “material food,” which are again narrowed into only 11 kinds of food commodities:
- “*Basic needed commodities, which are indispensable for people at large comprise:*
- a. *Rice;*
  - b. *Unhulled Rice;*
  - c. *Corn;*
  - d. *Sagoo;*
  - e. *Soybean;*
  - f. *Salt, either containing or not containing iodine;*
  - g. *Meat, namely fresh meat without processing, but has gone through slaughter process, skinned, cut, cooled, frozen, packed or not packed, salted, limed, acidified, preserved by other means, and/or boiled;*
  - h. *Eggs, namely unprocessed eggs, including cleaned eggs, salted, or packed;*
  - i. *Milk, namely dairy milk either having gone through cooling process as well as heated,*



- not containing added sugar or other materials, and/or packed or not packed;*
- j. Fruits, namely plucked fresh fruits, either having gone through the process of washing. Sorted, shelled, cut, sliced, graded, and/or packed or not packed; and*
- k. Vegetables, namely plucked fresh vegetables, washed, drained, and/or stored at low temperature, including minced fresh vegetables.”*

18. Mean, while the consumption of the basic need of food materials of the Indonesian society, does not only comprise the 11 kinds of material food as mentioned in the Elucidation to Article 4A section (2) letter b of the Law regarding VAT as such (*a quo*).
19. Referring to the Law Number 18 of 2012 regarding Food, Food is defined as all things originating from sources of biological products of agriculture, plantations, forestry, fishery, stock husbandry, waters, and water, those processed as well as unprocessed intended for foodstuff or beverages for human consumption, including additional Food materials, raw material Food, and other materials used in the process of preparing, processing, and/or the making of foodstuff or beverages;

### **THE RIGHT OF FOOD FOR QUALITY OF LIFE IMPROVEMENT**

20. Food commodities other than those stated in the Elucidation to Article 4A section (2) letter b of the Law regarding VAT as such (*a quo*) like: fish, red beans, peanuts, and green beans are food commodities rich in nutrition and contain much protein high quantities., while kitchen flavorings (like onion, candlenut (*pala*), pepper, coriander (*ketumbar*), ginger, galangal (*lengkuas*), etc.) have become peculiarity of the nation’s culinary culture. This turns food commodities into food commodities, which are indispensable for the public in the frame of fulfilling particularly their daily basic needs of food for self-development towards quality of life improvement;
21. Nuts are in the equal category with meat, fish, eggs, milk, *tempe* (soybean cake) and *tahu* (taofu). Still, there are many more other important food materials yet included in the basic commodities not subjected to VAT, like staple food such as cassava, potato, wheat, taro, sweet potato. Indeed, not all the Indonesian population have rice as their staple food. This policy is certainly counterproductive vis-à-vis the Local Non-Rice Food Resilience Program and the Campaign “Let’s Consume fish” planned by the Government;
22. Whereas being foodstuff rich in contents substance energy, protein, and nutrition, it is appropriate if food commodities like fish, including non-rice food materials, beans, and kitchen flavorings be included in the commodities, which cannot be separated from the source of fulfillment of the daily basic needs of the right of food as manifestation of quality of life improvement.
23. The presence of the state to guarantee, to protect availability and accessibility of food commodities rich in sources of energy, nutrition and protein can be manifested by intervention of the State in determining a policy related to those food commodities, not merely in the form of campaign or slogans, but manifested in the form of equitable regulations to make the access of the public to food commodities affordable;

### **THE URGENCY TO PROTECT THE RIGHT OF FOOD BY THE STATE BY EQUITABLE REGULATIONS**

24. It is the obligation of the State to guarantee the fulfillment of the right of each citizen of food and that right cannot be deprived by whatsoever, including by policy made by the State *per se*.  
The Draft Academic Text, of the Amendment to the Law Number 31 of 2004 regarding fishery, *Indonesian Human Rights Committee for Social Justice* 2009, page 17 and;  
Article of *Binadesa* dated 11 January 2016: “*Kewajiban the State dalam Hak atas Pangan,*” (The obligation of the State in the Right of Food), page 1, Anonim, downloaded from [www.binadesa.co/kewajiban-negara-dalam-hak-atas-food](http://www.binadesa.co/kewajiban-negara-dalam-hak-atas-food) on the date 26 February 2016. )
25. The drafting of policy by the state to guarantee availability as well as access of its people to the

- right of food shall certainly be equitable.
26. Unfortunately, the Elucidation to Article 4A section (2) letter b of the Law regarding VAT has made the enactment of Article 4A section (2) letter b of the Law regarding VAT discriminative, the 11 kinds of the basic needs of the people at large are interpreted and limited to food commodities only.
  27. Meanwhile, actually Article 4A section (2) letter b of the Law regarding VAT has accommodated the role and function of the state in the fulfillment of basic needs of the people at large:
    - (2) “*Kinds of the goods not subjected to Value Added Tax are certain goods in the category of the following goods*”:
      - a. ... etc.;
      - b. *Basic needed commodities, which are indispensable for the people at large.*”
  28. However, afterward the Elucidation to Article 4A section (2) letter b of the Law regarding VAT has narrowed that provision, causing food commodities beyond the 11 kinds of commodities to become subject to VAT, so that their prices have become more expensive and compounds the economic access of the public to those commodities. The price of food has become more expensive due to the failed policy of the State by imposing the Value Added Tax on food.
  29. The income level of the Indonesian communities is in the average low, where based on the World Bank data (2014), the percentage of poor residents earning below USD\$ 2.5/day reached 60.4% (around 149 million of the population are still poor);  
By such high poverty rate as well as income distribution, which is yet fully equitable, the access of the public to the basic needs, particularly food, shall win serious attention of the state. The policy derived by the state shall respond to the problem of economic access of the citizens to food. The imposition of VAT on food commodities is certainly only far from the nature as well as values of justice and contravenes the Constitution;
  30. Therefore, it is clear that the Elucidation to Article 4A section (2) letter b of the Law regarding VAT bars the fulfillment of constitutional rights of the people related to the right of quality development of the self, through the fulfillment of basic needs for the sake of quality of life improvement as regulated in Article 28 C section (1) of the Constitution of 1945, as well as the right to be free from discriminative treatment as regulated in Article 28I section (2) of the Constitution of 1945.

#### **DISCRIMINATION AND ACCESS REDUCTION OF THE PEOPLE’S RIGHT OF FOOD**

31. The definition of positive law in Indonesia, particularly Article 1 of the Law Number 39 of 1999 regarding Human Rights states “Discrimination is each limitation, harassment, or isolation, which is directly or indirectly based on discrimination against humans based on religion, tribe, race, ethnic, group, categories, social status, economic status, gender, language, political conviction, leading to the reduction, deviation, or abolition, recognition, execution or utilization of human rights and basic freedom in life individually as well as collectively in the field of politics, economy, law, social, culture, and other aspects of life ”;
32. That definition makes clear that the Elucidation to Article 4A section (2) letter b of the Law regarding VAT as such (*a quo*) is discriminative because it limits only 11 food commodities categorized into the criterion not subjected to VAT leads to difference of access of the public to reach other food commodities, which in daily life are equally indispensable for the people at large.

#### **THE PEOPLE ARE ENTITLED TO BE FREE FROM DISCRIMINATION IN ACCESSING THE RIGHT OF FOOD**

33. In this modern era, food is no longer just to saturate. Fulfillment of good nutrition has been understood as a requirement to develop good quality Indonesians. Geographical difference has given birth to the need and diversity of culture, causing also diversity in the basic needs of food of the Indonesian population. Here lies the important role of the state to guarantee non-discriminative access to the fulfillment of the need of various food commodities to fulfill the public need of food equitably.
34. When the state fails to fulfill that need caused by a policy of the state, which limits access to certain food commodities, then one may say that the state has conducted discrimination.  
(Source: The Draft Academic Text: “*Perubahan Undang-Undang Nomor 31 tahun 2004 tentang Perikanan*” (Amendment to the Law Number 31 year 2004 regarding Fishery), page 17, Written by M. Taufiqul. Mujib, year 2009, Publisher Indonesian. Human Rights Committee for Social Justice, Jakarta, downloaded from. <http://www.ihcs.or.id/download/Fishery/draft%20naskah%20akademik%20uu%20fishery.pdf>.)
35. Whereas only the 11 kinds of food commodities gaining “privilege” not be subjected to VAT, compared to the other food commodities, which are equally basic needs indispensable for the people at large, which if reviewed deeper, such classification has no clear parameter.
36. The nuance of discrimination caused by the enactment of the Elucidation to Article 4A section (2) letter b of the Law regarding VAT as such (*a quo*) has caused limited access of the public to various food commodities, nutritious and of good quality, which obstructs the fulfillment of the right of the public of self-development through the fulfillment of basic needs for the sake of quality of life improvement;
37. The public become obstructed in its access to food commodities other than the 11 kinds of food mentioned in the Elucidation to an article as such (*a quo*). For example:
- a. The fish and beans commodities other than being sources of high protein, even higher if compared to meat or soybean, gain a different treatment because they are subjected to VAT;
  - b. Cassava and sweet potato being the staple food of the Indonesian communities of the Eastern part are subject to VAT and are therefore discriminated vis-à-vis the Indonesian communities of the Western part who can eat rice without VAT.
38. If this discriminative Elucidation to Article 4A section (2) letter b of the Law regarding VAT is not revoked, then discriminative treatment and obstruction to the potential of self-development through the fulfillment of the basic need will continue occurring.

#### **DISCRIMINATION IN THE ELUCIDATION TO THE LAW REGARDING VAT PRODUCES BLACK MARKET**

39. The Elucidation to Article 4A section (2) letter b of the Law regarding VAT, which has a discriminative pattern as has been explained hereinabove opens the slit for smuggling practice leading to price discrimination in the markets.  
(Source: Berita Internet, Kompas Online, “*Harga Picu Penyelundupan*” (Price Triggers Smuggling.” Hen/Mas. <http://print.kompas.com/baca/2016/02/01/Harga-Picu-Smuggling> dated 1 February 2016 accessed dated 26 February 2016.)
40. The inability of the state to conduct supervision and poor law enforcement have become misused by some elements to look for more profit and destroying the existing market mechanism.
41. Whereas due to price difference, the consumer tends to look for prices, which are lower, in “illegal” commodities because of their more attractive prices.
42. From various literature, one can conclude that the definition of price discrimination is “a policy to impose different selling prices for one kind of the same good in different market segments.” Price discrimination occurs if the same product is sold to different consumers with different prices, based on reasons, which has nothing to do with cost.

(Source: *Pedoman Pasal 6 Tentang Diskriminasi Harga* (The Guidance of Article 6 Regarding Price Discrimination). Downloaded from [http://www.kppu.go.id/docs/Pedoman/guideline\\_article\\_6\\_discrimination\\_price.pdf](http://www.kppu.go.id/docs/Pedoman/guideline_article_6_discrimination_price.pdf))

43. Therefore, it is obvious that the right of citizens to self-development through the fulfillment of basic needs to quality of life improvement as protected by Article 28C section (1) of the Constitution of 1945 and the right to be free from discriminative treatment based on whatsoever as regulated in Article 28I section (2) of the Constitution of 1945 has become violated due to the existence of the Elucidation to Article 4A section (2) letter b of the Law regarding VAT as such (*a quo*);

### **THE ELUCIDATION TO THE ARTICLE OF THE LAW REGARDING VAT DEVIATES FROM THE SPIRIT/NATURE OF ITS NORM, so that IT VIOLATES THE NORM OF LAW MAKING**

44. In the drafting of a Law, the need of the public shall be accommodated equitably. A Law should be a response to the need of the public as perceived by the state, and afterward formulated in norms of law to be binding on the public *per se*.
45. The formulation of norms is set out in the articles of the laws and regulations in order to be implemented equitably for the whole public. The principal norm set out becomes concrete articles. Furthermore, certain articles are explained and described by the lawmakers in the Elucidation.
46. In the Attachment to the Law Number 12 of 2011 regarding the Formation of Laws and Regulations it is mentioned, “*the Elucidation functions as official interpretation of the makers of the Laws and Regulations on certain norms in the main body of laws or regulations.*” Therefore, an explanation contains only a description of a word, phrase, sentence, or synonym/foreign terms in a norm, which can be equipped by examples. An Elucidation as means to clarify a norm in the main body of laws or regulations may not cause obscurity, change or conflict of meaning of the mentioned norm.
47. The formulation of an Elucidation to an article shall pay regard to the following matters:
- a. It does not contravene the principal material regulated in the main body of laws or regulations;
  - b. It does not extend, narrow, or add meaning of a norm existing in the main body of laws or regulations;
  - c. It does not conduct repetition of the principal material regulated in the main body of laws or regulations;
  - d. It does not repeat a description of a word, term, phrase, or understanding already contained in a general provision; and/or
  - e. It does not make delegation of a formulation.
- (Source: Attachment I, the Law Number 12 of 2011 regarding the Formation of Laws and Regulations, Number 186)

48. Apparently, the Elucidation to Article 4A section (2) letter b of the Law regarding VAT has narrowed Article 4A section (2) letter b of the Law regarding VAT, which it explains, where the phrase “*basic commodities indispensable for the people at large*” has been narrowed by the interpretation of its Elucidation to become 11 kinds of food materials only, without clear parameter and basis. Take note of the following description:  
Article 4A section (2) letter b of the Law regarding VAT reads:  
“*Kinds of the goods not subjected to Value Added Tax are certain goods in the category of the following goods*”:
- a. ... etc.;
  - b. *Basic needed commodities, which are indispensable for the people at large.*”
- Furthermore, the Elucidation to Article 4A section (2) letter b reads:

*“Basic needed commodities, which are indispensable for the people at large comprise:*

- a. Rice;*
- b. Unhulled Rice;*
- c. Corn;*
- d. Sagoo;*
- e. Soybean;*
- f. Salt, either containing or not containing iodine;*
- g. Meat, namely fresh meat without processing, but has gone through slaughter process, skinned, cut, cooled, frozen, packed or not packed, salted, limed, acidified, preserved by other means, and/or boiled;*
- h. Eggs, namely unprocessed eggs, including cleaned eggs, salted, or packed;*
- i. Milk, namely dairy milk either having gone through cooling process as well as heated, not containing added sugar or other materials, and/or packed or not packed;*
- j. Fruits, namely plucked fresh fruits, either having gone through the process of washing. Sorted, shelled, cut, sliced, graded, and/or packed or not packed; and*
- k. Vegetables, namely plucked fresh vegetables, washed, drained, and/or stored at low temperature, including minced fresh vegetables.”*

49. The Elucidation to Article 4A section (2) letter b of the Law regarding VAT as such (*a quo*) produces a new norm, which is different and narrower than the spirit and substance of Article 4A section (2) letter b of the Law regarding VAT, which explains “*Basic needed commodities indispensable for the people at large*” is defined/interpreted: there are “only” 11 kinds of food commodities, which have been mentioned hereinabove, so that provision has obviously violated the formulation procedure of elucidation in the Attachment to the Law Number 12 of 2011 regarding the Formation of Laws and Regulations.

#### **THE CONSEQUENCE OF THE ELUCIDATION TO THE LAW REGARDING VAT CONTRAVENES ITS NORM SUBSTANCE AND LEADS TO DISCRIMINATION**

50. The act of the makers of the Law regarding VAT put down “only the 11 kinds of food commodities” not subjected to VAT, does not only limits the access of the people at large to their various basic needs, but also leads to discrimination against millions of children of the nation whose principal daily need (of food), which appears to be beyond those 11 kinds of food commodities.
51. The norm caused by the Elucidation to Article 4A section (2) letter b of the Law regarding VAT as such (*a quo*) has reduced the “substance” of the main body of the laws or regulations of the article as such (*a quo*). If read meticulously and complete, Article 4A section (2) letter b of the Law regarding VAT intends to exempt the imposition of VAT to basic commodities indispensable for the people at large. That said, the substance of the main body of the laws or regulations in this case regulates that indispensable goods for the people at large to fulfill their basic needs/their primary needs are not subjected to VAT. Nevertheless, in an Elucidation to an article as such (*a quo*) indeed without clear parameter and indication, basic needs are defined to be limited to the 11 kinds only.
52. The makers of the Law regarding VAT did not consider the interest of most of the Indonesian communities living in coastal areas as the consequence of a maritime and marine State, who consume fish daily as their staple food commodities. The privilege of “free of VAT” is only given to the public being eaters of meat as side dish.
53. The makers of the Law regarding VAT in the Elucidation to Article 4A section (2) letter b of the Law regarding VAT as such (*a quo*) only renders the privilege “free of VAT” to Indonesian communities of the Western part whose staple food is rice, but discriminating the Indonesian communities of the Eastern part whose staple food are sweet potato/cassava and other tubers.
54. Even the worse, this formal defect does indeed widen the conflict of policy made by the state

*per se*. With the intention to improve the quality of human resource by consuming fish being rich in protein, the Government issues the policy of “National Fish Day,” which delivers the Program of “Let’s Consume fish” by virtue of the Presidential Decree Number 3 of 2014 regarding National Fish Day. Nevertheless, contradictorily the Government indeed clogs its program *per se* by imposing VAT on fish commodities and its likes because it is not included in the category of the 11 kinds of commodities not subjected to VAT.

55. Can the objective of the enactment of the program “Let’s Consume Fish,” namely quality improvement of Indonesian human resources be achieved? What happened is the other way around where the public “is compelled” to become poorer because they must buy fish, which price has soared due to the imposition of VAT.
56. As such, the Elucidation to an article as such (*a quo*) does not only contain defect in its formal drafting, but is also loaded with discrimination, which even gives rise to hindrance to state’s program, which is prohibited by the Constitution.
57. Whereas it is proper if the Constitutional Court as guardian of the Constitution reviews that norm and returns the principle of justice without discrimination in the Elucidation to the article as such (*a quo*).

### **THE DEFINITION OF VALUE ADDED AND THE ASTRAY THINKING ON THE IMPOSITION OF VAT ON FOOD COMMODITIES**

58. The principle of Value Added Tax (VAT) is tax arising due to the existence of added value or value to goods.
59. This is in line with VAT, which has the nature of multistage levy, which means that the tax is subjected to each link of production and distribution lane. Consequently, VAT should only be subjected to tax on added value. Consequently, based on the definition of value added, VAT may only be imposed on goods/commodities having undergone change of form from its original form and added value to those goods, so that they become “new goods.”

(Source: *Pajak Pertambahan Nilai* (Value Added Tax). 2015. Untung Sukardji. Jakarta: Publisher Rajawali. page 41)

60. The imposition on change or added value to commodities appears from “the awareness” as well as the drafting conducted by “the law makers” to the Law regarding VAT along with all its amendments. In the Law regarding VAT along with its three amendments there are editorial differences, yet all those refer to the same matter, namely that there is a value added to goods/commodities.
61. There should be the activity of processing to change the form/the original nature, to become new goods, which are different from the original commodities. This appears from the comparison presented in the following table:

No.	Law	Article	Content
1.	The Law Number 8 of 1983 regarding Value Added Tax on Goods and Services	Article 1 point c	Goods Subject to Tax are goods as meant in letter b because of the process of fabrication subject to tax based on this Law.

	and the Sales Tax on Luxury Goods;	Article 1 point m	<p>Producing is an activity of processing to change the form or the nature of the goods from its original form to become new goods or having new efficiency including the making, cooking, assembling, mixing, packing, bottling, and mining or ordering a person or another entity to conduct this activity.</p> <p>Not included in the understanding of producing are:</p> <ol style="list-style-type: none"> <li>1) planting or plucking of agricultural products or raising animals;</li> <li>2) catching or preserving fish;</li> <li>3) drying or salting foodstuff;</li> <li>4) wrapping or packing, which ordinarily occurs in large or retail trading business;</li> <li>5) providing foodstuff and beverages in restaurants, homestays, or done by catering business;</li> </ol>
2.	The Law Number 11 of 1994 regarding the Amendment to the Law Number 8 of 1983 regarding Value Added Tax on Goods and Services and the Sales Tax on Luxury Goods;	Article 1 point m	Producing is an activity of processing to change the form or the nature of the goods from its original form to become new goods or having new efficiency, or the activity of processing natural resources including ordering a private person or another entity to conduct such activity;
3.	The Law Number 18 of 2000 regarding	Article 1 point 16	Producing is an activity of processing to change the form or the nature

	the Second Amendment to the Law Number 8 of 1983 regarding Value Added Tax on Goods and Services and the Sales Tax on Luxury Goods;		of the goods from its original form to become new goods or having new efficiency, or the activity of processing natural resources including ordering a private person or another entity to conduct such activity.
4.	The Law Number 42 of 2009 regarding the Third Amendment to the Law Number 8 of 1983 regarding Value Added Tax on Goods and Services and the Sales Tax on Luxury Goods;	Article 1 point 16	Producing is an activity of processing to change the form of and/or the nature of the goods from its original form to become new goods or having new efficiency or the activity of processing natural resources, including ordering a private person or another entity to conduct such activity.

62. Based on the definition and limitation of the Law as mentioned before, subjecting unprocessed food commodities to VAT is incorrect and are not based on law. Besides, there is non-existence of clear reason and logic, why there is only discrimination on the 11 food commodities not subjected to VAT, food, particularly those obviously planted and plucked and yet to undergo processing, which adds added value on those commodities.

63. A comparative example can be taken, like among:

- a) Rice (commodities included in the 11 food commodities not subjected to VAT) with cassava (commodities not included in the 11 food commodities not subjected to VAT). Where both commodities have similarities namely they equally have not yet obtained added value (absolute requirement for commodities subjected to VAT), they are equally main source of energy and they are equally staple food/food commodities indispensable for the people at large. Nevertheless, there is different treatment between the two. Where rice is not subject to VAT and conversely cassava is indeed subject to VAT.
- b) Soybean (commodities included in the 11 food commodities not subjected to VAT) with peanuts, red beans, and green beans. Where both commodities share similarities namely they equally have not yet obtained added value (absolute requirement for commodities subjected to VAT), they are equally main source of protein and they are equally food commodities indispensable for the people at large. Nevertheless, there is different treatment between the two. Where soybean is not subject to VAT and conversely peanuts, peanuts, red beans, and green beans are indeed subject to VAT.
- c) Spices for kitchen flavoring originating from plants/yields like cloves (*cengkeh*), pepper (*merica*), candlenut (*kemiri*), coriander (*ketumbar*), galangal (*lengkuas*), ginger (*jahe*), which are equally cultural culinary identity of the nation indispensable for the people at large and are obviously products of planting or plucking, so that they are yet to have added value but are placed subject to VAT, compared to salt, which is also yet to have added value, but is not subjected to VAT.



64. The absurdity and heretical thought of the lawmakers may appear from the messy classification of food commodities, which are subject to VAT with those not subjected to VAT. How come that commodities, which are equally yet to obtain added value (absolute requirement to commodities subjected to VAT), equally main source of energy, equally food commodities indispensable for the people at large, obtain different treatment based on something unclear?
65. The philosophical foundation of tax imposition is based on “Benefit Approach.” This benefit approach is based on the philosophy: because state has created benefit, which can be enjoyed by all citizens who live in a state, then the state is authorized to collect tax from the people by means, which can be mandated.

(Source: Buku “*Hukum Pajak: Suatu Sketsa Asas*” (Tax Law: A Principle Sketch), page 31, Written by Suparyono Printing 3, year 2012, Publisher Pustaka Magister Semarang, downloaded from [www.eprints.umk.ac.id/277/10/BUKU\\_HUKUM\\_PAJAK\\_SUATU\\_SKETSA\\_ASAS\\_-INDEKS.pdf](http://www.eprints.umk.ac.id/277/10/BUKU_HUKUM_PAJAK_SUATU_SKETSA_ASAS_-INDEKS.pdf).)

66. However, the objective of tax shall also be linked with the objective of the state as that stated in the Constitution. The objective of tax shall be in line with the achievement of the objective of the state. Tax is a facility to achieve the objective of the state, so that both objectives are inseparable.
66. The constitution explains that one of the objectives of the state of Indonesia is to advance general welfare and enrich the life of the nation. In that frame, the objective of tax is needed as a source of funds to achieving the general welfare and enrich the life of the nation.
67. When tax collection is executed, in this context when the Value Added Tax (VAT) appears to burden the public and bears the potential to obstruct the achievement of general welfare and enriching the life of the nation from the perspective of access to basic needs of decent food, the execution of that VAT collection, which is based on Law shall be reviewed. If it appears that VAT on food indeed obstructs the achievement of the objective of the State, then there is something, which is incorrect in the philosophical understanding, so that the constitutional rights of the public will fall victim.

(Source: *General Comment 12, Right to Adequate Food*, 2003)

#### **DISCRIMINATIVE TREATMENT BY THE STATE IN THE IMPLEMENTATION OF THE ELUCIDATION TO ARTICLE AS SUCH (A *QUO*) THREATENS THE DIVERSITY OF CULTURAL WEALTH OF THE NATION**

68. The culinary and food diversity possessed by the Indonesian people shall be viewed from the perspective, which is more extensive namely that culinary, food as well as flavor culinary is a cultural identity, which shall be protected by the State. We know corn as staple food material of several tribes in East Nusa Tenggara and Madura., then later sago, which is the staple food in Maluku and Papua. Rice to much of the public in Indonesia. Sweet potato and cassava to several tribes in Papua. Such is also with the food pattern of each tribe, which is different, like for example for the public in Sulawesi and Maluku who prefer fish as their main side dish compared to meat. It is different from the public in Papua whose *adat* ritual would use meat as sidedish in their *adat* ritual as well as daily life. But fish is discriminated from the facility not subjected to VAT. Why only meat is not subjected to VAT?
69. The Elucidation to Article 4A section (2) letter b of the Law regarding VAT as such (*a quo*) ignores indeed the food diversity, which is cultural identity and, which shall be protected by the state. The duty of the state as protector becomes marginalized when only the 11 kinds of food commodities are declared not to be subject to VAT as regulated in the Elucidation to an article as such (*a quo*), while the wealth of cultural identity in culinary, which is also related to national culture from Sabang up to Merauke cannot only be simplified into the 11 kinds only;
70. It is proven that the kinds of culinary of each tribe is different and closely related to its culture.

For example: the tribes of the coasts who prefer fish, compared to meat.

As a State, which since long in the past is a producer of spices (which is why Indonesia was targeted by the colonialists), it becomes automatic that Indonesia's culinary is rich in spices. Uniquely various spices have been adopted to become typical characteristic, which is different in each region.

71. Whereas the State should not compel the people of Maluku and Papua to consume rice and compel the people of Sulawesi and Maluku to eat meat, such is also to deprive the Dayak people from their tradition to consume food sourced from forest products., so that if the Elucidation to Article 4A section (2) letter b of the Law regarding VAT as such (*a quo*) with no perspective of protection for the variety of food as cultural identity is not revoked, discriminative treatment will continue occurring, while protection against discriminative treatment due to the enactment of the Elucidation to Article 4A section (2) letter b of the Law regarding VAT cannot be fulfilled.

### **THE IRONY OF A NATION: FOOD COMMODITIES SUBJECTED TO VAT, LUXURY GOODS EXCEMPTED FROM VAT ON LUXURY GOODS**

72. The imposition of the Value Added Tax (VAT) does not render justice to the public at large.
73. Whereas it is very ironic in Indonesia that the State imposes VAT on food commodities being basic need for all the segments of the public., while on the other hand, several luxurious fashion commodities having very tertiary nature and are consumed by the have's circles, the State indeed exempted the imposition of VAT on Luxury Goods (*Pajak Pertambahan Nilai atas Barang Mewah*, PPnBM) thereon.
74. While being in the midst of a difficult economic condition where most of the public being at a weak economy level (World Bank Data 60.4% poor), daily food commodities indispensable for survival are indeed subjected to VAT, which increasingly incriminates the public in the access to those food commodities. Nevertheless, on the other hand, those belonging to the capable economy group indeed enjoy a policy, which "spoils" them in their access to their tertiary/luxurious needs.
75. Whereas in its policy contained in the Regulation of the Minister of Finance Number 106/PMK. 010/2015 promulgated on the date of 9 June 2015, the State instead hurts the sense of justice of the public by exempting VAT on Luxury Goods on several kinds of luxurious goods, but does not move from its policy of imposing VAT on daily food commodities indispensable for the people at large.

### **REDEFINITION OF THE ELUCIDATION TO ARTICLE 4A SECTION (2) OF THE LAW REGARDING VAT: TO SAVE THE RIGHT OF FOOD OF THE PEOPLE AND THE STATE REVENUE**

76. Whereas by the potential of the loss of constitutional rights of the people of healthy and affordable food commodities, the more potential it is for not achieving the objective of the state, namely to advance the general welfare and enriching the life of the nation as has been set out in the Constitution. This confirms the more afterward, that legal certainty of the right as guaranteed by the Constitution is not fulfilled.
77. The effort to impose tax being conducted by the state should not let the public go poor as well as incriminating the public, while on the other hand, the right of the state to obtain income from tax and particularly VAT cannot be ignored as well. Food when still in its original form and has not yet gone through industrial process should appropriately not be subjected to VAT to protect the interest of the people at large. This is because food commodities as such are the most consumed by the public. However, food commodities, which have gone through processing/the industrial

process as well as having their form changed through the process of “producing” is a further processing activity, which are by virtue of its criterion and definition pursuant to the laws are decent to be subjected to VAT;

(Source: Artikel Kompasiana dated 21 June 2014: “*Ketimpangan Distribusi Pendapatan Penduduk dan Produktivitas di Indonesia*” (Imbalance in the Distribution of Population Revenue and Productivity in Indonesia,” page 1, by Prof. Dr. Vincent, D. Sc, CFPIM, CIQA, downloaded from <http://www.kompasiana.com> on the date 3 March 2016.)

79. In order to be able to distinguish those two matters, regard should be had to what is the definition of “producing” as well as the definition of “industry.” Article 1 letter (m) of the Law Number 8 of 1983 regarding Value Added Tax on Goods and Services and the Sales Tax on Luxury Goods states:

*“Producing is an activity of processing to change the form or the nature of the goods from its original form to become new goods or having new efficiency including the making, cooking, assembling, mixing, packing, bottling, and mining or ordering a person or another entity to conduct this activity.”*

Not included in the term of producing are:

- 1) *planting or plucking of agricultural products or raising animals;*
- 2) *catching or preserving fish;*
- 3) *drying or salting foodstuff;*
- 4) *wrapping or packing, which ordinarily occurs in large or retail trading business;*
- 5) *providing foodstuff and beverages in restaurants, homestays, or done by catering business.”*

That definition on the term “producing” has been amended several times in the amendments to the Law regarding VAT, however, it has not undergone significant change either editorial wise or meaning to date.

- Article 1 point m of the Law Number 11 of 1994 regarding the Amendment to the Law Number 8 of 1983 regarding Value Added Tax on Goods and Services and the Sales Tax on Luxury Goods states, *“Producing is an activity of processing to change the form or the nature of the goods from its original form to become new goods or having new efficiency, or the activity of processing natural resources including ordering a private person or another entity to conduct such activity;”*
- Article 1 point 16 the Law Number 18 of 2000 regarding the Second Amendment to the Law Number 8 of 1983 regarding Value Added Tax on Goods and Services and the Sales Tax on Luxury Goods states, *“Producing is an activity of processing to change the form or the nature of the goods from its original form to become new goods or having new efficiency, or the activity of processing natural resources including ordering a private person or another entity to conduct such activity.”*
- Article 1 point 16 the Law Number 42 of 2009 regarding the Third Amendment to the Law Number 8 of 1983 regarding Value Added Tax on Goods and Services and the Sales Tax on Luxury Goods states, *“Producing is an activity of processing to change the form of and/or the nature of the goods from its original form to become new goods or having new efficiency or the activity of processing natural resources, including ordering a private person or another entity to conduct such activity”;*

80. It is apparent that the Law has rendered a clear limitation on what can be categorized as “production activity” through processing as explained hereinabove. Therefore, food commodities included in that category of “not including producing” should not be subject to VAT. Whereas beyond that “exempted” can be subjected to VAT because those goods have entered “the processing/industrial processing to become new goods”;

81. Article 1 section (2) of the Law Number 3 of 2014 regarding Industry renders a definition,

*“Industry is the whole form of economic activity, which processes raw material and/or utilizes industrial sources to the producing of goods having added value or higher benefit including industrial services”;*

82. Whereas the terminology “added value” in the Law regarding Industry and “processing” in the Law regarding VAT uniformly links VAT with added value and processing, which has an industrial nature. This is afterward in line with the opinion of the Petitioners as has been described hereinbefore, namely that the imposition VAT on food commodities should not incriminate the public. Nevertheless, on the other hand, the facility not being subject to VAT should not harm the State either;
83. Whereas therefore, it is bright and clear that the Elucidation to Article 4A section (2) of the Law regarding VAT can firmly be declared contrary to the Constitution of 1945 and has no binding force to the extent it is understood as:” *Basic needed commodities, which are indispensable for the people at large cover:*
- a. *Rice;*
  - b. *Unhulled Rice;*
  - c. *Corn;*
  - d. *Sagoo;*
  - e. *Soybean;*
  - f. *Salt, either containing or not containing iodine;*
  - g. *Meat, namely fresh meat without processing, but has gone through slaughter process, skinned, cut, cooled, frozen, packed or not packed, salted, limed, acidified, preserved by other means, and/or boiled;*
  - h. *Eggs, namely unprocessed eggs, including cleaned eggs, salted, or packed;*
  - i. *Milk, namely dairy milk either having gone through cooling process as well as heated, not containing added sugar or other materials, and/or packed or not packed;*
  - j. *Fruits, namely plucked fresh fruits, either having gone through the process of washing. Sorted, shelled, cut, sliced, graded, and/or packed or not packed; and*
  - k. *Vegetables, namely plucked fresh vegetables, washed, drained, and/or stored at low temperature, including minced fresh vegetables.”*
84. Whereas therefore, it is right if the Petitioners appeal to the Constitutional Court to interpret the Elucidation to Article 4A section (2) of the Law regarding VAT petitioned for its review, to be interpreted to become, *“Basic needed commodities, which are indispensable for the people at large are food commodities originating from the products of agriculture, plantations, forestry, fishery, stock husbandry and water directly taken from its source or processed to the extent of post-harvest activity and are not the yield of processing (industry) as mentioned in the term of “producing” in Article 1 number (16) of this Law, is not subject to VAT”;*
85. The addition of the interpretation as it is mentioned hereinabove enables the execution of that article to open access to food commodities indispensable and highly nutritious for the people at large to be fulfilled in accordance with the mandate of the constitution [Article 28C section (1)];
86. This also turns the Government as Law enforcer needing no longer to struggle to determine certain commodities not to be subjected to VAT, so that no price discrimination will occur in the access of all the Indonesian people to their daily indispensable food commodities;
87. The potential neglect of the Constitutional Rights of the public to obtain protection against discriminative treatment as protected by Article 28I section (2) of the Constitution of 1945 and the right to self-development through the fulfillment of basic needs to quality of life improvement as protected in Article 28C section (1) of the Constitution of 1945 due to the promulgation of the erroneous Elucidation to Article 4A section (2) letter b of the Law

regarding VAT as such (*a quo*), can be overcome by the Constitutional Court as “the guardian of the constitution” and “the sole interpreter of the Constitution” to interpret the content as well as the execution of the Elucidation to Article 4A section (2) letter b of the Law regarding VAT as such (*a quo*) to become: “*Basic needed commodities, which are indispensable for the people at large are food commodities originating from the products of agriculture, plantations, forestry, fishery, stock husbandry and water directly taken from its source or processed to the extent of post-harvest activity and are not the yield of processing (industry) as mentioned in the term of “producing” in Article 1 number (16) of this Law, is not subject to VAT.*”

### **III. PETITUM**

Based on the whole description hereinabove and the attached evidences, it is clear that in this petition for material review it is substantiated that the Elucidation to Article 4A section (2) letter b of the Law Number 8 of 1983 regarding Value Added Tax Goods And Services And Sales Tax on Luxury Goods (State Gazette of 1983 Number 51, Supplement to the State Gazette Number 3264) as has been amended three times, the last time by the Law Number 42 of 2009 regarding the Third Amendment to the Law Number 8 of 1983 regarding Value Added Tax on Goods and Services and the Sales Tax on Luxury Goods (State Gazette of 2009 Number 150, Supplement to the State Gazette Number 5069) has harmed the Constitutional Rights of the Petitioners, which are protected, respected, promoted, and guaranteed by the Constitution of 1945. Therefore, it is expected that the granting of this petition may return the Constitutional Rights of the Petitioners in accordance with the mandate of the Constitution;

As such, the Petitioners pleaded to the Honorable Tribunal of the Constitutional Court deigning to grant a judgment as follows.

#### **PRIMARY**

1. To accept and to grant the petition of the Petitioners entirely;
2. To declare the Elucidation to Article 4A section (2) letter b of the Law Number 8 of 1983 regarding Value Added Tax on Goods and Services and the Sales Tax on Luxury Goods (State Gazette of 1983 Number 51, Supplement to the State Gazette Number 3264) as has been amended three times, the last time by the Law Number 42 of 2009 regarding the Third Amendment to the Law Number 8 of 1983 regarding Value Added Tax on Goods and Services and the Sales Tax on Luxury Goods (State Gazette of 2009 Number 150, Supplement to the State Gazette Number 5069) contravenes the Constitution of 1945 and has no binding force to the extent not to be interpreted as “*Basic needed commodities, which are indispensable for the people at large, namely food commodities originating from the products of agriculture, plantations, forestry, fishery, stock husbandry and water directly taken from its source or processed to the extent of post-harvest activity and are not the yield of processing (industry) as mentioned in the term of “producing” in Article 1 number (16) of this Law, is not subject to VAT*”;
3. To order the placement of this judgment in the Official Gazette of the Republic of Indonesia as it should be.

#### **SUBSIDIARY**

If Court opines otherwise, pleading a judgment *ex aequo et bono*.

[2. 2] Considering that to substantiate their postulates, the Petitioners have proposed letters/writings as instruments of evidence having been marked as evidence P-1 up to evidence P-29 as follows:

1. Evidence P-1: Photocopy of the Constitution of the Republic of Indonesia of 1945;
2. Evidence P-2a: Photocopy of the Law Number 8 of 1983 regarding Value Added Tax on Goods and Services and the Sales Tax on Luxury Goods;
3. Evidence P-2b: Photocopy of the Law Number 11 of 1994 regarding the Amendment to the Law Number 8 of 1983 regarding Value Added Tax on Goods and Services and Sales Tax on Luxury Goods;

4. Evidence P- 2c: Photocopy of the Law Number 18 of 2000 regarding the Second Amendment to the Law Number 8 of 1983 regarding Value Added Tax on Goods and Services and Sales Tax on Luxury Goods;
5. Evidence P-2d: Photocopy of the Law Number 42 of 2009 regarding the Third Amendment to the Law Number 8 of 1983 regarding Value Added Tax on Goods and Services and Sales Tax on Luxury Goods;
6. Evidence P-3: Photocopy citation from the book “*Hak Uji Material di Indonesia*” (The Right of Material Review in Indonesia), Written by Sri Soemantri M, Edition: 2, 1<sup>st</sup> Print, 2007, Publisher Alumni, Bandung;
7. Evidence P-4a: Photocopy of the Law Number 24 of 2003 regarding the Constitutional Court;
8. Evidence P-4b: Photocopy of the Law Number 8 of 2011 regarding the Amendment to the Law Number 24 of 2003 regarding the Constitutional Court;
9. Evidence P-4c: Photocopy of the Government Regulation in Lieu of Law Number 1 of 2013 regarding the Second Amendment to the Law Number 24 of 2003 regarding the Constitutional Court;
10. Evidence P-4d: Photocopy of the Law Number 4 of 2014 regarding Enactment of the Government Regulation in Lieu of Law Number 1 of 2013 regarding the Second Amendment to the Law Number 24 of 2003 regarding the Constitutional Court turned into Law;
11. Evidence P-5: Photocopy of the Law Number 48 of 2009 regarding Judicial Powers;
12. Evidence P-6: Photocopy of the Law Number 12 of 2011 regarding the Formation of Laws and Regulations;
13. Evidence P-7a: Photocopy of Resident Identity Card of the Petitioner I on behalf of DOLLY HUTARI P, S. E;
14. Evidence P-7b: Photocopy of Family Card of the Petitioner I on behalf of DOLLY HUTARI P, S. E;
15. Evidence P-8a: Photocopy of Resident Identity Card of the Petitioner II on behalf of SUTEJO;
16. Evidence P-8b: Photocopy of Receipt of Payment dated 8 January 2014 on behalf of SUTEJO to lease a kiosk at the Pasar Bambu Kuning (Yellow Bamboo Market) No. 30 RT 007 RW 03 for the period of January 2014 up to January 2016 in the amount of IDR 36,000,000.- (thirty-six million rupiah);
17. Evidence P-9: Photocopy of Invoice Number 011/INV/I/LD/2014 dated 7 January 2014 from PT LIKA DAYATAMA to SUTEJO for the purchase of rice not subjected to VAT;
18. Evidence P-10a: Photocopy of Invoice Number 059/INV/V/LD/2015 dated 18 June 2015 from PT LIKA DAYATAMA to SUTEJO to purchase green beans, which are subject to VAT;
19. Evidence P-10b: Photocopy of Invoice Number 063/INV/V/LD/2015 dated 29 June 2015 from PT LIKA DAYATAMA to SUTEJO to purchase cowpea green (*kacang tunggak hijau*), which are subject to VAT;
20. Evidence P-10c: Photocopy of Invoice Number 079/INV/V/LD/2015 dated 9 July 2015 from PT LIKA DAYATAMA to SUTEJO to purchase peanuts, green beans, and cowpea (*kacang tunggak*), which are subject to VAT;
21. Evidence P-10d: Photocopy of Invoice Number 079/INV/V/LD/2015 dated 9 July 2015 from PT LIKA DAYATAMA to SUTEJO for the purchase of peanuts, which are subject to VAT;
22. Evidence P-10e: Photocopy of Sales Invoice Number F. 15. 10-0427 dated 26 October 2016 from PT. SOURCE ROSO AGROMAKMUR to SUTEJO for the purchase of Indian peanuts subjected to VAT;
23. Evidence P-11: Photocopy of a Judgment of the Constitutional Court Number 006/PUU-III/2015 dated 19 May 2005;
24. Evidence P-12: Photocopy of citation from the theory of Abraham Maslow in his book “*Psychology of the Personality*,” Written by Alwisol, Revised Edition, 12<sup>th</sup> Printing, 2014, Publisher UMM PRESS, Malang;

25. Evidence P-13: Photocopy of the Law Number 18 of 2012 regarding Food;
26. Evidence P-14: Photocopy of citation from the theory of Stiglitz, Sen and Fitousi in the Journal “*Analisis Etos Kerja Pemulung dalam Meningkatkan Kualitas Hidup di Kecamatan Tikung Lamongan*” (Analysis of the Work Ethos of Scavengers in Increasing the Quality of Life in the Sub-regency (*Kecamatan*) of Tikung Lamongan,” the Journal *Jebis*, Volume 1, No. 2, Edition July - December 2015, by Henny Mahmudah, Publisher Universitas Brawijaya, Malang, downloaded from [www.e-journal.unair.ac.id](http://www.e-journal.unair.ac.id);
27. Evidence P-15: Photocopy of the Draft Academic Text “*Perubahan Undang-Undang Nomor 31 Tahun 2004 tentang Perikanan*” (Amendment to the Law Number 31 of 2004 regarding fishery), by M. Taufiqul Mujib, of 2009, Publisher: *Indonesian Human Rights Committee for Social Justice*, Jakarta, downloaded from <http://www.ihcs.or.id/download/Fishery/draft%20naskah%20akademik%20uu%20fishery.pdf>;
28. Evidence P-16a: Photocopy of Article Binadesa dated 11 January 2016, “*Kewajiban Negara dalam Hak atas Pangan*” (The Obligation of the State in the Right of Food),” downloaded from [www.binadesa.co/kewajiban-state-dalam-hak-atas-food-pada-tanggal-26-februari-2016](http://www.binadesa.co/kewajiban-state-dalam-hak-atas-food-pada-tanggal-26-februari-2016);
29. Evidence P-17: Photocopy of the Law Number 39 of 1999 regarding Human Rights;
30. Evidence P-18: Power Point re socialization from the International Labor Organization, “*Diskriminasi dan Kesetaraan: Konsep dan Prinsip*” (Discrimination and Equality: Concept and Principle,” by the International Labor Organization, year 2015, downloaded from <http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-jakarta/documents/presentation/wcms203601.pdf>;
31. Evidence P-19: Paper “*Diskriminasi Terhadap Minoritas Masih Merupakan Masalah Aktual di Indonesia Sehingga Perlu Ditanggulangi Segera*” (Discrimination Against Minorities Still an Actual Problem in Indonesia that Needs Immediate Handling), by Prof. Dr. James Danandjaja MA, of 2003, Publisher Universitas Indonesia, Depok, downloaded from [http://www.lfip.org/english/pdf/bali\\_seminar/Diskriminasi%20terhadap%20minoritas%20-%20james%20danandjaja.pdf](http://www.lfip.org/english/pdf/bali_seminar/Diskriminasi%20terhadap%20minoritas%20-%20james%20danandjaja.pdf);
32. Evidence P-20: Berita Kompas Online dated 1 February 2016: “*Harga Picu Penyelundupan*” (Price Triggers Smuggling), by Hen/Mas, downloaded from [print.kompas.com/baca/2016/02/01/Harga-PicuPenyelundupan](http://print.kompas.com/baca/2016/02/01/Harga-PicuPenyelundupan) dated 26 February 2016;
33. Evidence P-21: “*Pedoman Pasal 6 tentang Diskriminasi Harga*” (Guideline to Article 6 regarding Price Discrimination). Downloaded from [http://www.kppu.go.id/docs/Pedoman/guideline\\_Article\\_6\\_discrimination\\_price.pdf](http://www.kppu.go.id/docs/Pedoman/guideline_Article_6_discrimination_price.pdf) dated 25 May 2016;
34. Evidence P-22: Attachment II to the Law Number 12 of 2011 regarding the Formation of Laws and Regulations;
35. Evidence P-23: Presidential Decree Number 3 of 2014 regarding National Fish Day;
36. Evidence P-24: Photocopy of book citation “*Pajak Pertambahan Nilai*” (Value Added Tax), page 41, by Untung Sukardji, revised edition 2015, 11<sup>th</sup> Print, 2015, Publisher: Rajawali, Jakarta, as quoted from the book: “*Value Added Tax, International Practice and Problem*,” by Alan A. Tait;
37. Evidence P-25: Photocopy citation from the book “*Hukum Pajak: Suatu Sketsa Asas*” (Tax Law: A Principle Sketch), page 31, by Suparyono, 3<sup>rd</sup> Print, 2012, Publisher: Pustaka Magister, Semarang, downloaded from [www.eprints.umk.ac.id/277/10/BUKU\\_HUKUM\\_PAJAK\\_SUATU\\_SKETSA\\_ASAS\\_INDEKS.pdf](http://www.eprints.umk.ac.id/277/10/BUKU_HUKUM_PAJAK_SUATU_SKETSA_ASAS_INDEKS.pdf);
38. Evidence P-26: Berita *Republika Online* dated 11 September 2011: “*CNN: Rendang Masakan Terlezat di Dunia, Tambo Cie Dah*” (CNN: Rendang Most Delicious Cuisine in the World Tambo Cie Dah), by Didi Purwadi, downloaded from <http://www.republika.co.id/berita/gayahidup/culinary/11/09/11/lrc4yu-cnn-rendang-cookingan-terlezat-di-dunia-tambo-cie-dah>, dated 25 February 2016;

39. Evidence P-27: Citation re Learning Module: “*Kajian Folklor*” (Folklore Review), by Drs. Sumaryadi, M. Pd. dan Dra. Rumi Wiharsih M. Pd., 2009 Publisher: Universitas Negeri Yogyakarta, Yogyakarta, page 30;
40. Evidence P-28: Photocopy of the Regulation of the Minister of Finance Number 106/PMK. 010/2015, dated 8 June 2015 regarding Types of Goods Subject to Tax Categorized as Luxury other than Motor Vehicles being subject to Sales Tax on Luxury Goods;
41. Evidence P-29: Artikel Kompasiana dated 21 June 2014: “*Ketimpangan Distribusi Pendapatan Penduduk dan Produktivitas di Indonesia*” (Imbalance in the Distribution of Population Revenue and Productivity in Indonesia), page 1, by Prof. Dr. Vincent, D. Sc, CFPIM, CIQA, downloaded from <http://www.kompasiana.com> on the date 3 March 2016;

Moreover, to substantiate their postulate, the Petitioners have proposed 3 (three) experts namely **Prof. Hardinsyah, M. Sc. PhD; Yustinus Prastowo, S. E., M. Hum., MA; and Sony Maulana Sikumbang, S. H., M. H.**, who rendered their testimony under oath in the trial dated 18 July 2016 and have also conveyed the testimony in writing in that trial, while in the trial dated 25 July 2016 they submitted 3 (three) witnesses, namely **Libertina Layk, Linda Barus, and Sumarni** who rendered their testimony under oath in that trial. The verbal testimony and/or the testimony in writing of the experts and witnesses of the Petitioners are as follow:

## **EXPERTS’ TESTIMONY OF THE PETITIONERS**

### **1. Prof. Hardinsyah, M. Sc. PhD**

After having read the text of the application submitted by the Petitioners, I shall render my opinion regarding four matters. **Firstly**, regarding food as basic need and the factors affecting it, **Secondly**, regarding the nutritional needs and food of the Indonesian population and the importance to live healthy, intelligent, and productive. **Thirdly**, regarding the pattern of the food consumption of the Indonesian population various from the West to the East. **Fourthly**, regarding the influence of the price increase of food commodities to food consumption and nutrition of the population in its relation to tax added value (VAT) of food commodities, which increases food price;

### **Food as Basic Need**

Food is all that originate from sources of biological products of agriculture, plantations, forestry, fishery, stock husbandry, waters, and water, those processed as well as unprocessed intended for foodstuff or beverages for human consumption, including additional food materials, raw food material, and other materials used in the process of preparing, processing, and/or the making of foodstuff or beverages (the Law Number 18/2012);

It is noticed that food is the main basic need of humans, and its fulfillment is part of the human rights as guaranteed by the Constitution of the Republic of Indonesia of 1945 and in the Declaration of Human Rights by the United Nations. Food has been declared as the most basic need of humans because nutrition substances being consumed from food is needed all the time by any human, which cannot be replaced by other stuffs. The fulfillment of this need is manifested in the form of the main meals and drinks three times a day;

Without food, the human body will not gain nutritious substances. Without nutritious substances, the human body cannot move, cannot think, cannot work, cannot even breath. Let alone without nutrition, a pregnant mother lacking nutrition will only deliver a physically defect baby along with motoric and mental disturbances, bearing the risk to suffer various diseases, so that a weak generation would be born, sickly and unproductive. Reversely healthy, intelligent, and productive or quality humans or generations would be borne by good nutrition. That’s why important nutrition during the first 1000 days of life, which the UN has made a global nutrition movement named the Scale Up Nutrition Movement (SUN Movement);

In relation to the regulations for the fulfillment of the need of food of the population, the presence of the State or the government is needed to achieve the fulfillment of the need of good quality



food for each citizen sustainably. The Law Number 18/2012 regarding Food mandates that state has the obligation to manifest the availability, affordability, and the fulfillment of sufficient, safe, excellent, and nutritiously balanced food consumption, at the national level as well as in the regions evenly down to the individuals in the whole territory of the Unitary State of the Republic of Indonesia all the time by utilizing resources, institutions, and culture.

### The Need of Nutrition and Food of the Indonesian Population

The Honorable Tribunal of the Constitutional Justices. Dozens of nutritious substances are needed to live healthy. Each nutritious substance has a unique function and cannot be complementary. The Regulation of the Minister of Health (“Permenkes”) Number 75/2013 regarding the Number of Sufficient Nutrition recommended for Indonesians, declares some 33 nutritious substances needed or to be fulfilled by each person to live healthy. Those nutritious substances comprise energy, protein, fat, carbohydrate, fiber, water, the 14 kinds of vitamins and the 13 kinds of minerals. The fulfillment of all those needed nutritious substances is conducted by humans by means of consuming food (foodstuff and beverages) and in certain conditions also from nutritious supplements if needed;

The fulfillment of all those needed nutritious substances for everyone cannot be achieved from only one kind or one group of food only; because each group of food has certain excellence and shortcoming of nutritious substance. For instance, the food group of cereals is superior in contents of energy and fiber but has low contents of vitamin antioxidants; the food group of side dishes is superior in contents of protein but it has no fiber; the food group of fruits is superior in contents of vitamin but has low contents of protein. That’s why the nutrition experts and the government in each country compose a nutrition guideline, which in Indonesia is named Balanced Nutrition Guideline (*Pedoman Gizi Seimbang*). In Indonesia, the Balanced Nutrition Guideline is stipulated by the Regulation of the Minister of Health (*Peraturan Menteri Kesehatan, Permenkes*) Number 41/2014, which recommends the need of food for the Indonesian population according to age and gender group, the so-called *Tumpeng Gizi Seimbang* (Balanced Nutritious Rice Cone) as a simple visualization of the daily need of food, *Piring Makanku* (My Meal Plate) as a simple visualization of the need of food of each meal time, 10 main messages to live healthy, and various messages as well as nutrition tips to live healthy for each age group;

The Balanced Nutritious Rice Cone (*Tumpeng Gizi Seimbang*, Diagram 1) recommends the importance to eat various foods, not only various among groups of food (staple food, side dishes, vegetables, fruit, flavoring) but also the importance of variety in a group food, for instance staple food should not only be rice, animal sidedish should not only be meat. In the Balanced Nutrition Guideline (Permenkes Number 41/2014) a standard portion of the need of food consumption for various age and gender group is presented. In this matter food is grouped into eight groups of food namely: staple food (rice or its substitute), vegetables, fruit, sidedish vegetable (*tempe* (soybean cake)/*tahu* (taofu) or its substitute), animal sidedish (meat/fish or its substitute), milk, oil, and fat. One of the Example is presented in Table 1.

**Table 1. The need of food for teenager’s male and female 13-15 years (Regulation of the Minister of Health (Permenkes) 41/2014)**

Number	Group of food	Portion of food for the need of male teenagers 13-15 years	Portion of food for the need female teenagers 13-15 years
1	Staple food, rice, or substitute	6. 5 Portion	4. 5 Portion
2	Vegetable	3. 0 Portion	3. 0 Portion
3	Fruit	4. 0 Portion	4. 0 Portion
4	<i>Tempe/tahu</i> or	3. 0 Portion	3. 0 Portion

	substitute		
5	Meat/fish or substitute	3.0 Portion	3.0 Portion
6	Milk	1.0 Portion	1.0 Portion
7	Oil	6.0 Portion	5.0 Portion
8	Sugar	2.0 Portion	2.0 Portion

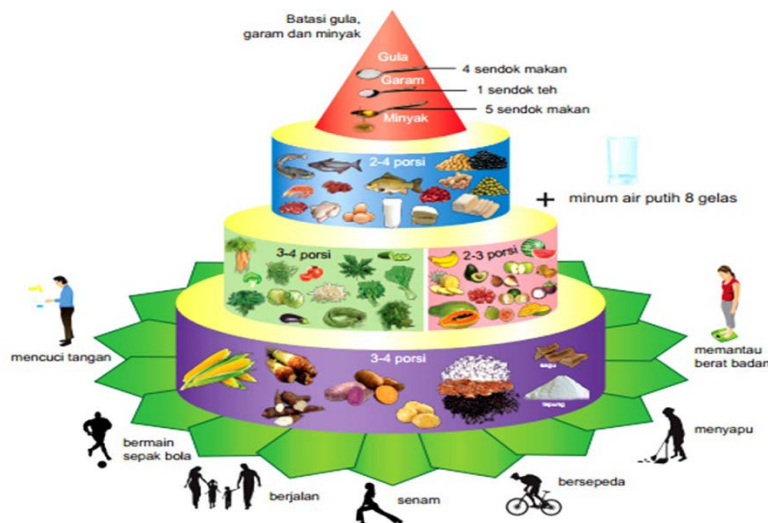


Diagram 1. *Tumpeng Gizi Seimbang* (Balanced Nutritious Rice Cone): Recommendation for the Daily Need of Food

### Pattern of Food Consumption of the Indonesian Population

Indonesia is known as an archipelagic country from Sabang to Merauke, inhabited by around 240 million population from hundreds of ethnics, and is rich of biological diversity including diversity in the kinds of food growing and consumed by the people. Generally, the pattern of the food consumption of the population was developed quite long ago, influenced by the ecological factor (physical environment, social and culture as well as the availability of food), the economic factor is particularly the purchasing power (food price and earning) and the knowledge factor and preferences;

As a matter of principle, the kinds of food being consumed by the population in a region or territory is the food available in that region, available either from local production activity as well from food provided from other regions because the food might be liked and is affordable. Data in Table 2 is condensed from the Study Report on the Total Diet, the Ministry of Health (*Laporan Studi Diet Total Kemenkes*, 2014) indicating the level of consumption (average  $\pm$ SD) and participation in the food consumption (percentage of subject consuming food) in Indonesia (the grouping of food into three columns is for convenience only);

This data of the Ministry of Health in Table 2 has inspired me to question: “What is the reason of the government to choose 11 food commodities (rice, unhulled rice (*gabah*), corn, sago, soybean, salt, meat, eggs, milk, fruit, vegetables), which is **not subject to VAT** like it is mentioned in Article 4A section (2) point b of the Law regarding VAT No42/2009?” (basic commodities, which are indispensable for the people at large). If based on percentage of the population who consume lots of those foods, why is sago (which is only consumed by 1.8% population) but is included in the 11 foods not subjected to VAT. Reversely cassava and fish being consumed a lot by the population at 25.5% and 19.6% respectively are not included in the kinds of food not subjected to VAT?

**Table 2. Consumption and Percentage of Subjects Consuming Certain Food in Indonesia**

Cereals, beet and sago	Nuts, sidedish and milk	Vegetable, fruit, and flavoring
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Type of Food	g/day (%)	Type of Food	g/day (%)	Type of Food	g/day (%)
1. Rice	197.1±112.4 (97.7)	1. Soybean	52.7±87.5 (47.7)	1. Leaf vegetable	56.8±68.0 (79.1)
2. Wheat	9.4±21.7 (30.2)	2. Peanuts	2.4±10.5 (11.2)	2. Banana	16.2±53.9 (15.1)
3. Corn	4.1±24.2 (9.1)	3. Sea fish	42.6±98.3 (25.5)	3. Orange	3.1±21.3 (6.0)
4. Cassava	10.9±48.3 (19.6)	4. Freshwater fish	23.4±91.7 (11.0)	4. Other fruits	6.5±36.4 (6.9)
5. Potato	6.3±33.1 (10.2)	5. Beef	4.8±22.3 (4.6)	5. Oil SK	19.7±16.7 (92.6)
6. Sweet potato, sweet potato,	7.7±88.8 (2.5)	6. Chicken meat	29.0±74.2 (21.5)	6. Salt	3.5±3.8 (96.3)
7. Sagoo	1.3±19.3 (1.8)	7. Eggs	18.2±34.4 (35.5)	7. Sugar	13.6±19.5 (66.6)
8. Other beets	1.0±17.6 (0.8)	8. Fluid milk	3.6±32.7 (2.6)	8. Wet flavorings	14.3±16.9 (84.3)

**Source: Abridged from the Study Report on the Total Diet, the Ministry of Health (2014)**

Based on the data of the Study Report on the Total Diet, the Ministry of Health (2014) it can also be substantiated that all age groups, starting from child, teenagers up to adults consume tubers (cassava, sweet potato, potato, and other beets) and wheat along with processed products. From the perspective of the pattern of the consumption of sidedish, the Indonesian population also consume fish and various beans and not only soybean. Flavorings in the food pattern of the Indonesian population is not only salt but also dry flavorings (pepper, coriander etc.) and wet flavorings like chili, saffron (*kunyit*), ginger etc. Palm oil and coconut oil are also present in the pattern of the food consumption of the Indonesian population;

Data from the National Social Economy Survey (Susenas) collected and reported by the Central Bureau of Statistics (*Badan Pusat Statistik*, BPS) like is presented in Attachment 1, indicates also the same, namely that the pattern of food consumption of the Indonesian population does not only consists of those 11 food commodities but includes also cassava, sweet potato, fish, chili, cooking oil (palm oil and coconut oil) and sugar (granulated sugar and brown sugar). In Attachment 2 is presented a comparison on the pattern of expenditure for food of the population of the Province of Papua versus the Province of Southeast Sulawesi. In the villages of Papua, the value of food expenditure for tubers is greater compared to rice., while in Southeast Sulawesi, the value food expenditure of the population for fish comes near to the value of food expenditure to rice. That said, tubers are important commodities in the pattern of the consumption of the population of the villages of Papua and fish in Southeast Sulawesi;

The pattern food consumption of the Indonesian population does not consist only of the 11 food commodities (rice/unhulled rice, corn, sagoo, soybean, salt, meat, eggs, milk, fruits, and vegetables), but also tubers, wheat, beans other than soybean, fish, oil as well as various flavoring to arouse the appetite.

**The Effect of Price Increase of Food to Food Consumption and Nutrition**

A discussion of the influence of Value Added Tax (VAT) of food commodities of food consumption and nutrition in the Indonesian communities needs to be based on three matters. **Firstly**, that the imposition of Value Added Tax (VAT) to certain food commodities would increase food price because the producers would incorporate the VAT cost as cost component of food production subjected to the consumers. In other words, the imposition of VAT on food commodities increases food price to be borne by the consumers or the consuming public. **Secondly**, that in accordance with price theory and food demand, that each price increase of food commodities would correspond with the decrease of demand and those food consumption commodities or named as negative correlation. **Thirdly**, that the

size of the influence of price increase of food commodities to the decrease of food consumption can be explained based on the study results regarding price elasticity value vis-à-vis food demand. The elasticity of food price indicates the percentage of change of food consumption due to the change of one percent of food price with the assumption of the other factor of *ceteris paribus*. The greater the number of the elasticity of food price, the worst is its effect on the decrease of food consumption. The value elasticity of food price against its demand has always a negative indication or reverse relationship between food price and demand for food consumption;

In the following Table 2 I shall present a review of various price elasticity value of food commodity in Indonesia. Price elasticity value of rice -0.88, which means an increase of 10% price of rice, will decrease 8.8% of rice consumption; this means also to decrease 8.8% consumption of nutrition substance of rice. Generally, an increase of 10% price of corn to decrease 13.6% consumption of corn; an increase of 10% price of cassava to decrease 11.3% consumption of cassava; an increase of 10% price of sweet potato decrease 7.4% consumption of sweet potato; an increase of 10% price of wheat to decrease 10.7% consumption of wheat; an increase of 10% price of soybean to decrease 9.8% consumption of soybean; an increase of 10% price of meat to decrease 5.4% consumption of meat; an increase of 10% price of fish to decrease 10.4% consumption of fish; an increase 10% price of milk to decrease 18.1% consumption of milk, and so forth;

The value elasticity of food commodities price according to the settlement ecology of the population (cities, villages, the East Indonesia regions (*Kawasan Indonesia Timur*, KTI) indicates that an increase of 10% of commodity price of corn, cassava, sweet potato beans and fish has a worse effect for the population in the region of villages and in the East Indonesia regions. The value elasticity of food commodities price analyzed based on the economy group of the population (grassroots/poor, middle class and upper class/rich) substantiates that an increase of 10% of commodity price of corn, cassava, sweet potato, and fish has a worse effect on the population group of lower economy and middle class compared to the upper or rich economy group (Table 1);

Considering the fact hereinabove, the imposition of 10% VAT against food commodities (like corn, cassava, sweet potato, beans, and fish) has a bad effect on the decrease of those foods consumption and the decrease of the consumption of nutritious substances from those foods, which are generally a source of energy (energy substance) and protein, particularly for the population of the lower and middle economy groups, the population of the villages and the East Indonesia regions. Those energy and protein substances are important to be fulfilled for all Indonesians to become a healthy generation, intelligent and productive;

That increase of local food commodities prices will decrease the purchasing power of the lower and middle economy groups of those commodities. Let alone with the current level of poverty in Indonesia, which is still relative high. Based on the criterion of the Central Bureau of Statistics (BPS, which is around USD\$0.75/day) it is 11.2 % being deemed underestimated, while according World Bank is 60.4% (the criterion of USD\$2.5/day).

The increase of those local food commodities prices accompanied by the decrease of its consumption will hamper policy and program implementation to increase the diversification of food consumption as mandated by Article 60 of the Law Number 18/2012 regarding Food, namely: “Government and the Regional Governments have the obligation to manifest the diversification of food consumption to fulfill the nutritional needs of the public and to support healthy, active and productive life”;

The Gini index as equalization indicators of (economic) welfare as reported by the Central Bureau of Statistics (*Badan Pusat Statistik*, BPS) indicates that the welfare level of the Indonesian population has become lop-sided during the last eight years (2005-2013) and lop-sided between the West Indonesian regions (*Kawasan Barat Indonesia*, KBI) and the East Indonesia regions. The BPS Report regarding poverty and the Report of the Ministry of Health regarding the nutrition status, indicates that the percentage of poor and malnourished residents is higher in the village regions and in the East Indonesia regions. This means that the imposition of VAT on food products used to be consumed by the village population, poor residents and population in the East Indonesia regions will also increase the lop-sidedness of access to food, the lop-sidedness of the problem of poverty and malnutrition as well as the

quality of urban versus rural Indonesians, the upper economy group versus the lower economy group, the East Indonesia regions versus the West Indonesia regions, which on its turn will hamper the achievement of the objective of living as a nation and a state like mandated by the preamble of the Constitution of 1945;

**Table 2. Review of the Elasticity of Food Price vis-à-vis Food Demand in Indonesia**

<b>Food commodity</b>	<b>Value of elasticity</b>	<b>Level</b>	<b>Source</b>
Rice	-0.88 -0.56	National East Indonesia Regions	Mauludyani VA (2008) Saliem HPS (2002)
Corn	-1.36 -1.12 -0.53 -1.48 -1.93 -0.75 -0.28 -1.55	National National Urban Rural Low economy (poor) Middle economy Upper economy (rich) East Indonesia Regions	Mauludyani VA (2008) Mauludyani VA et al. (2013)       Saliem HPS (2002)
Cassava	-1.13 -0.09 -1.48 -1.54 -1.06 -0.05	National Urban Rural Low economy (poor) Middle economy Upper economy (rich)	Mauludyani VA et al. (2013)
Sweet Potato	-0.74 -0.46 -0.86 -0.61 -0.90 -0.59	National Urban Rural Low economy (poor) Middle economy Upper economy (rich)	Mauludyani VA et al. (2013)
Beets	-1.27	East Indonesia Regions	Saliem HPS (2002)
Soybean	-0.975 -1.03	National National	Nur YH et al. (2012) Mauludyani VA (2008)
Nuts	-1.167	East Indonesia Regions	Saliem HPS (2002)
Meat	-0.54 -1.430 -1.36	National National East Indonesia Regions	Mauludyani VA (2008) Nur YH et al. (2012) Saliem HPS (2002)
Fish	-1.04 -0.44 -1.26 -1.59 -0.66 -0.26 -0.95	National Urban Rural Low economy (poor) Middle economy Upper economy (rich) East Indonesia Regions	Mauludyani VA et al. (2013)      Saliem HPS (2002)
Milk	-1.81 -2.11 -1.69 -2.02 -0.94 -0.82 -1.462	National Urban Rural Low economy (poor) Middle economy Upper economy (rich) East Indonesia Regions	Mauludyani VA et al. (2013)      Saliem HPS (2002)

Vegetables	-0.87	East Indonesia Regions	Saliem HPS (2002)
Fruits	-0.72	East Indonesia Regions	Saliem HPS (2002)
Sugar	-0.65	East Indonesia Regions	Saliem HPS (2002)
Cooking oil	-0.69	National	Mauludyani VA (2008)
	-1.03	East Indonesia Regions	Saliem HPS (2002)
Other foods	-0.99	East Indonesia Regions	Saliem HPS (2002)

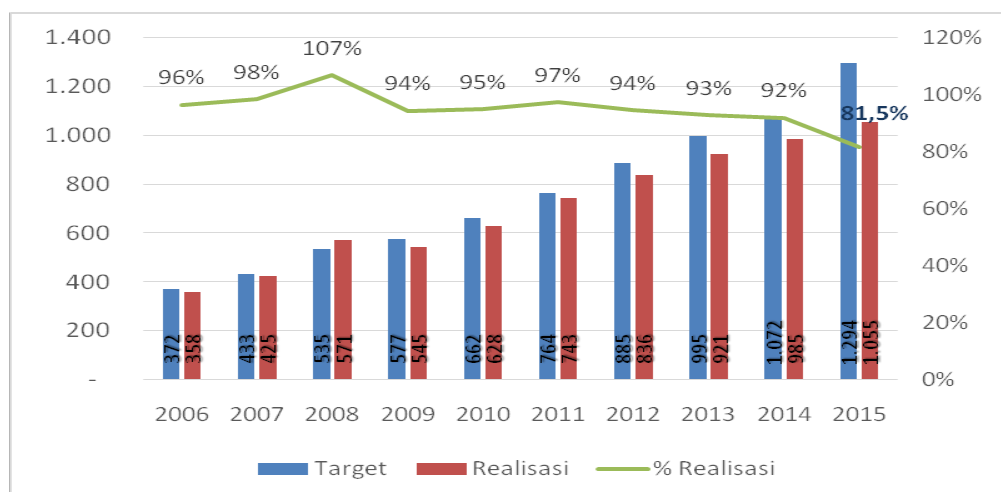
Therefore, the enactment of Value Added Tax (VAT) to other than the mentioned 11 food commodities in the elucidation to the Law regarding VAT Number 8/1983 in conjunction with the Law regarding VAT Number 42/2009 (the Fourth Amendment) can be deemed to marginalize or to waive a part of the fulfillment of the need of food of poor residents, the village population and of the East Indonesia regions. It is even deemed to be unjust and discriminative vis-à-vis the fulfillment of the need of food and nutrition of the village population and of the population in the East Indonesia regions, who used to consume food other than those 11 commodities like cassava, sweet potato, beans, and fish. The solution towards an increase of State revenue from tax can be directed to the increase of effectiveness and accountability of the tax revenue system, the implementation of progressive tax and VAT on non-food commodities for those who can pay;

## 2. Yustinus Prastowo, S. E., M. HUM. ,MA

### INTRODUCTION

The sustainability of the development depends very much on the financing capacity, particularly tax revenue, which reflects the independency of the State. Tax plays an important role in the financing of the development because almost 75% of the State revenue stems from taxation. Meanwhile, in the last ten years Indonesia's tax revenue performance has yet to fulfill expectation. Save in the year 2008, the Directorate General of Tax (DJP) fails to achieve the revenue target as stipulated. Even in the year 2015 the Government increased the tax revenue target more than 25%, to achieve IDR 1.294 trillion – an increase, which distorted the economy because it extremely surpasses the natural growth and condition of the economy, which was being under crises. Finally, with all the efforts made by the Directorate General of Tax, the achievement of the tax revenue realization in the year 2015 was only Rp1.060 trillion or 81.5% from the target;

**Target and realization of tax revenue, 2006-2015**



Source: NK APBN-P, Press Release, the Ministry of Finance, processed.

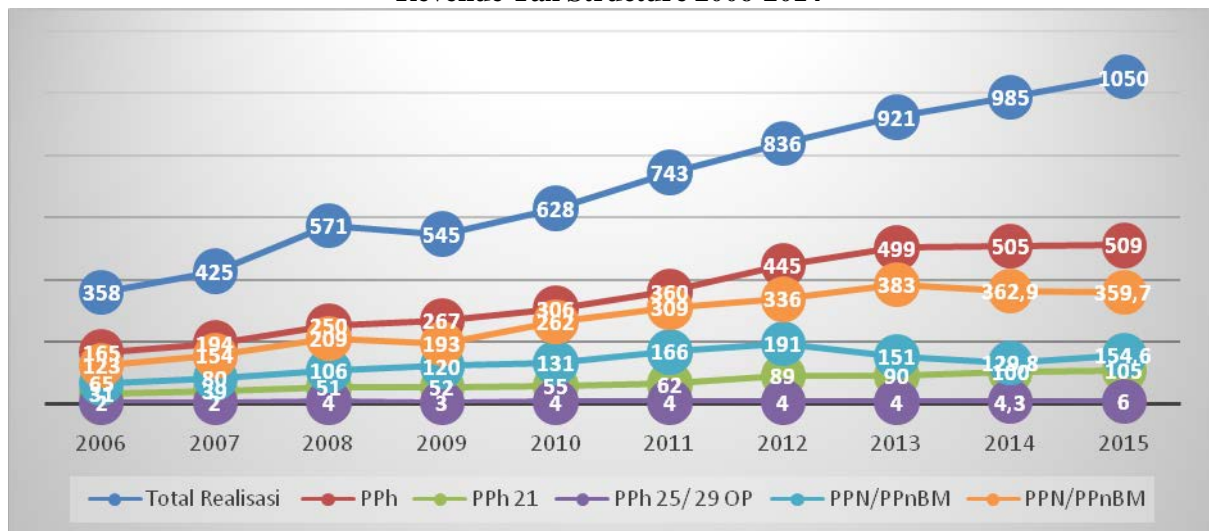
Indonesia's revenue performance is still lagging behind if compared to the other developing countries. Perceived from the size of the tax ratio, Indonesia is still lagging behind in numbers of 12-13%. This achievement is still below neighboring countries like the Philippines (14%), Malaysia (16%),

Thailand (17%), or the average countries of middle-low revenue (17%). Meanwhile, in that timeframe, the economic performance noted satisfying economic growth at 6,2% in year 2012, 5,8% (2013), and 5% (2014). In other words, the economic growth still cannot run side by side with tax revenue. There are still lots of tax potential, which can be dugout. Nevertheless, the Government has various limitations.

### Structure of Unjust Tax Revenue

On the other hand, as instrument of fiscal policy, tax has also a vital role in the redistribution of earning. Unfortunately, various indicators indeed have placed Indonesia as a problematic country with the lop-sidedness of its economy. The period 2004-2014 was marked with the increase of Gini coefficient indicating the widening gap from 0.32 to become 0.41. Research of the World Bank of 2015 indicates that 1% of the richest people in Indonesia control more than one half of the wealth of the whole country, and 10% of the richest people in Indonesia control 77% wealth the whole country. The high rate of the lop-sidedness of in Indonesia may be caused by the tax system being still incapable to carry out the function of redistribution well. Redistribution of income runs well if tax revenue is supported by tax, which has a progressive nature, which reflects the principle of those having the “ability to pay” that taxpayers who are more capable will pay bigger tax. A taxation system, which reflects justice can be seen from the size of the proportion of direct tax like the Income Tax (*Pajak Penghasilan*, PPh), which if compared to indirect tax like the VAT and excise tax imposed on without considering the economic condition of its subject. Generally, Indonesia still has the proportion of a rather dominant indirect tax. The following is a structure data of the State revenue contained in Diagram 1. 2.

**Diagram 1. 2**  
**Revenue Tax Structure 2006-2014**



Source: Financial Note (NK) APBN

Based on the graphic hereinabove in the year 2015, the proportion of per type of tax is the Income Tax in the amount of IDR509 trillion and VAT in the amount of IDR359.7 trillion. On the other hand, the revenue from Personal Income Tax, which should be the most progressive is indeed supported by the revenue from the Income Tax 21. That said, the revenue from Personal Income Tax relies on tax from salary of the employees (withholding system), while the entrepreneurs render a very low contribution indeed. In 2015, the Income Tax 21 withheld from the salary of employees has reached IDR109 trillion, defeated only by the Corporate Income Tax of IDR129.8 trillion, and far above the Personal Income Tax of nonemployees of only IDR6 trillion. The group of nonemployee private persons is a hard-to-tax sector because of the weak tax administration, the booming of backing practice, and practice of aggressive tax evasion.

The data hereinabove obviously indicates that the condition of Indonesia’s taxation is still far from substantial justice. The group of the rich who should pay bigger tax in accordance with the principle of the “ability to pay” indeed has become a group of the littlest tax payer. If this is left as it is, not only

would the lop-sidedness become wider, but it would also fail to bring about social justice and welfare for all the people. This condition is very contradictory with the rich countries, in the OECD, where the tax revenue of personal employees comprise even only 1% from the total revenue.

### **The Value Added Tax is Tax on Consumption**

One of the largest revenue source is the Value Added Tax (VAT). The VAT is a tax to include the consumption of goods or services, which are VAT objects. A part of the public may understand and distinguish, when spending their money whether they shall also pay VAT or not. However, for a part of the public who are lay people and understand tax poorly, there are those still unaware that on the price of the goods, which they pay, includes also VAT. Perhaps there are also a part of the public, particularly housewives, who will be dismayed if they knew that when they purchase fresh fish from the supermarket, the money they spent does not only pay the price of fish but also the VAT. If they ask, why “should we pay tax, while my husband when receiving salary, which is already in accordance with the Regional Minimum Wage (*Upah Minimum Regional*, UMR) from the office, it paid not only withholding tax,” then the easy response is that fresh fish bought is indeed subject to VAT.

VAT is a tax on the consumption of goods and services in the Customs Area and is subjected level wise in each production and distribution lane (multi stage tax). As an objective tax, the emergence of VAT obligation is very much determined by the tax object. The subjective condition of the tax subject is irrelevant in matters regarding the imposition of VAT, so that each tax subject, whatsoever its condition and economic capacity, it will shoulder the same tax burden in matters of the fulfillment of VAT obligation. In this context, the VAT is frequently said to have a regressive nature. Moreover, the imposition of VAT is strongly influenced by the development of business transactions as well as the pattern of consumption of the public being objects of VAT.

This writing explains basic matters regarding tax, the objective of the imposition of tax, principles of tax law, the philosophy of the imposition of tax and VAT, the mechanism of the imposition of VAT, as well as justice and legal certainty in the imposition of tax. The discussion regarding the philosophy of the imposition of VAT as well as justice and legal certainty in the imposition of tax in its relation to the regulation of basic commodities not subjected to VAT, as regulated in Article 4 section (2) letter b of the Law regarding VAT and its elucidation.

### **THE UNDERSTANDING OF TAX AND THE OBJECTIVE OF ITS IMPOSITION**

The objective of the imposition of tax can be understood from the understanding and function of tax *per se*. Generally, the understanding of tax is mandatory dues or levies paid by the people to the government based on laws and regulations, the outcome of, which is utilized to finance general expenditure of the government, the compensation of, which is not directly perceived by the people. Below are some understandings of tax, which we used to read:

- In accordance with Article 1 number 1 of the Law Number 6 of 1983 regarding General Provisions and Procedure on Taxation (*Undang-Undang Ketentuan Umum dan Tata Cara Perpajakan*, UU KUP, the KUP Law) as lastly amended by the Law Number 16 of 2009, Tax is a mandatory contribution to the state indebted by a private person or corporation, which has a compelling nature based on Law, which earns no direct compensation and is utilized for the purposes of the state for the optimal welfare of the people.
- According to P. J. A. Adriani, tax is dues of the public to the state (which can be mandated) indebted by those obliged to pay it according to general regulations (Law) with no directly identifiable reward and, which use is to finance general expenditure of the state to perform government. According to Prof. Dr. Rachmat Soemitro, S. H., tax are dues of the people to the state treasury based on Law with no direct reward service, which can be identified and is utilized to pay general expenditure.

From the above tax understanding, we may know that tax has the following elements:

- Tax is collected based on Law. This is in accordance with Article 23A of the Constitution of 1945 (the Third Amendment), which states “*tax and other levies, which have a compelling nature for the need of*



*the State regulated in the laws.”*

- There is no reciprocal services (*kontraprestasi*), which can be demonstrated directly.
- Tax collection is intended for the need of general funding of the government in the frame of carrying out the function of government, the routine ones as well as development.
- Tax collection can be mandated, which means that violation against taxation rules will lead to sanctions.

From the above tax understanding, we know that tax has a budgetary function, namely to fill the State Treasury/the State budget to finance the performing of government. Moreover, tax has also a regulating function, namely as an instrument to regulate or to execute the policy of the State in the field of economy, social, and politics.

## **PRINCIPLES OF TAX LAW**

Law principles are the heart of the problem for taxation academicians, which frequently becomes a point of heated debate. A principle is also understood as unwritten source of law accepted by the judge as basic consideration in the making of judgment or as a benchmark (*patok-banding*) for the legislators to conduct reform of law. Generally, we also accept the famous “canon of taxation” from Adam Smith, that the principle of equitable tax collection shall pay regard to the principle of justice (equity), legal certainty, the principle of convenience of payment, and efficiency.

According to Frans Vainstendael – a tax law expert from the University of Leuven - tax law has essentially a strict and mechanistic nature because tax is payable in a clear amount of money. Whereas a principle has a more flexible and soft nature, it does not directly point to one certain response against a question of law and does not point to some certain tax obligations. He stated that there are several principles and general concepts rarely found in written or positive law. Nevertheless, they are generally found as doctrines, jurisprudence, and the tradition of law, which are generally utilized in the general interpretation of law. Those principles are good faith (*bona fides*), fairness, *accessorium sequitur principle*, *ne bis in idem*, *in dubio pro reo*, principle of effectiveness, principle of proportionality, principle of neutrality, and the ability to pay principle.

Below are the most important principles in the field of taxation:

1. The principle legal certainty (*Lex certa*).

This principle is one of the fundamental principles in law requiring that law shall be clear, easily accessible, comprehensive, prospective, and stable. Legal certainty assumes the balance between stability and flexibility, and contains substantive as well as formal elements to avoid unnecessary arbitration. Legal certainty does not merely comprise the good formulation of law but also harmonizes and coordinates taxation, tax law enforcement, including dispute settlement.

2. The principle of proportionality

In the field of taxation, this principle is utilized in several matters. Firstly, the justification of state competence in stipulating tax burden and scope of competence because each tax burden is followed by limitation to the right of private ownership. Secondly, this principle guides the way of the state to allocate tax burden to citizens in proportion with the principle of equality and capability to pay –, so that it shall distributed proportionally.

3. The principle of Good Faith

The good faith principle in terms of tax evasion is indicated by three criteria:

- The legal form chosen by the taxpayer is inappropriate or unusual, and, in all cases, completely inappropriate to the economic facts;
- The taxpayer’s primary motive for his choice is to achieve substantial tax savings; and
- The taxpayer will in fact achieve a substantial reduction in tax if the legal form chosen is accepted by the tax administration.

4. The principle of Fairness

In the field of taxation, fairness has become a dominant issue in the recent times. International tax evasion committed by Google, Amazon, and Starbucks and several superrich people like Gerard

Depardieu and Queen Fabiola perturbed the public to ask, whether they have paid tax fairly? John Hart named it “mutual restrictions” because it binds both parties. John Rawls has sharpened the argument of Hart by confirming that it is mutually beneficial through a scheme of advantageous social cooperation. George Klosko – who departed from the thought of Hart and Rawls – has formulated this principle of fairness in the practice of taxation, that fairness means that the taxpayers who access resources of the public and enjoy the service of the government may not conduct tax evasion causing them to become free riders. This principle of fairness has strongly confirmed the obligation of equitable taxation for each taxpayer and provides a base for the effort to ward off international tax evasion.

5. The principle “*in dubio pro reo*” or “*in dubio contra fiscum*”

These principles are confirmation of the other principles that in matters where there is uncertainty or doubt, then the postulate used shall be one that advantages the taxpayers or in another word should not give rise to the obligation to pay tax. This is justified because basically the tax authorities have been given the authority to formulate rules and to conduct law enforcement.

## TAX INCENTIVE

The focus of the main reform of Indonesia’s tax system is still with the revenue-based approach. This is reflected in the taxation system and practice, which focuses more on the achievement of the tax revenue target in the State Budget of Revenues and Expenditures (*Anggaran Pendapatan dan Belanja Negara*, APBN) and pay less regard to the function of tax as a policy instrument (regulating) or nowadays frequently named the function of “socio-political engineering.” Although the government has rendered lots of tax incentive, in practice this incentive is less significant in encouraging an increase of social welfare because of a still unclear policy model. Included in the regulating function is among others the redistribution of income and attention on the side of expenditure in the form of welfare program (*social expenditure*). That said, taxation policy – in the form of deduction or exemption - is directed to become incentive and disincentive to assure the welfare program. In other words, the revenue-approach is no longer adequate, because it is frequently deemed to be neglectful against the problem of justice (equity) and equality.

According to Vito Tanzi (2011), generally the system of taxation knows Exemptions (the exemption of several kinds of income or object being subject to tax), Deductions (reduction as allowance or cost against earning), Tax Credits (tax credit as a deduction to tax obligation), Rate Relief (reduction or the decrease of tax tariffs), and Tax Deferrals (postponement or suspension tax payment). For the context of Indonesia, the Law regarding VAT knows several facilities granted:

1. The exemption of the goods and services, which are subject to VAT, as regulated in Article 4A of the Law regarding VAT.
2. The deduction or the decrease of the VAT tariffs, for example to export, which are subject to 0% VAT, as regulated in Article 7 of the Law regarding VAT.
3. Acquittal of VAT or non-collection of VAT for activities in certain areas or places, submission of certain Goods Subject to Tax (*Barang Subject to Tax*, BKP) or certain Services Subject to Tax (*Jasa Subject to Tax*, JKP), certain imported Goods Subject to Tax or Services Subject to Tax certain, as regulated in Article 16B of the Law regarding VAT.

The Law regarding VAT has actually facilitated an incentive for tax payers, including for Small Entrepreneurs. Nevertheless, its formulation and implementation are often inconsistent and not in line with the vision of taxation policy. In several matters, derivative regulations have indeed narrowed the space for incentive because the revenue paradigm is too dominant. This is reflected in several VAT policies in the last several years, which prioritize revenue and economic growth rather than social-political function, among others:

- a. The special regulation in Article 4A of the Law Number 18 of 2000, that goods produced from mining or produced from drilling taken directly from its source, or the Regulation of the Minister of Finance Number 206/PMK. 010/2015, which increases the lower limit of luxurious residences, which are subject to VAT on Luxury Goods (*Pajak Pertambahan Nilai atas Barang Mewah*, PPnBM) 20%, from the minimum width of 350 M2 to have a selling price of IDR20 billion (for

luxury houses), and the minimum width of 150 m<sup>2</sup> to have a selling price of IDR 10 billion (for apartments and those of the same kind).

- b. The Regulation of the Minister of Finance Number 106/PMK. 010/2015, which exempts furniture, electronic goods, and luxury bags from the imposition of Sales Tax on Luxury Goods (PPnBM).

For comparison, a literature study has been conducted, which analyses various VAT treatment on basic commodities in several countries in the world. Basic needed commodities (particularly food) are generally classified into 3 (three) groups, namely basic non-processed food, basic processed food, and non-basic food. Basic needed commodities, which have not been processed have been given an incentive in the form of 0% tariff (zero rate) tariff in countries like Uganda, Mexico, the United Kingdom and South Africa, or those goods having been given the exemption facility in countries like India and Morocco. Moreover, several neighboring countries (ASEAN) have also exempted goods of needed food from imposition of VAT, like Thailand, Malaysia, and Vietnam. Below is a Table related to VAT on basic commodities in other countries, in the form of exemption facility as well as 0% tariff.

Table 3  
VAT Treatment on Basic Commodities in other Countries

No	Country	Description of Basic Commodities	VAT Facility
1	Thailand	Sales and import of agricultural products not yet processed and related goods like fertilizer, animal feed, pesticide, etc.	Acquitted
2	Malaysia	Fruits and vegetables and various kinds of beans	Acquitted
3	Vietnam	Products of cultivation, stock husbandry and fishery or fishers not yet processed to become other products or those having only semi processed by business	Acquitted
4	India	Basic needed commodities	Acquitted
5	Morocco	All staple food materials like cereals, bread, milk, fish, meat, fruits and vegetables and agricultural products	Acquitted
6	Ghana	Imported basic commodities	Acquitted
7	United Kingdom	Basic needed commodities other than sugar and other foodstuffs	Zero rating
8	Uganda	Basic needed commodities, grains, fertilizer	Zero rating
9	Mexico	Basic needed commodities other than yoghurt and fruit juice, drink water, unprocessed food material	Zero rating
10	South Africa	Basic needed commodities limited to 19 goods, namely brown bread/high fiber wheat bread, dry corn, corn flour, corn rice, wheat flour, eggs, fruit, vegetables, bean/dry grains, lentil bean, corn, rice, tin sardines, vegetable oil, cooking oil, milk, cultured milk, powdered milk, and mixed powdered milk, beans, and plants bean, namely peas, beans, and peanuts	Zero rating

Source: Taxation and Gender Equity, 2009

The granting of the VAT facility on basic commodities is not only intended for public welfare. Moreover, this policy will become one of the instruments of the government to prepare Indonesia's food sector in dealing with the European Economic Community (EEC). Regard may be had that food industry based on agriculture, fishery, stock husbandry, and plantations is a potential sector, which shall be strengthened as mainstay in the future. Therefore, this sector needs to be given tax incentive in order to support efficiency and effectiveness in that link of business sector. This relief of tax burden will render space for the domestic food producers to increase the quality and innovation in local food products to be competitive in the global market.

#### THE CHARACTERISTICS OF VAT

Based on Law, the VAT has the following nature and characteristics: (1) it is an objective of tax, (2)

it is a tax on domestic general consumption, and (3) an indirect tax.

### **Objective Tax**

Objective tax is a kind of tax, which by the time of its emergence of tax obligation is determined by objective factors, named as *Tatbestand* (German: fact). The term refers to a condition, event, or legal act, which can be subjected to tax, which is also named a tax object. The VAT as an objective of tax may be understood as an obligation of the consumers to pay tax, which may be in the form of a private person or corporation, and are not related to the level of a certain income. Whosoever consumes goods or services, which are included as VAT object, will be treated equal and is obliged to pay VAT for the consumption of those goods or services regardless of the subjective capability or condition.

The tax subject in the sense of an objective tax is the consumer who is namely the party who bears the tax burden. In an objective tax, the subjective condition of the consumer is not considered in order to determine the legal event of the debtor or his/her obligation to pay tax. Whosoever the consumers, to the extent that legal event is a tax object, then that consumer is obliged to pay the same tax.

This is different from the subjective tax, like The Income Tax (*Pajak Penghasilan*, PPh), where the subjective condition of the party who bears the tax burden becomes a material consideration in determining the tax of the debtor. For example, the tariff for the Private Personal Income Tax (*Pajak Penghasilan bagi Orang Pribadi*, PPn OP) is different from the Income Tax for Corporations. Such is also with the Income Not Subjected to Tax (*Penghasilan Tidak Kena Pajak*, PTKP) of married Private Personals (*Orang Pribadi*, OP) and having a dependent child is different from the single Private Personals.

As an objective tax, the VAT gives rise to regressive effect, whereby the higher capability of the consumer, the lower the tax burden to be shouldered, while the lower the capability of the consumers, the heavier the tax burden to be shouldered.

### **The VAT as Tax on General Domestic Consumption**

Beside as an objective tax, the VAT in Indonesia is included in the category of tax on consumption. Viewed from the taxation law, tax on the consumption is a tax arising due to a legal event, which is the burden of the consumer, juridically as well as economically. In other words, subjected to tax are consumed goods or services, goods not being in the production process, and is addressed to final consumers. As long as those goods are still in the cycle of production or distribution, the imposition of VAT in that area has a temporary nature, which can be subjected to the next purchaser, through the mechanism of the crediting of Input Tax. The Elucidation to the Law regarding VAT has confirmed that the VAT is a tax on the consumption of goods and services in the customs areas, which is imposed level wise on each production and distribution lane. The true bearer of the tax burden are the final consumers, whereby goods and/or services are really consumed/used.

### **The VAT as an Indirect Tax**

Furthermore, other than as an objective tax and tax on consumption, the VAT is also an Indirect Tax. As an Indirect Tax, the consumers shoulder the burden of its tax payment. Nevertheless, the person in charge for the payment of the VAT to the State Treasury includes the seller. In other words, in the mechanism of the VAT collection, the bearer of the VAT burden of payment and the person in charge for the payment of the VAT to the State Treasury are different parties. The tax invoice issued by the seller, is utilized as evidence of levies on the VAT of the debtor, when selling Goods Subject to Tax (*Barang Kena Pajak*, BKP) or Services Subject to Tax (*Jasa Kena Pajak*, JKP) to a purchaser or a receiver of the Goods Subject to Tax (BKP) or Services Subject to Tax (JKP). Furthermore, the seller is obliged to deposit each VAT collected in each Tax Period to the State Treasury. The obligation of the purchaser is to pay the VAT of the debtor as stated in tax invoice to the seller. The tax invoice is an evidence of tax payment for the purchaser.

This is different from the mechanism of Direct Tax collection like the Income Tax (*Pajak Penghasilan*, PPh), where a private person or corporation as the bearer of the burden of tax payment also bears the responsibility of its deposit to the State Treasury.

Moreover, the VAT has also the characteristic as a tax imposed level wise in each production and distribution lane (*multi stage tax*) with a method of VAT calculation, which will be deposited with the State Treasury by means of deducting the VAT on acquisition, by the VAT on the delivery of the goods or

services (indirect subtraction method), so that it has a non-cumulative nature.

This characteristic is illustrated in **Attachment 1**. Whereas **Attachment 2** illustrates a comparison between the nature of the tax imposition, which is cumulative and non-cumulative;

Moreover, a VAT characteristic, which is also important is that it is neutral. The VAT does not want to influence the competition in the business realm, so that all goods or services should not be exempted from the imposition of VAT. Nevertheless, once again, one of the functions of tax is the function of regulating, so that it makes regulations possible, which among others is to guarantee the sense of justice of the public and to increase the competitiveness of a product.

## **THE VAT SUBJECTS, VAT OBJECTS AND THE CRITERION OF IMPOSITION OF VAT SUBJECT**

The reference to understand the subject is the Law Number 7 of 1983 regarding Income Tax as has been amended the latest by the Law Number 36 of 2008 (Law on Income Tax (*Undang-Undang Pajak Penghasilan*, UU PPh)). Article 2 of the Law on Income Tax regulates the Tax Subject of Income Tax (*Pajak Penghasilan*, PPh), namely Private Persons, Inheritance yet to be divided, corporation and Permanent Establishment (*Bentuk Usaha Tetap*, BUT). This is the Tax Subject, which will become subjected to the Income Tax and to become the bearer of the tax burden of the Income Tax. We may understand from the regulation that the tax subject as regulated in the Law on Income Tax is basically the party who bears the tax burden;

Such is also with VAT, whereby the tax subject or the party who will bear the tax VAT burden is the consumer. As a tax subject, the consumer is obliged to pay tax regardless of his/her subjective capability and condition.

### **The VAT Object**

As it is explained, the condition, event, or legal act, which can be subjected to tax is named the tax object. A condition, event, or legal act, which is subject to VAT has been regulated in the Law regarding VAT, namely:

- a. Delivery of the Goods Subject to Tax (*Barang Kena Pajak*, BKP) in the Customs Area being conducted by an Entrepreneur;
- b. Imported Goods Subject to Tax (BKP);
- c. Delivery of Services Subject to Tax (*Jasa Kena Pajak*, JKP) in the Customs Area being conducted by an Entrepreneur;
- d. The utilization of Intangible Goods Subject to Tax (BKP) from out of the Customs Area into the Customs Area;
- e. The utilization of Services Subject to Tax (JKP) from out of the Customs Area into the Customs Area;
- f. Exported Tangible Goods Subject to Tax (BKP) by an Entrepreneur Subject to Tax (*Pengusaha Kena Pajak*, PKP);
- g. Exported Intangible Goods Subject to Tax (BKP) by an Entrepreneur Subject to Tax (PKP); and
- h. Exported Services Subject to Tax (JKP) by an Entrepreneur Subject to Tax (PKP).

### **Criterion for the Imposition of VAT**

Actually, the criterion for the imposition of VAT is reflected in the article regulating the VAT Object. Nevertheless, to confirm a requirement for the imposition of VAT on Goods or Services, the following cumulative requirements shall be fulfilled:

1. Delivered Goods (tangible as well as intangible) are Goods Subject to Tax (BKP); or
2. Delivered Services are Services Subject to Tax (JKP);
3. Delivery is conducted in the Customs Area;
4. Delivery is conducted in the frame of its business activity or work.

Goods are tangible goods, which according to its nature or law may be in the form of movables or immovables, and intangible goods. Service is each service activity, which is based on a commitment or legal act, which causes a good, facility, convenience or a right made available for use, including services being conducted to produce goods due to purchase order or demand with materials and on directions from the buyer. Basically, all kinds of goods and/or services are VAT object save if determined otherwise based on Law. Goods or Services, which are subject to tax based on the Law regarding VAT are named Goods

Subject to Tax (BKP) or Services Subject to Tax (JKP);

The Customs Area is a territory of the Republic of Indonesia, which comprise land territory, waters, and the airspace there above, as well as certain places in Exclusive Economic Zone and continental shelf on, which the Law regulating customs is applicable.

An Entrepreneur is a private person or corporation in whatever form whose business activity or work produces goods, imports goods, exports goods, who conducts trading business, utilizes intangible goods from out of the Customs Area, who conducts service business including export of services, or utilizes services from out of the Customs Area;

Each Taxpayer as an Entrepreneur who is subject to tax based on the Law regarding VAT, is obliged to report his/her business to the office of the Directorate General of Tax whose work area comprises the place to live or the domicile of an Entrepreneur, and places where business activity is conducted to be confirmed to become an Entrepreneur Subject to Tax (PKP);

An Entrepreneur Subject to Tax (PKP) is an entrepreneur who conducts delivery of the Goods Subject to Tax and/or delivery of Services Subject to Tax, which are subject to tax based on this Law. An Entrepreneur Subject to Tax is obliged to collect, to deposit, and to report the VAT and Sales Tax on Luxury Goods (PPnBM) of the debtor;

Small entrepreneurs whose definition is determined by the Minister of Finance are exempted from the obligation to report their business activity to be confirmed as an Entrepreneur Subject to Tax (PKP). Nevertheless, small entrepreneurs may choose to be confirmed as PKP. If small entrepreneurs choose to be confirmed as PKP, then they are obliged to perform their obligation as PKP.

As such, basically the imposition of VAT is conducted if the tax object, namely the delivery of the goods and/or services being Goods Subject to Tax (*Barang Subject to Tax*, BKP) or Services Subject to Tax (JKP) delivery is conducted in the Customs Area, and is conducted in the frame of business activity or work. If one of those elements or criterion for the imposition of VAT is not fulfilled, then basically that delivery is not subject to VAT.

As regulated in Article 4A of the Law regarding VAT, if goods or services are determined as goods or services not subjected to VAT, then those goods or services are not Goods Subject to Tax (BKP) or Services Subject to Tax (JKP), so that on its delivery, although they are conducted in the Customs Area and is conducted by a PKP, they are not subject to VAT.

Such is also with the party who delivers Goods Subject to Tax (BKP) or Services Subject to Tax (JKP). If it is a small entrepreneur who chooses not to be confirmed as PKP who delivers Goods Subject to Tax (BKP) or Services Subject to Tax (JKP), then such entrepreneur who delivers Goods Subject to Tax (BKP) or Services Subject to Tax (JKP) is not obliged to collect VAT, so that a purchaser or a receiver of services who purchases Goods Subject to Tax (BKP) or who receives Services Subject to Tax (JKP) will not be subject to VAT. Nevertheless, bear in mind that a PKP or a non-PKP (small entrepreneurs) being the party who delivers Goods Subject to Tax (BKP) or Services Subject to Tax (JKP) in a link of production and distribution lane is not the real bearer of burden of the VAT. The real bearer of VAT burden remains the consumers. Although small entrepreneurs who deliver Goods Subject to Tax (BKP) or Services Subject to Tax (JKP) do not collect VAT at the time of conducting the delivery of the Goods Subject to Tax (BKP) or Services Subject to Tax (JKP), but if those small entrepreneurs are in the distribution lane and they purchase from the producers/suppliers/distributors having the status of a PKP, then the VAT paid by those small entrepreneurs will be calculated as selling price elements of the Goods Subject to Tax (BKP) or price substitution for Services Subject to Tax (JKP), which will be delivered to the purchasers or the consumers;

The tax burden to be borne by the consumers if the purchase is conducted from small entrepreneurs can be seen from the scheme as is illustrated in **Attachment 3**.

## **THE VALUE-ADDED PRINCIPLE**

VAT is to include each link of production and distribution lane of the Goods Subject to Tax (BKP) or Services Subject to Tax (JKP) – as a multi stage levy. Although the VAT is repeatedly subjected to each mutation of Goods Subject to Tax (BKP) or Services Subject to Tax (JKP), the VAT does not rise the

imposition of double taxation. The simple thought of a part of the lay public is, that the VAT, which is paid by an Entrepreneur Subject to Tax is added value of the Goods Subject to Tax (BKP) or Services Subject to Tax (JKP), which are delivered, which in the Law regarding VAT occurs as a consequence of **production activity**, namely *the activity of processing to change the form of and/or the nature of the goods from its original form to become new goods or having new efficiency or the activity of processing natural resources, including ordering a private person or another entity to conduct such activity*. Or, with another simple thought, the Entrepreneur Subject to Tax (PKP) will not pay or deposit the VAT if there is no added value on the Goods Subject to Tax (BKP) or Services Subject to Tax (JKP) having been delivered (price of the Goods Subject to Tax (BKP) or Services Subject to Tax (JKP) having been sold or delivered equals the purchase or acquisition price of the Goods Subject to Tax (BKP) or Services Subject to Tax (JKP)).

That simple thought is not fully erroneous, because that indeed occurs at the time of the imposition of VAT on the production or distribution lane, the VAT credited with the VAT collected, with the assumption that there is no added value, it will produce zero VAT, or the producers/the sellers being the Entrepreneur Subject to Tax (PKP) will not deposit VAT to the State Treasury. The thought that VAT is to include added value may be understood because it has been declared in the elucidation to the Law Number 11 of 1994 (amending the Law regarding VAT). Nevertheless, in the amendment to the Law regarding VAT further up to the final amendment there is no further explanation stating that VAT is to include added value. Indeed, the Law Number 8 of 1983 up to the latest amendment, declares that VAT is a tax on consumption. The deviation or shift from the Law Number 8 of 1983 happened, among others as demonstrated in the change of understanding:

Table 7  
Amendment to the Definition in the Law 8 of 1993 and the Law 42 of 2009

Description	The Law No. 8/1983	The Law No. 42/2009
Goods	Goods are tangible goods, which according to the nature or the law may be in the form of movables as well as immovables	Goods are tangible goods, which according to the nature or the law may be in the form of movables or immovables, and <u>intangible goods</u>
Goods Subject to Tax	Goods Subject to Tax are goods as mentioned in letter b because of the <u>process of fabrication</u> imposed on tax based on this Law	Goods Subject to Tax are goods, which are subjected to tax based on this Law.
Producing	Producing is an activity of processing to change the form or the nature of the goods from its original form to become new goods or having new efficiency including the making, cooking, assembling, mixing, packing, bottling, and mining or ordering a person or another entity to conduct that activity. Not included in the term of Producing is: 1) planting or plucking of agricultural products or raising animals; 2) catching or preserving fish; 3) drying or salting foodstuff;	Producing is an activity of processing to change the form of and/or the nature of the goods from its original form to become new goods or having new efficiency, or the activity of processing natural resources, including ordering a private person or another entity to conduct such activity

	<p>4) wrapping or packing, which ordinarily occurs in large or retail trading business;</p> <p>5) providing foodstuff and beverages in restaurants, homestays, or done by the business of catering.</p>	
Goods not subjected to tax	Regulated by the Government Regulation	<p>Regulated in Article 4A</p> <p>a. <u>goods produced from mining or produced from drilling directly taken from its source;</u></p> <p>b. basic commodities, which are indispensable for the people at large;</p> <p>c. foodstuff and beverages presented in hotel, restaurants, bistros, stalls, and the like, comprises foodstuff and beverages being consumed in place as well as not consumed in place, including foodstuff and beverages to be delivered by business or catering; and</p> <p>d. money, bouillon, and securities.</p>

**Source:** The Law regarding Value Added Tax, the Ministry of Finance.

If we pay regard to the provision of Article 4A section (2) letter b, regulating the category of the basic commodities not subjected to VAT, besides that those basic commodities are indispensable for the people at large, there are several basic commodities not subjected to VAT if they have not been processed further, which changes the form and/or the nature of those goods. Simplified we will think that those several goods not subjected to VAT are goods, which have not gone through further processing, which are included in the term of producing, so that there is no added value on those goods, so that they are not subject to VAT.

The limitation of several basic commodities being deemed indispensable for the people at large, by adding the requirement of without further processing, implies the impression that those several basic commodities not processed further are indeed the basic needs indispensable for the people at large and regulated in the elucidation to Article 4 section (2) letter b of the Law regarding VAT. With this regulation, the thought of a part of the consuming public, consuming indispensable goods for daily life, to the extent that they are not processed further, should be included in the category of the goods not subjected to VAT.

### **TYPES OF GOODS AND SERVICES, which ARE NOT SUBJECT TO VAT – THE HISTORY OF ARTICLE 4A OF THE LAW REGARDING VAT**

To know how the regulation regarding the kinds of goods not subjected to VAT came to being, we should review the history of its regulation in the Law regarding VAT. For the first time Article 4A appeared in the Law Number 11 of 1994 (the Law Amending the Law regarding VAT of 1984) to make explicit the understanding of “producing” in the Law Number 8 of 1983. The Law delegates the regulation of the kinds of goods and the kinds of services not imposed on VAT to Government Regulation (*Peraturan Pemerintah*, PP). Afterward the Government Regulation regulates the kinds of goods not subjected to the Value Added Tax to be:

1. Agricultural products, plantation products and forestry products, directly plucked, directly taken, or directly tapped from its source;
2. Livestock product goods, hunting/catching or breeding, directly taken from its source;
3. Catch product goods or fishery cultivation, directly taken from its source;
4. Mining product goods, excavation, and drilling, directly taken from its source;
5. Basic commodity goods;



6. Food and beverages presented in hotels, restaurants, bistros, stalls, and the like;
7. Electricity, save if electricity to housing with power above 6600 watts;
8. Shares, obligations, and the like securities;
9. Freshwater channeled through pipes.

The grouping of the kinds of those goods not subjected to VAT is in accordance with the grouping as per the elucidation to the Law Number 11 of 1994. It became regulated further in the Government Regulations (PP) regarding basic commodities not subjected to VAT like rice and unhulled rice, corn, sagoo, soybean and salt either containing or not containing iodine;

Afterward, as of 1 January 2001, along with the applicability of the Law Number 18 of 2000 (the Law on the Second Amendment to the Law regarding VAT of 1984), the grouping of the kinds of goods not subjected to VAT became changed:

- a. goods produced from mining or produced from drilling directly taken from its source;
- b. basic commodities, which are indispensable for the people at large;
- c. foodstuff and beverages presented in hotels, restaurants, bistros, stalls, and the like;
- d. money, bouillon, and securities.

The Elucidation to the Law Number 18 of 2000 confirms also that the mentioned basic commodities, which are indispensable for the people at large are rice and unhulled rice, corn, sagoo, soybean, salt either containing or not containing iodine. The regulation regarding the kinds of goods not subjected to VAT is no longer in the Government Regulation (PP) Number 143 of 2000, which states that the Government Regulation (PP) Number 50 of 1994 is revoked and declared not applicable;

How, then with the category of the goods not subjected to VAT, which were regulated in Article 4A of the Law Number 11 of 1994, which as of the applicability of the Law Number 18 of 2000 is no longer included in the category of the goods not subjected to VAT. Through the Government Regulation (PP) Number 12 of 2001, agricultural products included in Goods Subject to Tax (BKP), which has strategic nature, which import and delivery are exempted from the imposition of VAT. The Government Regulation (PP) explains that agricultural products are goods produced from business activities like: a). agriculture, plantations, and forestry; b) stock husbandry, hunting or catching, as well as breeding; or c). fishery either from catching or cultivation. *Consequently, agricultural products, which initially include goods not subjected to VAT, as of the applicability of the Law Number 18 of 2000, agricultural products became Goods Subject to Tax (BKP).* Nevertheless, it obtains the facility of exemption from the imposition of VAT;

The Government Regulation (PP) Number 12 of 2001 have been amended several times, the latest by the Government Regulation (PP) Number 31 of 2007, and finally that the Government Regulation (PP) Number 31 of 2007 became petitioned for material review to the Supreme Court (*Mahkamah Agung, MA*). The Judgment of the Supreme Court (MA) 70P/HUM/2013, which revokes several articles in that Government Regulation (PP), turning agricultural products to become subject to VAT because based on that Judgment of the Supreme Court, agricultural products are not categorized goods as strategic, which obtains the exemption facility from the imposition of VAT.

## **JUSTICE AND LEGAL CERTAINTY IN ARTICLE 4A SECTION (2) LETTER b OF THE LAW REGARDING VAT**

The Law regarding VAT is a material law, which contains norms explaining among others the condition, acts, legal event, which are subjected to tax (the tax object), who are subjected to tax (subject), the amount of tax imposed (tariff), all things regarding the emergence and the nullification tax debt, and legal relationship between the government and the tax payers. The tax material regulates the technical of tax imposition and to determine the certainty and success of tax collection, in this case the VAT.

Being the principles of a just tax law and tax equitable collection, that for an equitable tax collection, it shall among others pay regard to the principle of legal certainty and the principle of justice (equity).

Legal certainty is one of the fundamental principles in law requiring that the law shall be clear, easily accessible, comprehensive, prospective, and stable. Legal certainty in tax does not only comprise the formulation of good laws but also harmonizes and coordinates taxation, including dispute settlement.

The principle of justice in tax collection, how the formulation of the Laws and taxation rules as well as taxation practice, which can fulfill the sense of justice, is also one of the important requirements to manifest good tax collection;

As explained in point 0, how the experts formulated the theory and the thought, which produces the formulation principles of law and the practice of good tax collection and to fulfill the sense of justice, this is also what is expected by the public from the formulation of the Law regarding Tax and taxation practice in Indonesia;

Basically, the drafting of an amendment to the Law regarding VAT intends among others to increase legal certainty and justice in the imposition of VAT and to simplify the VAT system. Referring back to the characteristic of an objective tax and the principle of “ability to pay,” if the formulation of the provision in the Law regarding VAT may manifest the principle of justice, it can certainly not be conducted by formulating the provision in the Law regulating the tax subject, but the formulation of the provision in the Law regarding VAT may be conducted by regulating the tax object, among others goods or services, which are subject to or are not subject to VAT, certain Goods Subject to Tax (BKP) or Services Subject to Tax (JKP) not subject to VAT or exempted from the imposition of VAT, or the regulation regarding Goods Subject to Tax (Goods Subject to Tax, BKP) be categorized as luxurious goods object to PPnBM, so that the have’s public capable to purchase luxurious goods other than shall pay VAT shall also be obliged to pay Sales Tax on Luxury Goods (PPnBM);

One of the formulations of the rules regarding goods not subjected to VAT in the Law regarding VAT is Article 4A section (2) letter b of the Law regarding VAT regulating that the kinds of goods not subjected to VAT are certain goods in the category of the basic commodities, which are indispensable for the people at large.

The elucidation to Article 4A section (2) letter b of the Law regarding VAT explains that basic commodities, which are indispensable for the people at large comprise:

- a) rice;
- b) unhulled rice;
- c) corn;
- d) sago;
- e) soybean;
- f) salt, either containing or not containing iodine;
- g) meat; namely fresh meat without processing, but has gone through slaughter process, skinned, cut, cooled, frozen, packed or not packed, salted, limed, acidified, preserved by other means, and/or boiled;
- h) eggs, namely unprocessed eggs including cleaned eggs, salted, or packed;
- i) milk, namely dairy milk either having gone through cooling process as well as heated, not containing added sugar or other materials, and/or packed or not packed;
- j) fruits, namely plucked fresh fruits, either having gone through the process of washing, sorted, shelled, cut, sliced, graded, and/or packed or not packed, and
- k) vegetables, namely plucked fresh vegetables, washed, drained, and/or stored at low temperature, including minced fresh vegetables.

For the people at large, the provision in the Law regarding VAT, which does not impose VAT on basic commodities is certainly considered to be very noble, particularly because those basic commodities are indispensable for the people at large and are certainly very important for the livelihood of the people at large. In the perspective of taxation, Article 4 section (2) letter b and its elucidation reflects the regulating function of tax, namely tax as an instrument or tool to regulate or perform one of the functions of the state to regulate and to guarantee the social life of the people. The noble impression is also reflected from the regulation in this article, whereby the state makes the impression as if they did not only think about the budgetair function of tax, which is also important.

Pervading Article 4 section (2) letter b of the Law regarding VAT and its elucidation, that the provision has a limitative nature, limiting basic commodities indispensable for the people at large to comprise only 11 (eleven) kinds of goods. If there are basic commodities, particularly food, other than the 11 kinds of the basic commodities regulated in that Law regarding VAT, which are indispensable for the

public, then those basic commodities include Goods Subject to Tax (BKP), which are subject to VAT. The public like the consumers, will be burdened by VAT when paying the price of those goods;

To manifest the provision in the Law regarding VAT, which can guarantee the fulfillment of the sense of justice for the public and to manifest the neutrality of the VAT, the Government should be prudent and consider lots of matters when formulating a provision in the Law regarding VAT. If the provision in the Law regarding VAT has a limitative nature, then thought should really be had and considered whether the limitation in that provision may fulfill the sense of justice of the people at large, or instead hurts their sense of justice indeed. Moreover, the provision in the Law regarding VAT shall also be capable to reflect the neutrality spirit of the VAT in economic activities, because the imposition of VAT may influence competitiveness of the goods in the markets. Questionable for the Government is whether basic commodities as regulated in the elucidation to that article have comprised all the basic commodities, which are indispensable for the people at large, whether the determination of the basic commodities regulated in that article can fulfill the sense of justice of the people who consume their basic commodities other than those regulated in the elucidation to that article;

## CONCLUSION

Based on the explanation conveyed above, one can conclude several important matters as follow:

1. Tax has the important function to fill the state budget and to guarantee the performance of development, but tax has also a regulating function, the function of the State to regulate the social life of the public, which final objective is to manifest the independency of the nation and equitable public welfare.
2. VAT is a tax on consumption, imposed level wise in each production and distribution lane. As a tax on consumption, the party who actually bears the VAT burden is the consumer. Therefore, the formulation of the Law shall really pay regard to the effect of the imposition of VAT on the consumers, particularly goods being consumed by the public at large. The shift and deviation occurring in the Law regarding VAT indicates the bias of the Government in conducting regulation, because at the same time it indeed renders the facility or incentive for goods not consumed by nor the need of the people at large.
3. As an Indirect Tax, the obligation to pay VAT to the state is the responsibility of the party who collects the VAT, namely the Entrepreneur Subject to Tax (PKP) selling the goods or delivers services to the consumers. The convenience rendered to small entrepreneurs to choose to be Entrepreneur Subject to Tax (PKP) (is not obliged to collect VAT) will not influence the tax burden, which finally will be borne by the consumers.
4. Based on the existing data and fact, one of the causes of stagnation in tax revenue in Indonesia is the limited capacity of the Government to collect tax from the group of high income earners. The structure of tax revenue is not yet equitable, namely it still relies on tax on consumption (VAT and Excise), rather than the Income Tax of Private Persons, which is a challenge and simultaneously opportunity to increase tax revenue and to guarantee justice for the whole Indonesian society.
5. The formulation of the provision in the Law regarding Tax should be to fulfill the principle of justice and legal certainty, to guarantee good and equitable taxation practice. If the provision in the Law regarding Tax can fulfill the sense of justice of the public, then the principle of “convenience of payment” and efficiency may be realized in the practice of tax collection. The exemption of the goods produced from mining and drilling as Goods Subject to Tax (BKP), the exemption of Sales Tax on Luxury Goods (PPnBM) on luxury bags and certain luxurious residences –, while on the other hand several basic commodities are indeed subject to VAT – that certainly reflects injustice in the imposition of tax.
6. As such, to guarantee the effectiveness of the regulating function for the sake of justice for all the people of Indonesia, the formulation of the Law regarding VAT as an instrument to achieve the objective of living in a state becomes very important and urgent for repair. The formulation of the Law shall guarantee the obligation of the state to fulfill the livelihood and the interest of the people may be performed at best.

#### 4. Sony Maulana Sikumbang, S. H., M. H

**Firstly.** The fourth Paragraph of the Preamble of the Constitution of 1945 mentions the objective of having a state, namely “... to form a Government of the State of Indonesia, which shall protect the whole Indonesian nation and the entire native land of Indonesia and to advance the public welfare, to educate the life of the nation, and to participate in the execution of world order, which is by virtue of freedom, perpetual peace and social justice...” In the effort to achieve the objective of having that state, Article 23 section (1) of the Constitution of 1945 stipulates, that the Government needs to manage the finances of the state as manifested in the state budget of revenues and expenditures for the optimal welfare of the people. One of that state source of revenue is Tax. As such, tax has the function of raising funds for the state revenue. This is the function of budgetary tax. Moreover, keep in mind, that as it is raised through levies, which has compelling nature, Article 23A of the Constitution of 1945 mandates the regulation of tax by Law;

The same with the other kinds of taxes, the Value Added Tax (VAT) is established to raise funds for the state revenue. This kind of tax is regulated in the Law Number 8 of 1983 regarding Value Added Tax on Goods and Services, and the Sales Tax on Luxury Goods, as has been amended the last time by the Law Number 42 of 2009 regarding the Third Amendment to the Law Number 8 of 1983 regarding Value Added Tax on Goods and Services, and the Sales Tax on Luxury Goods;

**Secondly.** Article 4A section (2) letter b of the Law Number 8 of 1983 regarding Value Added Tax on Goods and Services, and the Sales Tax on Luxury Goods, as has been amended the last time by the Law Number 42 of 2009 regarding the Third Amendment to the Law Number 8 of 1983 regarding Value Added Tax on Goods and Services, and the Sales Tax on Luxury Goods stipulates, that the kinds of goods not subjected to Value Added Tax are certain goods in the category of basic commodities, which are indispensable for the people at large. This is the other function of tax, namely the regulating function. Tax is established not merely to raise funds for the state revenue, but it can also be utilized as an instrument to support the economic policy of the state;

The provision in Article 4A section (2) letter b, which stipulates “basic commodities, which are indispensable for the people at large as the kinds of goods not subjected to Value Added Tax” is utilized by the Government to encourage the capability of the public in the fulfillment of their basic needs of basic commodities for the sake of quality of life improvement and for the sake of the welfare of mankind as mandated by Article 28C section (1) of the Constitution of 1945. In order to each person to be entitled to be free from discriminative treatment based on whatsoever as mandated by Article 28I section (2) of the Constitution of 1945, the provision in Article 4A section (2) letter b sufficiently determines “basic commodities, which are indispensable for the people at large”;

**Thirdly.** The Elucidation to Article 4A section (2) letter b of the Law Number 8 of 1983 regarding Value Added Tax on Goods and Services, and the Sales Tax on Luxury Goods, as has been amended the last time by the Law Number 42 of 2009 regarding the Third Amendment to the Law Number 8 of 1983 regarding Value Added Tax on Goods and Services, and the Sales Tax on Luxury Goods determines, that basic commodities, which are indispensable for the people at large cover certain 11 (eleven) food commodities;

This Elucidation has distorted the provision in Article 4A section (2) letter b, so that it contravenes the recognition and protection of the right of each person to self-development through the fulfillment of basic needs and be free from discriminative treatment based on whatsoever as mandated by Article 28C section (1) and Article 28I section (2) of the Constitution of 1945;

**Fourthly.** Moreover, technically with regard to the drafting of the laws and regulations, the Elucidation to Article 4A section (2) letter b has exceeded its function as official interpreter of the lawmakers and regulations to clarify provisions of the laws and regulations it has drafted. The Elucidation to this article contains or creates a new norm. That contravenes the drafting technique of laws and regulations;

#### Testimony of the Witness of the Petitioners

##### 1. Libertina Layk

- The Witness is married, she has 3 children, of the ages 17 years, 12 years, and 17 months;
- The husband of the witness works as a driver;
- The Witness receives each day household money from the husband of the witness in the amount of IDR.50.000. The witness uses that money to spend IDR. 25,000 up to IDR. 30,000. -
- The Witness feels that that household money of IDR. 25,000 up to IDR. 30,000 suffices to buy food, however, that cannot fulfill the need of nutrition;
- With that much household money, the witness bought taofu (*tahu*) and bean cake (*tempe*) as sidedish;
- When the witness purchases basic commodities from stalls, the witness did not know whether it is subjected to VAT or not because when shopping in stalls there is no indication (shopping note), but if she shops in a mini market there is VAT of 10% as listed in the shopping slip;
- The Witness expects that that VAT be revoked;
- The imposition of VAT in that amount of 10% percent applies when the witness purchases green beans, corn;

## **2. Linda Barus**

- The Witness works as vendor in a stall and sells foodstuff and cookies;
- If the witness shops in the market in Kelapa Gading, Pasar Senen (both in Jakarta), there is no VAT, but the merchant of the goods said the prices constantly increase because the tax increases;
- The price of the goods, which the witness bought in the market has a big influence on processed foodstuff, which the witness sells. If the price of the goods increases, then the witness will also increase the price of foodstuff. That price increase of foodstuff has an influence on the buyers. The buyers would complain, and they move to other sellers;
- When the prices have not yet gone up, the witness could employ two assistants and pay motorcycle taxi driver, but when prices went up, the witness could no longer pay assistants, so that she had to terminate the assistants;
- Goods of, which the prices have gone up are namely fish, beans, vegetables, tubers;

## **3. Sumarni**

- The witness is a merchant in Gembira who sells green beans, peanuts, and flavorings;
- The witness bought those goods from wholesalers in Pasar Rumpit (Jakarta);
- The price increase in one year can occur up to three times;
- When there is a price increase of goods, those wholesalers did not tell the witness regarding the cause of that price increase;
- That price increase has an influence on the number of purchasers, and so decreasing the number of customers;
- The merchants selling foodstuff who purchase goods from the witness are among others, the seller of *ketoprak* (soybean cake and rice cubes with peanut sauce), merchant of green beans porridge;
- That price increase of the goods caused a decrease in purchasers, or at least decrease of goods bought, for instance like those who used to buy 3 – 5 kg decreased to become 2 kg;
- The witness of also sells kitchen flavoring, among others, candlenut, pepper, garlic;
- When purchasing those kitchen flavorings from wholesalers, the witness did not gain information regarding the cause of that price increase;
- That price increase of flavorings compels the decrease in the purchase of flavorings, for example prior to the price increase those who used to buy 1 kg now buy 1/2 kg;

[2. 3] Considering that the President in the trial dated 22 June 2016 conveyed his verbal testimony and has also delivered his testimony in writing dated 22 June 2016, which was accepted the Office of the Clerk of the Court dated 1 August 2016, which principally conveyed the following matters:

### **THE LEGAL STANDING OF THE PETITIONERS**

Based on the provision of Article 51 section (1) of the Law Number 24 of 2003 regarding the Constitutional Court as has been amended by the Law Number 8 of 2011 (hereinafter referred to as the

Law of the Constitutional Court) it is mentioned that the Petitioners are the party having assumed that their Constitutional Rights and/or authority have been harmed by the applicability of the Law, namely:

1. Indonesian individual citizen;
2. Unities of the adat law societies to the extent that they are still alive and corresponding with the development of its society and the principle of the Unitary State of the Republic of Indonesia as is regulated in Laws;
3. public or private legal entities; or
4. state institutions.

That provision has been affirmed in its elucidation, that mentioned by “constitutional rights” are rights regulated in the Constitution of 1945;

Moreover, as of a Judgment of the Constitutional Court Number 006/PUU-III/2005 and the Judgment Number 11/PUU-V/2007, as well as further judgments, the Constitutional Court has rendered a cumulative understanding and definition regarding the loss of constitutional rights and/or authorities arising from the applicability of a Law according to Article 51 section (1) of the Law of the Constitutional Court shall comply with 5 (five) requirements, namely:

1. there are constitutional rights of the Petitioners granted by the Constitution of the Republic of Indonesia of 1945;
2. whereas the Petitioners assume those constitutional rights of the Petitioners to have been harmed by a Law to be reviewed;
3. whereas the constitutional loss of the mentioned Petitioners has a specific and actual nature or at least bear the potential, which according to normal reasoning can be ascertained that it will happen;
4. there is a causal relationship (Dutch: *causal verband*) between the loss and the applicability of the Law pleaded for review; and
5. there is the possibility that by granting the petition, the postulated constitutional loss will not or will not happen again.

Whereas the non-fulfillment of one of the criteria of the loss of constitutional rights and/or authorities as described hereinabove, will cause the Petitioners to be regarded to have no legal standing to submit a petition for constitutional review to the Constitutional Court;

Based on the above-mentioned provisions, related to the application submitted by the Petitioners, the Government queried the constitutional loss of the Petitioners as follows:

1. Is it that the applicability of the Law pleaded for review indeed gives rise to loss for the petitioner?
2. Is there a possibility that by granting the petition, the postulated constitutional loss will not or will not happen again?

Related to the above-mentioned queries, the Government conveyed the following matters:

1. With regard to the loss as postulated by the Petitioners
  - a. The Petitioner I in essence postulated that the Petitioners perceives to have been disadvantaged of her constitutional rights because only the 11 kinds of the basic needs are exempted from the imposition of the Value Added Tax (VAT) in accordance with the provision of the Law regarding VAT, while the Petitioner assumed that there are still other basic needs, which should be exempted from the imposition of VAT.

The Government may convey the followings with regard to the loss postulated by the Petitioner I:

- 1) Whereas the most basic need for human resources of the nation is the need of food. The staple food regulated in the article as such (*a quo*) plays an important role in the aspects of economy, social, even politics, so that its availability becomes basic attention of the Government.
  - 2) Whereas the applicability of the article as such (*a quo*) is merely to encourage the capability of the Indonesian communities (including the Petitioner) to fulfill the basic need of food comprehensively by rendering an exemption of VAT for food materials, which according to the Government is staple food materials, which are indispensable for the public in general, so that its applicability has not at all harmed the Petitioner.
- b. The Petitioner II postulated that as a small-scale merchant of food commodities in a traditional

market, the petitioner feels disadvantaged because the trading business of those commodities became hampered.

The Government may convey as follows against the loss postulated by the Petitioner:

- 1) The tax collection system has regulated the mechanism of protection for small entrepreneurs through the stipulation of the definition of small entrepreneurs who are not obliged to be confirmed as Entrepreneur Subject to Tax (PKP).
  - 2) In the VAT administration system, protection for small entrepreneurs is conducted through the stipulation of the definition of small entrepreneurs who are not obliged to collect, to deposit and to report VAT and Sales Tax on Luxury Goods (PPnBM), so that Goods Subject to Tax (BKP) delivered by those small entrepreneurs may compete because they do not bear the VAT.
  - 3) The Petitioner as a small entrepreneur distributing BKP in the form of basic commodities other than those regulated in the article as such (*a quo*) has been given protection by rendering the opportunity not to become an Entrepreneur Subject to Tax who is obliged to collect VAT, so that the selling price of basic commodities delivered becomes more competitive.
  - 4) Based on the above-mentioned matters, it is obvious that the applicability of the provision as such (*a quo*) does not give rise to loss to the petitioner, or at least there is no causal relationship (Dutch: *causal verband*) between the loss and the applicability of the Law pleaded for review.
2. Against the possibility that by granting the petition, the postulated constitutional loss of the Petitioners will not or will not happen again, the Government may convey that those matters have not been substantiated because like that what the Government has conveyed, the applicability of the Article as such (*a quo*) is merely in the interest of the public at large, including the interest of the Petitioners., so that based on the above mentioned matters, the Government is of the opinion that the Petitioners have not fulfilled the qualification in this petition as a party having legal standing as mentioned by the provision of Article 51 section (1) of the Law of the Constitutional Court, as well as based on the previous judgments of the Constitutional Court. Therefore, according to the Government it is appropriate if the Honorable Chief Justice/the Honorable Tribunal of the Constitutional Court prudently state the petition of the Petitioners not acceptable (Dutch: *niet ontvankelijk verklaard*);

## **TESTIMONY OF THE GOVERNMENT AGAINST THE MATERIAL PETITIONED FOR REVIEW**

### **A. A General Description on the Imposition of VAT in Indonesia**

One of the objectives of the Republic of Indonesia, which is based on Pancasila and the Constitution of 1945 is to advance the general welfare for the sake of social justice for all the Indonesian people. In the effort to achieve that objective, the Republic of Indonesia needs to manage the finances of the state as manifested in the form of the State Budget of Revenues and Expenditures (*Anggaran Pendapatan dan Belanja Negara*, APBN) being a financial reflection of the State. One of the sources of the State revenue covered in the APBN is tax. Tax is the means of the public to be in synergy with state in accelerating the development of various sectors including the security facility being indispensable for the public. Article 23A of the Constitution of 1945 regulates that tax and other levies, which have a compelling nature for the purposes of the state be regulated in Laws;

In the performance thereof, other than the budgetair function to raise funds for the state revenue, tax has also the function of regulating, namely as an instrument to regulate the economic policy of the state. Related to the function of VAT as a source of funding of the state (the budgetair function), the role of the VAT in supporting tax revenue is very significant and the growth of VAT revenue from year to year also always experience increase. Statistic data indicates that the realization of VAT revenue and Sales Tax on Luxury Goods (PPnBM) of 2014 in the amount of IDR.408.83 trillion being 41.5% from total central tax revenue or central equivalent to 3.7% from the total of Indonesia's Gross Domestic Product (*Produk Domestik Bruto*, PDB);

The regulating function of tax related to VAT is manifested among others through the grouping of the goods and services not subjected to VAT (Goods Not Subject to Tax (Non-BKP) and

Services Not Subject to Tax (Non-JKP), the stipulation of the definition of small entrepreneurs exempted from the obligation to be confirmed as an Entrepreneur Subject to Tax (PKP), the regulation of guidance for the crediting of the Income Tax for the entrepreneurs of certain sectors or entrepreneurs with a turnover below a certain definition, as well as the granting of the facility in the form of VAT Exemption and Uncollected VAT are regulated in Article 16B of the Law regarding VAT. Those various regulations have been designed and are directed to equally support Indonesia's economic policy;

VAT is an Indirect Tax to include the consumption of goods and/or services, which although its imposition may be conducted on each link of submission in the production network, distribution as well as the marketing of goods and/or services, the actual bearer of the VAT is the final consumer of those goods and/or services. The imposition of VAT being conducted on each link of submission in the production network, distribution, as well as the marketing of those goods and/or services is basically only a mechanism, whereby in order to secure its neutrality, on the VAT paid, as well as collected on the link prior to the goods and/or services reaches a final consumer (Input Tax) a set-off or crediting is conducted on the VAT collected by the seller of the goods and/or services by the time of delivery to the final consumers (Output Tax). That set-off or crediting is a mechanism of securing the neutrality of the VAT along the production, distribution as well as the marketing lane of the goods and/or services, which are subject to VAT, so that economically there is no double tax imposition. With such mechanism only the final consumers really bear the indebted VAT on the consumption of goods and/or services;

As it is usually implemented in lots of countries adhering to the VAT system, all goods and/or services are basically Goods Subject to Tax (BKP) or Services Subject to Tax (JKP). Nevertheless, several kinds of the goods and/or services are exempted from the imposition of VAT or are not subject to VAT (Non-BKP and Non-JKP), as well as given the exemption of VAT facility or are subject to VAT with 0% tariff (zero rating). The treatment is not subject to VAT (Non-BKP and Non-JKP) or exempted from the imposition of VAT used to be given limitedly to the deliveries of certain goods and/or services, while the imposition of VAT with 0% tariff is used to be given to export goods and to export of several kinds of services. In the current regulation of the Law regarding VAT of Indonesia, the kinds of goods and services, which are included in the category of the goods not subjected to VAT are regulated in Article 4A, while the granting of the facility of non-collection or exemption of VAT is regulated in Article 16B and the derivative of the Government Regulation (PP), so that the structure of the category of the goods and services as a VAT object in Indonesia may be divided into two large groups, namely:

1. Goods Subject to Tax (BKP)/Services Subject to Tax (JKP), the delivery of Goods Subject to Tax (BKP)/Services Subject to Tax (JKP) are subjected to the following tariffs:
  - a. 0% to export, where the profit may credit the Input Tax.
  - b. 10% to import and/or domestic consumption, where the profit may credit the Input Tax. If necessary, the Government may render the VAT facility on the import and/or domestic consumption as is based on Article 16B Law regarding VAT. That facility is in the form of:
    - 1) VAT exemption, namely the indebted VAT will be exempted. Nevertheless, the previously collected/paid Input Tax, cannot be credited.
    - 2) VAT is not collected, namely the indebted VAT is not collected by the seller, the previously collected/paid Input Tax, may be credited.
2. The delivery, export and/or import of Goods Not-Subjected to Tax (Non-BKP)/Services Not-Subjected to Tax (Non-JKP), are not subject to VAT and the previously Input Tax collected in the production or distribution link cannot be credited.

The difference between the various categories of goods and services in the structure of the imposition of VAT is particularly related to the mechanism of the crediting of the Input VAT, namely a VAT, which has been paid in the production as well as distribution activity prior to the sale of goods or services to the final consumers. No credit is given for the Input VAT on goods and



services, which are included in Goods Not-Subjected to Tax (Non-BKP) and Services Not-Subjected to Tax (Non-JKP), as the Input VAT on goods and services gain the exemption facility from the imposition of VAT, so that that Input VAT will become selling price elements to the final consumers. The Input VAT on goods and services gaining the VAT facility are not collected nor be subjected to VAT with the 0% tariff (on export) may be credited, so that goods and services reaching the final consumers are clean from the whole VAT in each production and distribution link.

This different treatment in crediting Input VAT will certainly have different influence on economic activities in Indonesia. The granting of Goods Not-Subjected to Tax (BKP) or Exemption treatment against input goods to be processed or produced further may cause the already paid Input VAT will carried out as selling price and be subjected to VAT on the stage of further production/distribution, so that there will be taxation on the already paid VAT. As a result, the price of the goods will become higher and the VAT imposed on and be deposited with the Government will become higher rather than the imposed VAT on Goods Subject to Tax (BKP) having the standard tariff. Therefore, the exemption of VAT or exemption from the imposition of VAT is generally given to goods directly consumed by the end-user, in order to minimize its derivative effect against price and the occurrence of double taxation;

#### **B. The Treatment of the Imposition of VAT on Basic Commodities**

Included in the category the goods not subjected to VAT (Goods Not-Subjected to Tax (Non-BKP) are among others basic commodities, which are indispensable for the people as regulated in Article 4A section (2) letter b. In that Elucidation to the Article, goods included in the Non-BKP are limited to:

- a. rice;
- b. unhulled rice;
- c. corn;
- d. sagoo;
- e. soybean;
- f. salt, either containing or not containing iodine;
- g. meat, namely fresh meat without processing, but has gone through slaughter process, skinned, cut, cooled, frozen, packed or not packed, salted, limed, acidified, preserved by other means, and/or boiled;
- h. eggs, namely unprocessed eggs, including cleaned eggs, salted, or packed;
- i. milk, namely dairy milk either having gone through cooling process as well as heated, not containing added sugar or other materials, and/or packed or not packed;
- j. fruits, namely plucked fresh fruits, either having gone through the process of washing, sorting, shelled, cut, sliced, graded, and/or packed or not packed; and
- k. vegetables, namely plucked fresh vegetables, washed, drained, and/or stored at low temperature, including minced fresh vegetables.

As has been explained before, being goods categorized as Goods Not-Subjected to Tax (Goods Subject to Tax, BKP), the delivery of basic commodities as listed in the Elucidation to Article 4A is not subject to VAT, and VAT, which has been paid in relation to the activity of producing or trading of those goods cannot be credited.

The basic needs are goods related to the livelihood of the people at large having a high scale of fulfillment of the need and becomes supporting factor of public welfare. The basis for not imposing VAT on the goods mentioned above is to ensure that the public gains the basic needs, which are expected to support nutritional needs of the public.

Based on the above various considerations, the stipulation of the kinds of basic commodities not subjected to VAT has been conducted meticulously and prudently, and is limited to basic commodities, which really have the basic nature as has been mentioned in the Elucidation to Article 4A section (2) letter b of the Law regarding VAT.

Furthermore, the following is the explanation related to the substance of the petitioned review:

A. The Elucidation to Article 4A section (2) letter b of the Law regarding VAT does not contravene

Article 28C section (1) of the Constitution of 1945 because:

1. The Government conveyed again that the existence of the provision as such (*a quo*) is merely to encourage the capability of the Indonesian communities to fulfill their Constitutional Rights, namely to fulfill the basic needs of staple food, so that equalization of the fulfillment of that basic needs of food can be achieved.
2. To guarantee the sense of justice of the whole the public and to protect general welfare by encouraging the fulfillment of basic needs of the public comprehensively, the Government renders the exemption of VAT on food materials, which according to the Government are staple food materials, which are indispensable for the public in general.
3. The determination of staple food materials, which are indispensable for the public is a law regulation policy (open legal policy) and has gone through various studies, including from the perspective of dependence/the public need of food commodities.
4. There are several commodities being staple food materials, which are not listed in the article as such (*a quo*) like granulated sugar and cooking oil. The Government consideration does not include those commodities because those are products of processed goods/industrial process. With regard to the VAT collection system through the mechanism of the crediting of Input Tax, if the VAT, which has been paid is directly related to production or trading activity of commodities like granulated sugar and cooking oil cannot be credited, that may hamper the development of industry, which produces or trades those goods.
5. Based on the above-mentioned explanation, in our opinion, the Elucidation to Article 4A section (2) letter b of the Law regarding VAT does not contravene Article 28C section (1) of the Constitution of 1945.

B. The Elucidation to Article 4A section (2) letter b of the Law regarding VAT does not contravene Article 28I section (2) of the Constitution of 1945 because:

1. The provision as such (*a quo*) does not discriminate Taxpayers and applies for all Taxpayers still having the tax rights and obligations of private person Taxpayers as well as corporate Taxpayers, domestic Taxpayers as well as overseas Taxpayers (equality before the law). Therefore, that provision does not contain a discriminative provision, which might lead to injustice;
2. Bearing in mind that the enactment of the provision as such (*a quo*) indeed is the effort of the government to uphold welfare of all the Indonesian people, there is no element of discrimination in its application, so that one can conclude that in this regard, the postulate of the Petitioners stating that the application of Article 4A section (2) letter b of the Law regarding VAT has caused the emergence of discriminative treatment is not reasoned and does not contravene Article 28I section (2) of the Constitution of 1945.

## PETITUM

Based on the above-mentioned explanation and arguments, the Government appeals to the Honorable Chief Justice/the Honorable Tribunal of the Constitutional Court examining, adjudicating, and deciding on the petitioned review (constitutional review) of the provision as such (*a quo*) against the Constitution of the Republic of Indonesia of 1945, may render the following judgment:

1. To declare that the Petitioners have no legal standing;
2. To dismiss the petitioned review of the Petitioners (*void*) entirely or at least to state the petitioned review of the Petitioners not acceptable (Dutch: *niet ontvankelijk verklaard*);
3. To accept the Testimony of President entirely;
4. To declare the Elucidation to Article 4A section (2) letter b Law number 8 of 1983 regarding Value Added Tax on Goods and Services and Sales Tax on Luxury Goods as has been amended the last time by the Law Number 42 of 2009 regarding the Third Amendment to the Law Number 8 of 1983 regarding Value Added Tax on Goods and Services and the Sales Tax on Luxury Goods be not against the Constitution of the Republic of Indonesia of 1945.

Moreover, the President submitted 2 (two) experts in the trial dated 25 July 2016 namely **Prof. Dr. Gunadi** and **Refly Harun, S. H., M.H** who rendered their testimony under oath and/or conveyed

their testimony in writing in that trial expressed the followings:

### **1. Prof. DR. Gunadi**

In order to achieve the national objective as mentioned in the Preamble of the Constitution of 1945, the Government performs government activity and development with funding from tax revenue, including VAT. The jurisdiction or authority to collect tax, is an attribute of the state sovereignty (Starke, 1989). The tax jurisdiction comprises 3 (three) elements: (1) regulations (drafting of the Law regarding Tax), (2) revenue (right of the state as a part of income and/or wealth of the citizens), and (3) administration, including the enforcement of the Law (Rohatgi, 2005; and Knechtle, 1979). The relationship between taxation of the state entitled to revenue as represented by the government and the people who have the obligation to fulfill it have democratically agreed to by their representatives in the Parliament. The theory in *Du Contrat Social* (Jean Jacques Rousseau, 1712-1718) postulated that all citizens have made an agreement with the state, based on norms of law jointly stipulated by the people and the state, they consciously determined to support the existence and sustainability of the state. The organic theory postulated that naturally the citizens have the joint obligation to support the state by delivering a part of wealth (like tax) to the general interest performed by the state. The theory of sovereignty stated that each state is free to formulate its Tax Law being deemed most appropriate with the situation and condition (OECD, 2013). There is no definition on the scope of the right to tax of the state, to the extent that there is a tax connecting factor with the tax subjects (private persons or corporations), and the tax objects (condition, incident, and occurrence) in its sovereign territory as well as regulated in the Law (Rohatgi, 2005). The Indonesian tax jurisdiction is implied in Article 23A of the Constitution of 1945 stating that tax and other levies have a compelling nature for the purposes of the state as regulated by Laws. The Tax Law is based on that basic law. That Law refers to several generally accepted taxation policies (OECD, 2014): (1) neutrality, which said, tax shall be neutral and applies equitable to all parties. An Entrepreneur under the same condition or conducting the same business shall be subject to equal tax, (2) efficient, namely cost of compliance of the Tax Payers and minimum government administration cost, (3) certain and simple, in other words, regulations should be clear and easy to understand, so that any party may anticipate the tax consequence on a transaction undertaken, including to know when, where, how and how much tax to be paid, (4) effective and proper, in other words, tax imposition should be able to render an adequate revenue amount on time. Minimizing the potential of tax evasion and smuggling, and prevention rule in proportion with risks, and (5) flexible. That said, the tax system shall be smooth and dynamic in order to always adjust with the development of business, trade, economy, and technology as well as information. As a legislative product, all Tax Laws, including the Law regarding VAT have obtained approval of the representatives of the tax paying people to fulfill the principle of “no taxation without representation” of Article 23A of the Constitution of 1945. The People’s Representative Council (*Dewan Perwakilan Rakyat*, DPR) renders approval to the Draft Tax Law through a procedure of official meetings and sessions. That approval reflects the wish and undertaking of the people on tax collection and its procedure. The VAT is collected based on the Law regarding VAT. Regulated by the Law means that tax collection shall be based on a Law approved by the representatives of the people (including the petitioners of the material review). As a legislative product, a Law is law containing norms, which shall be followed and complied with by all parties. In accordance with the principle of law fiction, any person shall be obliged to know the law (Dutch: *iedereen wordt geacht de wet to kennen*, Latin: *nemo ius ignorare consetur*). A Law binds all citizens after its promulgation in the State Gazette (Mertokusumo, 2008, *Mengenal Hukum* (Recognizing Law)). Because it is formed based on a provision, which is higher (the Constitution of 1945) and by an authorized institution (the legislative), the Law regarding VAT has fulfilled the formal legality, procedural and constitutional principle, so that it is valid and has binding force (Soeprapto, 2007). As it is customary with Tax Laws, the normative legal nature of the Law regarding VAT is heteronomic. That said, the obligation to pay tax stems from the state and can be mandated, so that like it or not, citizens shall comply with tax obligations (Soeprapto, 2007);

The provisions in the Tax Law are general formulations of a rule. As normal humans, the drafters are certainly underprivileged to predict as to what will happen in the dynamic economic, social, cultural, and political life full of change and fast development in the future, so that they left behind a slit in the regulations, which can be abused by tax rent seekers by means of various engineered transactions, legal artificials, and accounting not quite in line with the intention and the objective of the Laws

(Mertokusumo, 1985). Irfan Fachrudin (2004) stated that the Laws are always imperfect because the drafters cannot estimate all things, which will happen in the future. Moreover, thanks to the human nature of the drafters, Mertokusumo stated that although it looks apparent, a Law might be incomplete and thorough in regulating all things and matters regarding taxation, because the sum of techniques, methods, nature, the kind, and a variety of activities of the tax subjects and objects are countless, continuously changing, and sometimes they are full of engineered interests. A Law, which has been stipulated cannot be amended fast in order to adjust it with the natural dynamics of the tax subjects and objects, which never stop developing economic, social, and cultural activities, which will always give rise to new taxation subjects, objects, and phenomenon. To safeguard the certainty, flexibility and contemporariness of the law, efficiency of the regulations and equitable taxation, then the norms regulated in the Laws in general, which has a static and permanent nature including the subjects, objects, tariffs, sanctions, and basic administrative rules, while the procedures, details as well as further rule execution should have the nature of not burdening the people in order to be flexible and dynamic, are generally delegated to rules below the Laws. In the frame to safeguard the flexibility and contemporariness of rules, the Tax Law frequently experiences reform of norms like the subjects, objects, tax withholders, the basis of tax imposition, methods of collection and withholding by other parties (including beneficiaries of services), tax tariffs as well as sanctions and those stated in the Law have obtained the objective approval of the people including the tax withholders through their representatives in the People's Representative Council (DPR), so that it has fulfilled the principle of formal and constitutional legality as well as binding all parties;

By fiscal and non-fiscal reason (particularly revenue), through the Law regarding VAT, as of 1 April 1985 Indonesia replaces the sales tax collection system from multi stage cascading effect based on the Law regarding Sales Tax of 1951 to become "multi stage non-cascading effect," namely the Value Added Tax (VAT) based on the Law regarding VAT (1984). The general Elucidation to the Law 8/1983 mentioned that VAT is sales tax imposed based on added value arising from the use of production factor in each company lane in preparing, producing, distributing, and trading of goods or the rendering of services to the consumers. The Elucidation to the Law 42/2009 confirms the VAT concept to become tax on the consumption of goods and services in the Customs Area imposed level wise in each production and distribution lane. To understand the substance of VAT, in *the Value Added Tax and Direct Taxation* (2009, eds. Michael Lang, et. al, IBFD), Sigrid Hemels mentioned that "technically VAT is tax on added value from goods and services rendered by entrepreneurs being independent economic activity agents. Nevertheless, effective wise it is tax on consumption. As an Indirect Tax, the objective of VAT (Sigrid; 2009) is the imposition of tax to tax addressees (the bearer of final tax burden – taxable bearer), namely the consumers, through the entrepreneurs as tax collectors (the entrepreneurs subject to tax – *taxable firms*). Because tax lessen the purchasing power of citizens (the consumers), traditionally-conventionally in accordance with taxation politics, then VAT should not hamper: (1) economic life of the public, (2) the smoothness of production and trade, (3) the achievement of people's happiness, and (4) the public interest (Santoso Brotodihardjo, ed 4, *Pengantar Ilmu Hukum Pajak* (Introduction to Tax Law));

Some basic legal principles being the background of the concrete regulations of the Law regarding VAT (Mertokusumo, 2008) are the followings:

A. According to the Elucidation to the Law 8/1983, among others, like the followings:

- (1) VAT and Sales Tax on Luxury Goods (PPnBM) collected by the Law regarding VAT is one of the new imposition system of Sales Tax replacing the Sales Tax of the time with the objective of among others to increase revenue, encouraging export, and equalization of tax burden (equality principle);
- (2) VAT and Sales Tax on Luxury Goods (PPnBM) regulated in the Law regarding VAT is one unity of the tax imposition on domestic consumption (domestic-consumption tax);
- (3) VAT may be collected several times on various links of company lanes (multi-stage levies). Nevertheless, because collected on added value from each delivery of goods or services on the next company lane, the tax burden is finally not that burdensome;
- (4) Added value emerges because of the use of production factor on each company lane in preparing, producing, distributing, and trading of goods or the rendering of services to the consumers. All costs to obtain and to retain profit including interest on capital, land lease, wages and profit of

the entrepreneur are added value, which is the basis of the imposition of VAT;

- (5) The Law regarding VAT regulates expressly and clearly how Goods, Services and Delivery of Goods or Delivery of Services are subjected to tax (objective tax on the Delivery of Goods and Services). In accordance with its character as tax on added value, goods, which are subject to tax are limited to those, which have undergone manufacturing process only, directly taken from its source without processing not subjected to Tax;
- (6) On the Delivery of Goods or Services a tax invoice shall be issued as a transaction evidence of the indebted tax on Delivery of Goods and evidence of tax collection, which can be credited by entrepreneurs subjected to indebted tax (VAT of the type of indirect-subtraction-invoice/tax credit method);
- (7) As a matter of principle, VAT, and the Sales Tax on Luxury Goods (PPnBM) are tax imposition on general tax on domestic consumption of Goods and Services. Because it is not domestic consumption, then the export of goods is subjected to 0% tariff and tax and the VAT, which is also included in the price of the exported goods, which may be returned in order to depress the principal price of goods and increase the competitiveness in the international market. Reversely, imported goods are subjected to the same tax with domestically produced goods (confirming the implementation of the jurisdiction of tax imposition of destination principle, internal and external neutrality).

B. The Elucidation to the Law 11/1994 adds several principles as follows:

- (1) Based on economic, social, and cultural considerations, not all kinds of Goods and Services are subjected to VAT (main-exception rule approach, negative list approach);
- (2) The Input Tax (PM) on acquisition of capital goods may be credited like PM from the acquisition of Goods Subject to Tax (BKP)/Services Subject to Tax (JKP) used for business activity, the delivery of, which is payable tax (Consumption-type VA1);
- (3) The principle of equal treatment to all taxpayers [entrepreneurs] or against cases in the field of taxation, which are the same in substance (nondiscriminatory, neutrality principle, *similia-similibus*).

C. The Elucidation to the Law 42/2009 adds the following principles:

VAT is a tax on the consumption of Goods and Services in customs areas, which is imposed level wise in each production and distribution lane.

From several principles of law in the General elucidation to the Law regarding VAT it appears that VAT and the Sales Tax on Luxury Goods (PPnBM) is one of the Sales Tax imposition system, namely an Indirect Tax on the general consumption of Domestic Goods and Services (*general Indirect Tax on domestic consumption of Goods and Services*). As part of Sales Tax, theoretically there shall be several legal characters of VAT (Terra & Kajus, 2008) among others: (1) general tax on consumption (tax on all Goods and Services, without discrimination of object, having a general nature, it is not specific like excise, which is not addressed to the consumption of production and distribution), (2) indirect (collected from the bearer of burden/the consumers through the lanes of production/import and distribution to the consumers, (3) the consumption of goods and services [(the objective is to impose tax on expenditures) – proksi the consumption of private persons (nonbusiness, including the government), on goods and services (as an objective tax)], (4) in accordance with its character as tax on added value, then goods, which are subject to tax are limited to those, which have been through manufacturing process only, directly taken from its source without processing not subjected to Tax, and (5) domestic consumption (domestic production as well as import; confirmation of the jurisdiction of VAT – destination principle; and the applicability of the neutrality principle of tax; because it is not domestic consumption, then exported goods are subject to 0% tariff VAT and tax, which is included in the price of re-exported goods. Conversely, imported goods are subjected to tax the same as domestic products;

With regard to the Neutrality Principle, Ben Terra & Julie Kajuss (*A Guide to the European VAT Directives, 2008, Introduction to European VAT* (Vol 1), IBFD, Amsterdam) refer to Article 1(2) *Recast VAT Directive (European Directive on VAT)* stating that the principle of common system of VAT requires that the implementation of tax on general consumption of goods and services be proportional

with the price of the goods and services, without dependence on the sum of transaction occurring in the production process and distribution prior to the stage of the imposition of tax;

With reference to that principle, the European Court of Justice (ECJ) renders several illustrations on Fiscal Neutrality in its various judgments as follow:

- (1) Equal treatment of the Goods and Services – Case C-384/01 -- the neutrality principle prevents different tax treatment on the same goods and services, in competition with other goods and services.
- (2) Avoiding cumulation of tax – Case C-155/01 -- tax imposition on delivery of services in the other member states, which has been subjected to tax by the state of origin gives rise to double taxation, which is not in line with the principle of neutrality.
- (3) Equality of similar economic activities – Case C-155/94 – tax treatment to all economic activities shall be the same, although the actors are different.
- (4) Equality of economic operators – Case C-141/00 -- the neutrality principle prevents different tax treatment among economic actors with the same activities; if one activity is exempted from tax, then the same activity being conducted by whomsoever shall be free from tax;
- (5) Neutral treatment of lawful and unlawful acts – Case C-349/96 -- the neutrality principle, which deems the lawfulness or unlawfulness of the delivery transaction of goods or services less relevant;
- (6) Consistency in application – Case C-291/92 -- consistent with less relevance of the unlawfulness of the delivery of goods or services, then whether a PM may be credited or not depends on the provision of the tax;
- (7) Neutrality towards the length of production and distribution chains – Case C-309/06 -- the delivery of the same goods and services shall bear the same tax burden (proportional) regardless of the length of the production and distribution lane to the consumers;
- (8) Neutrality eliminates distortion in competition – Case C-363/05 -- the neutrality prevents different VAT treatment on the same goods or services because it will distort competition;

This case involves a material review on the norm of the Elucidation to Article 4A section (2) letter b of the Law 8/1983 regarding Value Added Tax on Goods and Services and the Sales Tax on Luxury Goods as has been amended the latest by the Law 42/2009 regarding the Third Amendment to the Law 8/1983. Relevant with those three amendments, hereunder is a comparison of the understanding of Goods, Goods Subject to Tax (Article 1), a part of the tax object (Article 4) and not being a tax object (Article 4A) from each Law;

<b>UU 42/2009</b>	<b>UU 18/2000</b>	<b>UU 11 /1994</b>	<b>UU 8/1983</b>
Goods are tangible goods, which according to its nature or law may have a form of goods bergerak or brg tdk brgerak, and brg tdk berwujud	Goods are tangible goods, which according to its nature or law may have a form of goods bergerak or brg tdk brgerak, and brg tdk	Goods are tangible goods, which according to its nature or law may have a form of goods bergerak or brg tdk brgerak, maupun brg tdk	Goods are tangible goods, which according to its nature or law may have a form of goods bergerak maupun brg tdk brgerak
Goods Subject to Tax are goods not being subject to tax based on this Law..	Goods Subject to Tax are goods as mentioned hereinabove	Goods Subject to Tax are goods as mentioned herein above, which are	Goods Subject to Tax are goods as mentioned herein above as a result of

An entrepreneur is a private person or entity in whatever form, which in its business activity or its work produces imported goods,	An entrepreneur is a private person or entity mentioned above who in its business activity	An entrepreneur is a private person or entity in whatever form who in its company environment or its work produces	An entrepreneur is a person or entity in whatever form which in its company environment or its
Producing is an activity of processing through the process of form changing and/or the nature of goods from its original form to become new goods or having new utility or activity of natural resources, including ordering a private person or another entity to conduct that activity..	Producing is a processing activity through the process of form changing and/or the nature of goods from its original form to become new goods or gaining a new utility baru, or natural resource processing activity, including ordering a private person or another entity to conduct that activity..	Producing is a processing activity through the process of form changing and/or the nature of goods from its original form to become new goods or gaining a new utility, or natural resource processing activity, including ordering a private person or another entity to conduct that activity..	Producing is a processing activity through the process of form changing and/or the nature of goods from its original form to become new goods or gaining a new utility, including making, cooking, assembling, mixing, packing, bottling, and mining, or ordering person or another entity to conduct that activity..
VAT is to include delivery of Goods Subject to Tax in customs areas conducted by an entrepreneur	VAT is to include delivery of Goods Subject to Tax in customs areas conducted by an entrepreneur.	VAT is imposed on delivery of Goods Subject to Tax in customs areas, which is conducted by an entrepreneur.	VAT is imposed on delivery of Goods Subject to Tax is conducted in customs areas in the environment of company or processing work entrepreneur yg:
Requirement of delivery of Goods Subject to Tax to the tax debtor: tangible goods/intangible goods delivered shall be BKP,	Requirement of delivery of Goods Subject to Tax to the tax debtor: tangible goods/intangible goods delivered shall be Goods	Requirement of delivery of Goods Subject to Tax to the tax debtor: tangible goods/intangible goods delivered shall be Goods	Requirement of delivery of goods of the tax debtor: goods delivered Goods Subject to Tax, act of delivery subject to tax, delivery by

<p>2. Types of goods not subject to the Government Regulation (PPN) are certain goods in groups of goods as follow:</p> <p>a. goods product of mining or product of drilling taken directly from its source;</p> <p>b. goods basic commodities indispensable for people at large;</p> <p>c. mknan and miniman disajikan di htl, rest, RM,</p>	<p>1. Tangible movable or immovable goods and intangible, not subject to tax based on Law stipulated by the Government Regulation (PP).</p> <p>2. The stipulation of types of goods not subject to tax based on following groups: Tangible movable or immovable goods not subject to tax based on Law stipulated by the Government</p>	<p>Tangible movable or immovable goods not subject to tax based on Law stipulated by the Government Regulation (PP)</p>	
<p>Elucidation to Ps 4A(2)(b) Basic commodities indispensable for people at large covering:</p> <p>a. rice</p> <p>b. unhulled rice</p> <p>c, corn</p> <p>d. sagoo</p> <p>e. soybean</p> <p>f. salt containing iodine or not-containing iodine</p> <p>g. meat, namely fresh meat not processed but through slaughter, skinned, cut, cooled, frozen, packed or unpacked, salted, limed, acidified, preserved or by other means, or cooked</p>	<p>Elucidation to Art.4A(2)(b) Meant by basic commodities in this section is rice do unhulled rice, corn, sagoo, soybean, salt containing iodine or not-containing iodine.</p>	<p>Elucidation to Art.4A Stipulation of types of goods not subject to the Government Regulation (PPN) based on groups:</p> <p>a. goods product of agriculture, plantations, forestry directly plucked, directly taken, tapped directly from its source like crops, palm oil, rubber.</p> <p>b. goods product of husbandry, hunting/catching, or breeding, taken directly from its source, like beef cattle, poultry</p> <p>c. goods product of catching, or cultivation, fishing taken directly from</p>	

In brief, several amended formulations have been made on various provisions in the Law 8/1983



as follows:

### 1. Goods and Goods Subject to Tax

The term “goods” in the understanding of the Law 11/1994 has undergone an addition of the phrase “intangible goods” from the Law 8/1983, while the term of goods subject to tax (BKP) got rid of the phrase “as a result of the process of fabrication.” Moreover, the Elucidation to Article 1 letter c the Law 11/1994 with the phrase “Basically all goods are subject to tax, save if determined otherwise by this Law” has amended the formulation of the Elucidation to Article 1 letter c of the Law 8/1983 mentioning that goods subject to tax (BKP) are goods produced by manufacturing. Goods not originating from manufacturing, for example goods being agricultural products, plantations, forestry, stock husbandry, fishery, and other agricultural products not further processed, are not included in the term of goods subject to tax. That said, an amendment has been made to the substance of Goods Subject to Tax (BKP) from previously, which are only limited to goods produced by manufacturing leading to an element of added value, to become all kinds of goods regardless of the element of added value, including goods being agricultural products and as well as intangible goods may become Goods Subject to Tax (BKP). Whether goods be or not be subject to tax is not determined by the existence of added value due processing, but shall be based on the provision of the Law regarding VAT. Consequently, legally, and structurally as of the Law 11/1994, the substance of the object structure has been moved to “Goods and Service Tax” (GST), although the label is still “Value Added Tax” (VAT), because in principle all goods are subject to tax, save if determined otherwise in the Law. Legally, the VAT concept is a tax on added value on goods and services, while GST is a tax to include goods and services regardless of the existence of added value, although it is the same as VAT (by crediting of the PM).

### 2. Entrepreneur and producing

The term “entrepreneurs” in the understanding of the Law 8/1983 and the phrase “environment of the company or its works” in the Law 11/1994 has been amended in the Law 18/2000 and the Law 42/2009 to become “its business activity or work,” while in the term “producing” in the Law 11/1994, the Law 18/2000 and the Law 42/2009 the phrase “Not included in the term of producing” and so forth have been deleted. The replacement of the phrase “company” with “business activity,” is perhaps to obtain the idiom “business and work.” Meanwhile, the removal of the exemption from producing intends to support and extensify the object of taxation to include all goods including goods being agricultural products and the like, plucked or directly taken from its source without processing. The determination of goods not to be imposed by tax is regulated in the Law, namely in Article 4A.

### 3. The Provision of Article 4 section (1) letter a regarding the tax object and its Elucidation

The phrase “VAT is imposed on the delivery of Goods Subject to Tax (BKP) being conducted in the customs areas in the environment of the company or work by an Entrepreneur yang: 1).. ; 2).. ; 3).. ; 4).. ; and 5).. ;” in the Law 8/1983 has been replaced with the phrase “VAT is imposed on the delivery of Goods Subject to Tax (BKP) in the Customs Area being conducted by an Entrepreneur” in the Law 11/1994, the Law 18/2000 and the Law 42/2009 having a simpler and more efficient formulation by making them all Entrepreneurs Subject to Tax (PKP), save if regulated otherwise by a Law. That exemption has been regulated in Article 1 letter k of the Law 8/1983 stating that “Not included in the term of a PKP are small entrepreneurs whose definition and size are stipulated further by the Minister of Finance.” The exemption mentioned in the Law 42/20012 is retained in Article 3A section (1). In the PMK-197/PMK.03/2013 the size of small entrepreneurs exempted from PKP are those whose turnover in one year is not more than IDR4.8 billion. Consequently, all purchase of basic commodities other than the 11 kinds as mentioned in the Elucidation to Article 4A section (2) letter b from an Entrepreneur not being an Entrepreneur Subject to Tax (PKP) are exempted from VAT. As an indirect tax, VAT on all basic commodities can be avoided by shopping with an Entrepreneur Not-Subject to Tax (PKP), which are generally Micro, Small and Medium Businesses (*Usaha Mikro, Kecil, dan Menengah*, UMKM). The consumers would therefore raise the Micro, Small and Medium Businesses to become Medium and up Businesses, so that there are no longer again Micro and Small Businesses as they would grow to become Medium and up Businesses and hopefully become multinational companies.

4. The provision on goods exempted from tax based on Article 4A section (2) letter (b) and its Elucidation

By adding Article 4A in the Law 11/1994, legally, structurally, and technically the substance of VAT has become GST. That amendment appears from the replacement of the limitation on Goods Subject to Tax (BKP) only to goods being the products of manufacturing having added value, thereinto that all goods become Goods Subject to Tax, other than those not imposed by tax based on the Law with the stipulation thereof in the Government Regulation (PP). As of 1995, the drafters of the Law have actually inserted the GST tax object into the Law regarding VAT, so that all goods and services are in principle Goods Subject to Tax (BKP) and Services Subject to Tax (JKP), save if exempted from tax by a Law as stipulated in a Government Regulation (PP). Article 4A section (2) letter (b) of the Law 18/2000 reads [The stipulation of the kinds of goods not subjected to VAT as mentioned in section (1) is based on the group being the category of the following goods:'] “basic commodities, which are indispensable for the people at large.” Its Elucidation mentioned that “*Referred to with basic needs in this section are rice and unhulled rice, corn, sagoo, soybean, salt containing iodine as well as not-containing iodine.* If that Elucidation is compared to the main body of Article 4A section (2) letter (b), then the phrase in the Elucidation becomes “*are rice and unhulled rice, corn, sagoo, soybean, salt containing iodine as well as not-containing iodine,*” or only seven kinds of goods can be deemed to limit the phrase the main body of the laws or regulations regarding “*basic commodities, which are indispensable for the people at large.*” Meanwhile, the amendment of Article 4A section (2) of the Law 18/2000 by Article 4A section (2) of the Law 42/2009 by inserting the wording “*are certain goods*” in the formulation of “*Kinds of goods not imposed by VAT... in the category of the following goods*”:], making the formulation of the Elucidation to Article 4A section (2) letter b of the Law 42/2009 mentioning the 11 kinds of the basic commodities as the explanation to the main body of the Article 4A section (2) letter b, which reads “[Kinds of goods not subjected to VAT are certain goods in the group of] basic needs, which are indispensable for the people at large,” cannot be deemed to be limiting the authority of the main body of the Law, because the 11 kinds of those goods explain the phrase “certain goods in the group of basic needs.. ..”

Other than to amend several provisions mentioned hereinabove, in order to make the price of agricultural products and the like inexpensive and affordable for the people at large, based on Article 16B the Law 18/2000 and the Government Regulation (PP) 12/2001 as amended by the Government Regulation (PP) 31/2007 on import and/or submission of domestic Strategic Goods Subject to Tax (BKP) in the form of products of agriculture, plantations and forestry are exempted from VAT. Nevertheless, on 25 February 2014 the judgment of the Supreme Court (*Mahkamah Agung*, MA) Number 70P/HUM/2013 granted the application of a material review on several provisions of the Government Regulation (PP) 31/2007 by the Chamber of Commerce and Industry of Indonesia. As of 23 July 2014, that judgment came into force and for, which the SE-24/PJ/2014 was issued on 25 July 2014. The verdict of its judgment states that Article 1 section (1) letter c [certain Goods Subject to Tax (BKP), which has strategic nature are products of agriculture], Article 1 section (2) letter a [goods being agricultural products are goods produced from business activities in the field of agriculture, plantations and forestry, plucked, taken, or directly tapped from its source including those initially processed to extend its storage age or to ease its further process], Article 2 section (1) letter f [certain imported Goods Subject to Tax (BKP), which have strategic nature in the form of goods being agricultural products exempted from VAT], and Article 2 section (2) letter c [on the Delivery of strategic Goods Subject to Tax (BKP) in the form of goods being agricultural products exempted from VAT] based on the Government Regulation (PP) 31/2007 regarding the Fourth Amendment to the Government Regulation (PP) 12/2001 regarding Import and/or Delivery of Certain Strategic Goods Subject to Tax (BKP) exempted from VAT contravenes the Law regarding VAT, and therefore, are invalid and generally not applicable. Consequently, on the import and the domestic delivery of Goods Subject to Tax (BKP) of the products of agriculture, plantations, and forestry are VAT indebted.

Based on the above description and the opinion of the other experts, in relation to a material

review on the norms of the Elucidation to Article 4A section (2) letter b of the Law regarding VAT (the Law 42/2009) with Article 28C section (1) and Article 28I section (2) of the Constitution of 1945 we may convey several opinions as follow:

*Firstly:* the provisions of Article 4A of the Law 11/1994, the Law 18/2000, and the Law 42/2000 are required to render relief on several categories of the basic commodities of the people at large, because the Law 11/1994 has amended the substance of VAT to become GST with the assumption that all goods are subject to tax (in the Law 8/1983 it is limited to manufactured goods only), save if determined otherwise by Law. The provision of Article 4A section (2) letter b of the Law regarding VAT states that the kinds of goods not subjected to VAT are certain goods in the category of the basic commodities, which are indispensable for the people at large as part of the effort to fulfill the right to self-development through the fulfillment of basic needs as mentioned in Article 28C section (1) of the Constitution of 1945. Such is also in order for each person to be entitled to non-discriminative treatment based on whatsoever, included in taxation, as mentioned in Article 28I section (2) of the Constitution of 1945, then the exemption of VAT on certain groups of goods of basic needs apply to all citizens without exception. Even if they shop with an Entrepreneur Not-Subject to Tax, they will also be exempted from VAT on all goods, including basic commodities. Therefore, the provision of Article 4A section (2) letter b and its Elucidation are in accordance with the provision of Article 28C section (1) and Article 28I section (2) of the Constitution of 1945. The same opinion has also been conveyed by the expert Sony Maulana Sikumbang SH MH on 18 July 2016;

*Secondly:* the mentioning of the 11 kinds of goods in the category of basic commodities, which are indispensable for the people at large in the Elucidation to Article 4A(2)(b) is intended to explain the phrase “are certain goods in the group of the kinds of goods not subjected to VAT” in the legal norm of the provision of Article 4A section (2) letter b of the Law regarding VAT (the Law 42/2009). Therefore, the mentioning of the 11 kinds of the basic commodities (to explain word “certain”) is in accordance with and cannot be deemed to limit the legal norm of the provision of Article 4A section (2) letter b of the Law regarding VAT. Apparently, the Elucidation to the Law 18/2000 indeed limits the legal norm of the provision of the main body of Article 4A section (2) letter b, because it limits only to 7 of the kinds of the basic commodities, although in the main body of the provision there is no indication of limitation, like the word “certain.” Nevertheless, the Government has attempted to eliminate this definition by issuing the Government Regulation (PP) 12/2001 as has been amended by the Government Regulation (PP) 31/2007. Unfortunately, the judgment of the Supreme Court (*Mahkamah Agung*, MA) Number 70P/HUM/2013, dated 25 February 2014 has revoked the enactment of that Government Regulation (PP). Hopefully this revocation brings about the blessing of revenues. With regard to the amendment to the coming Law regarding VAT, all court judgments, which are not in line and in accordance with conceptual design, the spirit, and the paradigm of a modern VAT need to be evaluated;

*Thirdly:* In taxation politics, tax collection is designed to not hamper the economic life of the public, the smoothness of production and trade, the achievement of people’s happiness, and the public interest. Moreover, to lessen regression VAT on earnings, the VAT policy selects three groups of tax tariffs based on the type of goods, whether they are primary, secondary, or tertiary needs. Primary goods may be exempted or be subjected to low tariff, secondary goods be subjected to standard tariff, while tertiary goods be subjected to high tariff or the standard VAT tariff added by the Government Regulation Sales Tax on Luxury Goods (PPn). How many lots of the Primary goods can be exempted VAT, generally depends on the fiscal policy of the government. With the less optimum performance of tax revenues, like conveyed by the expert Mr. Yustinus Prastowo SE. MHum, MA on 18 July 2016, with a tax stagnant ratio indicator around 12%, there is an optimization limit on the Goods Not Subjected to Tax. Other data mentioned that revenue achievement in 2015 in the amount of 73.68%, tax ratio VAT 3.56% (, while the minimum ratio should be 4%), Indonesia’s VAT performance effort is around 66% (Thailand and Vietnam 90%), and revenue achievement in 2016 to date is around 34%. Hopefully the future of the Tax Amnesty may encourage taxation performance towards a higher effectiveness of revenue achievement;

*Fourthly:* One of our country's objectives is to increase general welfare. Therefore, the fulfillment of basic needs, particularly food for the people at large is one of the work program priorities of the government. The execution of that program requires funding including from tax, and/or sacrifice of the tax revenue in the form of "supply side policy" (the provision of tax incentive for the producers in order to produce more in order to achieve cheaper price) or the "demand side policy" (exempting VAT from consumers to make its price affordable). An increase of the need of government services and development cost, encouraging the Government to make greater efforts to get out of the tax stagnation ratio of 12% and to increase revenue from VAT/GST from 3.56% to achieve an international average minimum level of 4%. How many kinds of the basic commodities indispensable for the people at large to be named in the Elucidation to Article 4A section (2) letter b of the Law 42/2009 is a part of the fiscal policy. Consequently, without obtaining other productive additional VAT object produces more additional revenue, because it does not contravene the legal norm of the main body of Article 4A section (2) letter b of the Law 42/2009, it will not be easy to amend its Elucidation without tax reform with meticulous consideration.

## **2. Refly Harun, S. H., M.H.**

The subject matter of the petition of the Petitioners is a review on the Elucidation to Article 4A section (2) letter b of the Law Number 8 of 1983 (Law regarding VAT), which has been amended three times, finally by the Law Number 42 of 2009, being assumed to contravene the Constitution of 1945, namely Article 28C section (1) regarding "The right to self-development through the fulfillment of basic needs" and Article 28I section (2) regarding "*The right not to be discriminated and to obtain protection against such discriminative treatment.*" The criteria of the Law Number 12 of 2011 regarding the Formation of Laws and Regulations regulates the criterion regarding elucidations as follows:

- (i) Paragraph 176 states, "*the Elucidation functions as official interpreter of the lawmakers and regulations on certain norms in the main body of laws or regulations. Therefore, an elucidation contains only a description of a word, phrase, sentence, or synonym/foreign terms in a norm, which can be equipped by examples. The Elucidation as a means to clarify a norm in the main body of laws or regulations may not cause obscurity of the mentioned norm.*"
- (ii) Paragraph 177 of the Attachment to the Law Number 12 of 2011 said, "*the Elucidation cannot be utilized as legal base for the making of further regulations and may not put down a formulation containing a norm.*"
- (iii) Paragraph 178 of the Attachment to the Law as such (*a quo*) said, "*the Elucidation shall not utilize a formulation the content of, which contains a hidden amendment against the provision of laws and regulations.*"
- (iv) Paragraph 186 of the Attachment to the Law as such (*a quo*) said, "*The formulation of an elucidation to article by article shall pay regard to the following matters.*
  - a. *It does not contravene the principal material regulated in the main body of laws or regulations.*
  - b. *It does not extend, narrows, or add meaning to a norm existing in the main body of laws or regulations.*
  - c. *It does not affect repetition on the principal material regulated in the main body of laws or regulations.*
  - d. *It does not repeat a description of word, term, phrase, or the understanding already contained in general the provision of and/or,*
  - e. *It does not make a delegation of a formulation.*"

The question is, whether the elucidation to Article 4A section (2) letter b of the Law regarding VAT questioned by the Petitioners have indeed caused norm obscurity? To put down a formulation containing a norm? To contain a hidden amendment, which contravenes the principal material regulated in the main body of laws or regulations? To extend, to narrow, or to add a meaning to a norm existing in the main body of those laws or regulations?

The expert admitted that at best is that all materials in the elucidation to Article 4A section (2) letter b of the Law regarding VAT be integrated into the main body of laws or regulations, in order not

to raise doubt and not be interpreted as if it contravenes the guideline of making an elucidation, as listed in the Attachment to the Law Number 12 of 2011 regarding the Formation of Laws and Regulations;

Nevertheless, the fact is that the lawmakers frequently assess that the inclusion of that material, which is too technical into the main body of laws or regulations will cause a Law becoming very technical, so that the testimony as such have frequently been inserted into an elucidation, which afterward would give rise to debate whether that would give rise to a new norm, whether there is hidden agenda or not? To the extent that an inclusion from the perspective of legal morality does not contain hidden agendas deliberately inserted into the elucidation, the expert opines that those matters can still be deemed as imperfection in legal drafting, so that it cannot immediately be deemed to contravene the constitution;

For instance, in 2015, the Constitutional Court eliminated an elucidation declared to have no legal binding force, when into the amendment to the Law Number 32 of 2004 a limitation was inserted namely that only political parties having seats in the Regional People's Representative Council (*Dewan Perwakilan Rakyat Daerah*, DPRD) may submit candidate heads of regions. Mean, while the norm states that all political parties being participants to a General Election may propose, yet the elucidation limits it. Afterward the Constitutional Court has revoked the elucidation as such (*a quo*). The expert assumed that there is a hidden agenda from the political parties in the case, particularly the political parties having seats in the People's Representative Council (*Dewan Perwakilan Rakyat*, DPR) the majority, which had limited it. That provision was not included in the main body of the Law, but was inserted in the elucidation;

From the perspective of legal morality, the expert opined that the judgment was correct, but the expert understood in this context that those matters had rather a technical nature, save if there was other information, which could explain, which matters were basic commodities exempted from the VAT. One can imagine that if the article is only limited to that as formulated in the Law, namely that the kinds of goods not subjected to Value Added Tax are certain goods in the category of goods namely basic commodities, which are indispensable for the people at large, without any elucidation, then this norm would indeed give rise to contention, would give rise to legal uncertainty, and bear the potential to contravene the constitution;

According to the expert, that elucidation indeed explains better although it gives a limiting impression. Therefore, the expert opines that in the future matters like this should be included in the main body of laws or regulations in order not to be deemed to be or not be in accordance with the guideline of making elucidations as regulated in the Law Number 12 of 2011, but not at once be deemed to contravene the constitution, because the expert did not view that there was willfulness to insert this provision in the elucidation or hidden agendas. Suppose that elucidation is not in the elucidation to the Law as such (*a quo*) and that material be delivered to the President to regulate it in a Government Regulation, then the query is whether an elucidation to a law has a higher or lower degree than a Government Regulation? It occurs frequently that a norm provision is not clearly regulated in a government regulation. If rice, sweet potato, and those others as regulated in a Government Regulation of, which the provision as such (*a quo*) is not regulated in a Law, then whether the degree of a Government Regulation may be higher if compared to an elucidation to that Law;

The expert queried whether an elucidating norm as such (*a quo*) has eliminated or lessen the right to self-development through basic needs as regulated in Article 28C section (1) of the Constitution of 1945 regarding the right to self-development through the fulfillment of basic needs and Article 28 section (2) of the Constitution of 1945 regarding the right to be free from discriminative treatment to obtain protection against discriminative treatment;

Has that provision of elucidation eliminated, lessen, negated the constitutional rights in Article 28C section (1), particularly the rights of the Petitioners. Have the Petitioners not been able to self-development to fulfill basic needs due to the existence of the elucidation to Article as such (*a quo*)? According to the expert, this is a strong forgone logic;

It deserves also to be questioned, where the discrimination lies, what are those basic commodities? To the best of the expert's knowledge, that discrimination is against people, and not against basic commodities;

If the formulation petitioned by the Petitioners are followed namely that basic commodities indispensable for the people at large are goods originating from agricultural products and so forth as mentioned in the term of “producing” in Article 1 number 16 Law as such (*a quo*) is not subject to VAT, then the Constitutional Court has been trapped in making a new norm;

The expert explained the above-mentioned queries as follows:

1. The provision in Article 4A section (2) letter b of the Law regarding VAT states, “*Kinds of the goods not subjected to value added tax are certain goods in the category the following goods. B. Basic needed commodities, which are indispensable for the people at large.*” According to the expert if there is no other elucidation to the article as such (*a quo*), then indeed it will contravene the constitution because it would give rise to legal uncertainty. If there is no further elucidation in its laws and regulations, then it will be difficult to detail the kinds of the basic commodities indispensable for the people at large because of its lots of kinds. For instance, in a region it is mentioned, “Sagoo is a basic need,” but in another place people say, “No”; Certainly, this provision shall be followed by another norm;
2. Hypothetically if that elucidation was revoked because it was deemed to give rise to a new norm, deemed to limit the provision, which has been contained in the main body of laws or regulations, the query is what is the criterion of basic needs indispensable for the people at large because the article as such (*a quo*) does not clearly mention it. Would that unclear matter be regulated in a Government Regulation? It should be like that. Nevertheless, the query is why the Government Regulation is like more entitled than an elucidation to the Law, whether a norm of the Government Regulation is higher than the norm in the elucidation to Law? An elucidating norm according to the Attachment to the Law Number 12 of 2011 does not require to give rise to a new norm, but in daily life Government Regulations make lots of new norms, making new provisions. If that elucidation to the Law be revoked, and becomes regulated in a Government Regulation, there is no longer a representation because a Government Regulation are merely products of the executives. If the elucidation to a Law lacks, at least there is no representation from the people;
3. Have the 11 items already comprised basic needs of the people Indonesia, but from the perspective of legal drafting this article requires an additional testimony, whether in the main body, in the next section or article, in the elucidation, or be delegated in the making of regulations in the lower level of government, like in a government regulation or presidential regulation. But certainly, this norm requires an additional testimony because this norm is unclear, is not concrete because it only states that basic needs indispensable for the people at large are not subject to VAT. The expert meant that the phrase “basic needs indispensable for the people at large” is still unclear, should speak a norm of a Law and should not give rise to doubt. It should be concrete;
4. In the debate regarding the elucidation, the Constitutional Court in its judgment of 2015 has revoked an elucidation stating, “*only political parties having seats, which can submit nomination of a candidate head of a region,*”, while its norm says, “*can be proposed by political parties and joint political parties in its main body of laws or regulations,*” but in its elucidation, it was inserted “*which only have seats.*” The expert is of the opinion that from the perspective of legal morality there is a hidden agenda, namely a hidden agenda of the majority parties being in control of the parliament or in the regional parliaments. Therefore, a provision like that should be revoked from the perspective of morality because it contains a rule, which has been deliberately smuggled into, with the intention to avoid debate in the main body of the laws or regulations, but included in the elucidation. The expert is not aware about (shortcoming of information) whether the article as such (*a quo*) contains a hidden agenda. That is the duty of the Petitioners to substantiate the existence or non-existence of a hidden agenda in those 11 commodities;
5. According to the Petitioners if the population A eat meat, the population B eat fish, why should meat be free of VAT, while fish is subjected to VAT, is that discrimination? The expert opined, for example meat is subjected to VAT for a certain group of the public, but meat is not subjected to VAT for another group of the public, then that is discriminative because there is discrimination of

treatment. But if fish is subjected to VAT, while meat is not subjected to VAT, the expert doubts that that is discriminative;

If the principle of “no taxation without representation” is applied, then the statement that all goods are subject to tax. Yet the query is who would determine it, whether the lawmakers as representation of the people having the authority to make all goods be subject to tax;

Tax imposition can be conducted to citizens if there has been an approval of the people through their representatives, therefore it shall be clear as to what things can be subjected to tax. The Petitioners have indeed petitioned the converse article, namely the kinds of staple food indispensable for the people at large mentioned in the provision as such (*a quo*) not be subjected to tax but is not subjected to tax because the provision as such (*a quo*) may be understood as “All goods are subjected to tax save those not subjected to tax”. According to the expert such provision indeed contravenes the constitution adhering to the principle of “no taxation without representation”;

[2. 4] Considering that the Petitioners conveyed a written conclusion accepted at the Office of the Clerk of the Court on 1 August 2016 basically indicating that they remain on their position;

[2. 5] Considering that in order to abbreviate the description of this judgment, then all things written in the minutes of the trial are contained in and is an inseparable part of this judgment;

### 3. LEGAL CONSIDERATION

#### Authority of the Court

[3. 1] Considering that based on Article 24C section (1) of the Constitution of the Republic of Indonesia of 1945 (hereinafter referred to as the Constitution of 1945), Article 10 section (1) letter a of the Law Number 24 of 2003 regarding the Constitutional Court as has been amended by the Law Number 8 of 2011 regarding the Amendment to the Law Number 24 of 2003 regarding the Constitutional Court (State Gazette of the Republic of Indonesia of 2011 Number 70, Supplement to the State Gazette of the Republic of Indonesia Number 5226, hereinafter referred to as the Constitutional Court Law), and Article 29 section (1) letter a of the Law Number 48 of 2009 regarding Judicial Powers (State Gazette of the Republic of Indonesia of 2009 Number 8, Supplement to the State Gazette of the Republic of Indonesia Number 4358), the Court is authorized, among others, to adjudicate at the first and final level whose judgment has final nature to review a Law against the Constitution of 1945;

[3. 2] Considering that because the petition of the Petitioners is a petition to review the constitutionality of a norm of Law, *in casu* the Law Number 8 of 1983 regarding Value Added Tax on Goods and Services and the Sales Tax on Luxury Goods, as has been amended lastly by the Law Number 42 of 2009 regarding the Third Amendment to the Law Number 8 of 1983 regarding Value Added Tax on Goods and Services and the Sales Tax on 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, hereinafter referred to as the Law 42/2009) against the Constitution of 1945, then the Court is authorized to adjudicate on the petition as such (*a quo*);

#### Legal Standing of the Petitioners

[3. 3] Considering that based on Article 51 section (1) of the Constitutional Court Law along with its Elucidation, those entitled to submit a petition to review a Law against the Constitution of 1945 are those having assumed that their constitutional rights and/or authorities granted by the Constitution of 1945 have been harmed by the applicability of a Law, namely:

- a. Indonesian individual citizens (including group of persons having the same interest);
- b. unities of the adat law societies to the extent that they are still alive and corresponding with the development of its society and the principle of the Unitary State of the Republic of Indonesia as is regulated in Laws;
- c. public or private legal entities; or
- d. state institutions;

As such, the Petitioners in a review of Law against the Constitution of 1945 shall explain first:

- a. their position as Petitioners as mentioned in Article 51 section (1) of the Constitutional Court Law;
- b. whether there is or there is no loss of constitutional rights and/or authorities granted by the Constitution of 1945 caused by the applicability of the Law pleaded for review in their position as mentioned in letter a;

[3. 4] Considering that the Court as of its Judgment Number 006/PUU-III/2005 dated 31 May 2005 and the Judgment Number 11/PUU-V/2007 dated 20 September 2007 as well as further judgments, is of the opinion that the loss of constitutional rights and/or authorities as mentioned in Article 51 section (1) of the Constitutional Court Law shall comply with 5 (five) requirements, namely:

- a. there are constitutional rights and/or authorities of the Petitioners granted by the Constitution of 1945;
- b. those constitutional rights and/or authorities by the Petitioners are assumed to have been harmed by the applicability of the Law pleaded for review;
- b. that constitutional loss shall have a specific and actual nature or at least bears the potential, which according to normal reasoning can be ascertained that it will happen;
- c. there is a causal relationship between the mentioned loss and the applicability of the Law pleaded for review;
- d. there is the possibility that by granting the petition, constitutional loss like postulated will not or will not happen again;

[3. 5] Considering that based on a description of the provision of Article 51 section (1) of the Constitutional Court Law and requirements of the loss of constitutional rights and/or authorities as described hereinabove, furthermore the Court will consider the legal standing the Petitioners as follows:

1. Whereas the provision pleaded for review in the application as such (*a quo*) is the Elucidation to Article 4A section (2) of the Law 42/2009, which reads, “*Basic needed commodities, which are indispensable for the people at large comprise:*
  - a. *rice;*
  - b. *unhulled rice;*
  - c. *corn;*
  - d. *sago;*
  - e. *soybean;*
  - f. *salt, either containing or not containing iodine;*
  - g. *meat, namely fresh meat without processing, but has gone through slaughter process, skinned, cut, cooled, frozen, packed or not packed, salted, limed, acidified, preserved by other means, and/or boiled;*
  - h. *eggs, namely unprocessed eggs, including cleaned eggs, salted, or packed;*
  - i. *milk, namely dairy milk either having gone through cooling process as well as heated, not containing added sugar or other materials, and/or packed or not packed;*
  - j. *fruits, namely plucked fresh fruits, either having gone through the process of washing, sorted, shelled, cut, sliced, graded, and/or packed or not packed; and*
  - k. *vegetables, namely plucked fresh vegetables, washed, drained, and/or stored at low temperature, including minced fresh vegetables”;*
2. The Petitioners explain their qualification in their petition as such (*a quo*) as Indonesian individual citizens, stating that they are consumers of food commodities (Petitioner I) and as a merchant of food commodities (Petitioner II).
3. The Petitioners assumed that the application of the Elucidation to Article 4A section (2) of the Law 42/2009, the formulation of, which is as described under number 1 hereinabove, has harmed their constitutional rights, *in casu* the right to self-development through the fulfillment of basic needs for the sake of quality of life improvement, as regulated in Article 28C section (1) of the Constitution of 1945, and the right to be free from discriminative treatment, as regulated in Article 28I section (2) of the Constitution of 1945, the elucidation of, which if abbreviated is basically as follows:

For the Petitioner I:



- a. as a housewife, the Petitioner I feel that the provision in the Elucidation to Article 4A section (2) of the Law 42/2009 rather incriminates in her effort to fulfill the nutritional sufficiency of her family;
- b. a variety of the kinds of foodstuff is needed to fulfill the nutritional sufficiency, which is not only limited to the eleven kinds of commodities as regulated in the mentioned Elucidation to Article 4A section (2) of the Law 42/2009;
- c. for Indonesian communities the majority of, which are below the poverty line and having low purchasing power, the limitation of the kinds of the basic commodities as regulated in the Elucidation to Article 4A section (2) of the Law 42/2009 obstructs the fulfillment of basic needs;

For the Petitioner II:

- a. as a merchant of local food commodities, the Petitioner II feels to have been discriminatively treated by the provision in the Elucidation to Article 4A section (2) of the Law 42/2009 due to a difference in local food commodities prices not included in the eleven kinds of food commodities as regulated in the provision as such (*a quo*) due to the application of VAT thereto;
  - b. the staple food of Indonesians is different, in the context of territory (*in casu* between the western part of Indonesia and the eastern part of Indonesia) as well as in the context of habitation (*in casu* between the coastal communities and the urban communities). Nevertheless, due to the existence of the provision as such (*a quo*), the treatment against foodstuff, which are equally staple food have been different because they have been categorized as those exempted from VAT and those subjected to VAT resulting in the occurrence of price difference;
  - c. the existence of demand of the need of inexpensive food has led to the smuggling of basic commodities having lower prices (as they are not subject to VAT) if compared to local commodities (as they are subjected to VAT), which is the merchandise of the Petitioner II, so that that has harmed the Petitioner II.
4. Based on the explanation of the Petitioners regarding the loss of their constitutional rights as described in number 2 and number 3 hereinabove, the Court opines:
- a. Whereas the provision of the Law pleaded for review in the application as such (*a quo*) is related to basic needs directly related to the fulfillment of basic needs, which are constitutional rights of the citizens, so that all citizens have the interest in the policy of the state related to this problem, which in this regard is set out in the form of a Law;
  - b. Whereas that regulation of basic needs being directly related with the fulfillment of basic needs being the constitutional rights of citizens is in line with the spirit of the Constitution of 1945, which mandates the state to advance general welfare, as contained in the fourth paragraph of the Preamble of the Constitution of 1945, and therefore it is an obligation of the state to strive for it;
  - c. Whereas based on the consideration in letter a and letter b hereinabove, to the extent related to the constitutional rights for the fulfillment of basic needs of each citizen, as regulated in Article 28C section (1) of the Constitution of 1945, the Court may accept the explanation of the Petitioner I regarding her assumption on the mentioned loss of constitutional rights as caused by the applicability of the Elucidation to Article 4A section (2) of the Law 42/2009;
  - d. Whereas related to the Petitioner II, although with the explanation of the Petitioner II in his application, no discrimination can be claimed to have happened. Nevertheless, with that explanation there is sufficient reason for the Court to accept the reasoning of the Petitioner II that as a merchant of local food, the Petitioner II is indirectly also harmed in his constitutional rights to fulfill his basic needs due to the different treatment against food commodities, which are equally categorized as basic commodities.

Based on all the considerations in number 1 up to number 4 hereinabove, the Court is of the opinion that the Petitioners have legal standing to act as Petitioners in their petition as such (*a quo*).

[3. 6] Considering that because the Court is authorized to adjudicate on the petition of the Petitioners as

such (*a quo*) and the Petitioners have legal standing to act as Petitioners, then Court will furthermore consider the subject matter of the petition.

#### Subject Matter of the Petition

[3. 7] Considering that the subject matter of the petition as such (*a quo*) is the postulate of the Petitioners, that the Elucidation to Article 4A section (2) of the Law 42/2009 contravenes the Constitution of 1945. If the arguments of the Petitioners (which is set out completely in the part of the State of the Case) are abbreviated, they are in essence as follows:

1. People are entitled to food, which is inexpensive, affordable, and nutritious. Food or the need of food is part of the physiological needs of humans, therefore it is part of the basic needs. The Constitution, *in casu* Article 28C section (1) of the Constitution of 1945, confirms the right of basic needs fulfillment that is part of the right to self-development for the sake of quality of life improvement. That is also accommodated by Article 4A section (2) letter b of the Law 42/2009 by not imposing VAT against “basic commodities, which are indispensable for the people at large.” Nevertheless, according the Petitioners, the Elucidation to Article 4A section (2) letter b of the Law 42/2009 has narrowed the scope of “basic commodities, which are indispensable for the people at large,” so that it only comprises 11 (eleven) kinds;
2. The State, according the Petitioners, has the obligation to fulfill the need of each citizen of food for the quality of life improvement by making equitable regulations to enable them access and capability to fulfill their daily basic needs, so that the limitation only against the eleven kinds of goods exempted from the imposition of VAT, as regulated in the Elucidation to Article 4A section (2) letter b of the Law 42/2009, has led to the unfulfillment of that obligation of the state because it limits access and the capability of the public to the fulfillment of their need of food;
3. With limiting only to eleven kinds of the basic commodities being exempted from VAT, as regulated in the Elucidation to Article 4A section (2) letter b of the Law 42/2009, according the Petitioners, a discriminative treatment has occurred. There is different treatment among the same kinds of the basic commodities, whereby one is subjected to VAT, while the other not;
4. The Elucidation to Article 4A section (2) letter b of the Law 42/2009, according the Petitioners, has deviated from the spirit or nature of its norm. The Elucidation to, which according to the Law Number 12 of 2011 regarding the Formation of Laws and Regulations is means to clarify a norm in the main body of laws or regulations in the case as such (*a quo*) has indeed caused obscurity, change, or conflict of meaning of its norm;
5. According to the Petitioners, there have been heretical thought in the formulation of the provision of the Law pleaded for review related to the stipulation of added value on goods deserving to be subjected to VAT, whereby the VAT should be imposed due to the existence of added value or value to goods. As such, according the Petitioners, VAT should only include goods or commodities having undergone change of form from its original form and added value of those goods or those commodities, so that they become “new goods.” Meanwhile, the enactment of the Elucidation to Article 4A section (2) letter b of the Law 42/2009 ensues in the goods or commodities beyond the eleven kinds mentioned in the Elucidation to Article 4A section (2) letter b of the Law 42/2009 will become subjected to VAT, while those goods or commodities are equally categorized as basic commodities, which have not gone through added value or value to goods;
6. Perceived from a wider perspective, the Petitioners opined that the enactment of the provision in the Elucidation to Article 4A section (2) letter b of the Law 42/2009 threatens the cultural variety of Nusantara (Indonesia), *in casu* culinary wealth, which should obtain protection from the state. The reason is, the culinary wealth of Nusantara is not only sourced from and limited to the eleven basic commodities as mentioned in the Elucidation to that Article 4A section (2) letter b of the Law 42/2009;
7. The Petitioners opined that the enactment of the Elucidation to Article 4A section (2) letter b of the Law 42/2009 is also unjust. The reason is, the basic needs are not included into those eleven basic commodities in the Elucidation are subjected to VAT, while the state indeed exempts the goods

categorized as luxurious and of very tertiary nature only affordable by those haves from the imposition of VAT on Luxury Goods.

[3. 8] Considering that to support the arguments of their petition, the Petitioners have furnished instruments of evidence in the form of letters or writings marked as P-1 up to P-29, 3 (three) witnesses, and 3 (three) experts (testimony of the witness and the expert of the Petitioners are contained completely in the part of State of the Case);

[3. 9] Considering that although the Court has accepted the testimony of the People's Representatives Council (*Dewan Perwakilan Rakyat, DPR*) on the date 23 August 2016. Nevertheless, because that testimony was conveyed late after the trial was declared finished, then the Court did not consider that testimony;

[3. 10] Considering that the Court has read and heard the testimony of the President (the Government) in the trial dated 22 June 2016 along with the expert submitted by the President (testimony of the President and the expert of the President are contained completely in the part State of the Case);

[3. 11] Considering that after the Court has meticulously read the petition of the Petitioners, examined the submitted evidences, read and heard the testimony of the People's Representatives Council (DPR) and the President, as well as heard the testimony of the experts, either submitted by the Petitioners as well as by the President, the Court is of the opinion that the constitutional issue to be considered by the Court is whether it is true that the provision, which limits the scope of "basic commodities, which are indispensable for the people at large," which only comprise 11 (eleven) kinds or the category as contained in the Elucidation to Article 4A section (2) letter b of the Law 42/2009 contravenes the Constitution of 1945 and therefore, shall be declared to have no binding legal force? The Court is of the opinion regarding that constitutional issue, as follows:

1. Whereas the fulfillment of the basic commodities, let alone, which are indispensable for the people at large, is an inseparable part of the effort to advance the general welfare, which is the constitutional obligation of the state (the Government) to actualize it, as confirmed in the fourth paragraph of the Preamble of the Constitution of 1945, which in the end disembogues in the effort to manifest social justice for all the Indonesian people being one of the basic aspirations of the state and the Indonesian people as an independent and sovereign state and nation, as contained in the basis of the state Pancasila. Furthermore, whenever the fulfillment of basic needs is more confirmed again as constitutional rights – *in casu* the right to fulfill the basic needs being part of the right to self-development and the right to live prosperous physically and emotionally, as regulated in Article 28C section (1) and Article 28H section (1) of the Constitution of 1945 –, then that constitutional obligation of the state is more confirmed.
2. Whereas, furthermore, from the perspective of the existence of Indonesia as part of the international society, Indonesia has ratified the International Covenant on Economic, Social and Cultural Rights through the Law Number 11 of 2005 regarding Ratification of the International Covenant on Economic, Social and Cultural Rights (CESCR), so that there is an obligation derived from international law (international legal obligation) for Indonesia to respect, protect, and to fulfill the economic, social and cultural rights regulated in that Covenant. The scope of the rights categorized into economic, social, and cultural rights comprises (however not limited to) rights to decent work, inadequate standard of living, housing, food, water and sanitation, social security, health, and education [vide further Article 7 up to Article 15 of the CESCR). As such, the obligation to fulfill basic needs, *in casu* the need of adequate and affordable food nowadays is not only constitutional obligation but also an international law obligation that requires the serious and hard work of the state (through the Government) to guarantee respect, protection, and its fulfillment.
3. Whereas different from civil and political rights, the respect, protection, and fulfillment for which require the least interference from the state, the fulfillment of respect, protection, and fulfillment of economic, social, and cultural rights indeed requires lots of interference from the state, *in casu* including the right of food or basic needs. Therefore, particularly the fulfillment of economic, social, and cultural rights depends very much on the capability of the state. Nevertheless, capability

cannot and may not be utilized as a reason to release the state from its obligation to fulfill those rights, which shall be understood and placed in the frame of tolerance and understanding that the fulfillment of economic, social, and cultural rights cannot and is impossible to be performed at once. The efforts, hard work, and seriousness of the state to respect, protect, and to fulfill those economic, social, and cultural rights, particularly in the context of petition as such (*a quo*) of the right of fulfillment of the need of food, shall appear among others in its legislation policy in the frame of performing national development, particularly the legislation policy set out in the form of Laws, including (however not limited to) the Law in the field of taxation.

4. Whereas, in another perspective, the capability of the state in performing national development, including the fulfillment of its constitutional obligation for the fulfillment of the rights of citizens of the need of food, the rise of the need to collect tax and matters is justified as a matter of doctrine as well as constitutionally. Although theoretically and ideally it is feasible for the state to not collect tax if the state revenue from the other sectors allows it, such is not realistic and the fact is that to date this tax still holds the first rank and is the main source of funding of the state [vide further Judgment of the Court Number 57/PUU-XIV/2016 in a review of the Law on Tax Amnesty). Therefore, the promulgation and the enactment of the Law 42/2009 shall be placed in this frame of thought.
5. Whereas although the problem, which is related to doctrinal basis as well as constitutional authority of the state to collect tax is no longer a constitutional issue prone to debate in its relation to the Value Added Tax (VAT), although as a matter of doctrine as well as practice, countries have accepted the general principle that basically all goods or services are subjected to tax save if determined otherwise by a Law, the query is why against “basic commodities, which are indispensable for the people at large” needs to be exempted from VAT? The Court considers that query as follows:
  - a. As has been explained in the consideration in number 1 up to number 3 hereinabove, the fulfillment of basic needs is part of the effort to advance the general welfare and therefore is the constitutional obligation of the state to guarantee its fulfillment in accordance with the capability it has. This is recognized by the President (the Government) as conveyed in his testimony in the trial dated 22 June 2016, which among others stated, “*The basic needs are goods related to the livelihood of the people at large high in the scale of fulfillment as well as to become supporting factor for public welfare. The basis of not imposing VAT on goods as the above mentioned is to ensure that the public gain the basic needs, which are expected to support the nutritional needs of the public.*” In another part of his testimony, the President (the Government) affirmed, “*In order to guarantee the sense of justice of the whole the public and to protect the general welfare by encouraging the fulfillment of basic needs of the public comprehensively, the Government render the exemption of not being subject to VAT on food material, which according to the Government is staple food material, which are indispensable for the public in general*” [vide Testimony of the President (the Government) page 11];
  - b. Factually and sociologically, a part of the population or citizens still live below the poverty line, so that according to normal reason, one can conclude that they are categorized into the group of population or those poor citizens who indeed requires the exemption of VAT on those basic commodities considering that VAT is the objective of tax, which imposition is determined by the tax object, so that if basic commodities are subjected to VAT, then the poor public would also bear VAT when they purchase those goods for the need of consumption;
  - c. Parallel with the consideration in letter b hereinabove, the expert from the Petitioners, Yustinus Prastowo, S. E., M. Hum, M. A., stated in his testimony in the trial dated 18 July 2016, that as an objective of tax, VAT gives rise to regressive effect, namely the higher the capability of the consumer, the lighter the tax burden to be shouldered, while the lower the capability of the consumer, the more burdensome the tax burden to be shouldered. As such, if basic commodities

subjected to VAT are related with the obligation of the state to fulfill the basic needs of the people, then that will contravene one of the important principles in taxation namely the principle of proportionality, which among others contains the term that the allocation of tax burden to citizens shall be in proportion with the principle of equality and capability to pay, so that the distribution of tax burden shall be performed proportionally.

Based on the consideration in letter a up to letter c hereinabove, the Court is of the opinion that the exemption of VAT on “basic commodities, which are indispensable for the people at large,” as regulated in Article 4A section (2) letter b of the Law 42/2009 should consider the factual-sociological condition as well as the principle of proportionality in taxation, so that it should be in line with the mandate of the Constitution of 1945;

6. Whereas, furthermore, if the reason or basis of the thought to exempt from VAT against “basic commodities, which are indispensable for the people at large” is in accordance with the mandate of the Constitution of 1945 as described in consideration in number 5 hereinabove, then in its relation to the petition as such (*a quo*), the Court shall further consider: whether the scope of the kinds of “basic commodities, which are indispensable for the people at large” is only limited to the 11 (eleven) kinds of goods as regulated in the Elucidation to Article 4A section (2) letter b of the Law 42/2009? That question is caused by the formulation in the Elucidation to Article 4A section (2) letter b of the Law 42/2009 stating, “*Basic needed commodities indispensable for the people at large covering*,” so that the reasoning developing from the utilization of the word “*covering*” in that formulation gives rise to the interpretation that the detailing of the kinds of goods of the formulation has a limitative nature. The Court considers that factually-sociologically, based on the testimony of the expert of the Petitioners, Prof. Dr. Ir. Hardinsyah, M. S., as conveyed in the trial dated 18 July 2016, one can conclude that the kinds of foods growing and consumed by the Indonesian population categorized into basic commodities of the Indonesian population are diverse indeed and are not limited to the 11 (eleven) kinds as it is mentioned in the Elucidation to Article 4A section (2) letter b of the Law 42/2009. That diversity is influenced by the ecological factor (physical environment, social and cultural, as well as the availability of food), the economic factor particularly the purchasing power (food price and earning), and the factors of knowledge and preference. Meanwhile, to fulfill the nutritional sufficiency some 33 nutritional substances to be complied with by each person are needed to live healthy, which comprise energy, protein, fat, carbohydrate, fiber, water, the 14 kinds of vitamin, and the 13 kinds of mineral. As such, in order to fulfill those nutritional sufficiency one group of foods only is not sufficient, let alone if limited only to the 11 kinds of the basic commodities as regulated in the Elucidation to Article 4A section (2) letter b of the Law 42/2009 [vide further the testimony of the expert Prof. Dr. Ir. Hardinsyah, M. S., page 4 etc.]. Based on the testimony of the expert, the Court may accept the postulate of the Petitioners that the Elucidation to Article 4A section (2) letter b of the Law 42/2009 has gone out from or is not in line with the spirit contained in a norm of Law, which it explains, namely Article 4A section (2) letter b of the Law 42/2009.
7. Whereas based on the whole consideration in number 1 up to number 6 hereinabove, it has become clear to the Court that:
  - a. The Elucidation to Article 4A section (2) letter b of the Law 42/2009 contravenes the intention Article 4A section (2) letter b of the Law 42/2009, which should exempt the imposition of VAT on “basic commodities, which are indispensable for the people at large”;
  - b. The Elucidation to Article 4A section (2) letter b of the Law 42/2009 contravenes the understanding and basic thought of VAT as regulated in the Law 42/2009 *per se* wherein, in accordance with the terminology and its character as tax on added value, VAT is only imposed on goods having undergone added value, namely, which has been through the process of manufacturing. This is supported by the testimony of the lawmakers *per se*, the President (the Government) as well as the People’s Representative Council (DPR), as well as the expert submitted by the President (the Government), although the testimony of the People’s Representative Council (DPR) has not been made a consideration in this regard, which binds on

the Court [vide the testimony of the expert of the President Prof. Dr. Gunadi and the Elucidation to the Law Number 8 of 1983]. That said, all basic commodities having not gone through the process of manufacturing should not be subjected to VAT. Nevertheless, with a limitative formulation in the Elucidation to that Article 4A section (2) letter b of the Law 42/2009, those goods although logically are not categorized as basic needs but not listed explicitly in the Elucidation to that Article 4A section (2) letter b of the Law 42/2009 becomes subject to VAT;

- c. The Elucidation to Article 4A section (2) letter b of the Law 42/2009 is also unjust because according to Article 4A section (2) of the Law 42/2009, goods produced from mining or produced from drilling directly taken from its source [Article 4A section (2) letter a the Law 42/2009], foodstuff and beverages presented in hotels, restaurants, bistros, stalls and the like, comprises foodstuff and beverages being consumed or not consumed in place, including foodstuff and beverages delivered by business of catering services [Article 4A section (2) letter c of the Law 42/2009], money, bouillon, and securities [Article 4A section (2) letter d the Law 42/2009] are not subjected to VAT, while basic commodities, which are factually-sociologically indispensable for the people at large are subjected to VAT also merely because those goods are not included in the eleven kinds of the basic commodities indispensable for the people at large according the Elucidation to Article 4A section (2) letter b of the Law 42/2009;
  - d. The Elucidation to Article 4A section (2) letter b of the Law 42/2009 bears the potential to give rise to legal uncertainty because despite there is the possibility that in practice goods, which are not included into the 11 (eleven) kinds as it is mentioned in that Elucidation to Article 4A section (2) letter b of the Law 42/2009 are not subjected to VAT, yet, if those goods are subjected to VAT, that also cannot be blamed. Therefore, the possibility may occur, whereby in a certain place and on a certain time basic commodities indispensable for the people at large be exempted from the imposition of VAT, while in a different place and on different time the same goods are subjected to VAT.
8. Whereas with the whole consideration hereinabove, particularly the consideration in number 7, the Court is of the opinion that despite it is not correct to be regarded as discriminative as postulated by the Petitioners, the Elucidation to Article 4A section (2) letter b of the Law 42/2009 contravenes the Constitution of 1945 because it hampers the fulfillment of the right of basic needs of the citizens, hamper the fulfillment of the right of citizens to live prosperous physically and emotionally, and not render legal certainty, as they are respectively mentioned in Article 28C section (1), Article 28H section (1), and Article 28D section (1) of the Constitution of 1945 to the extent that basic commodities, which are indispensable for the people at large as contained in the Elucidation to Article 4A section (2) letter b of the Law 42/2009 not to be interpreted merely as examples, not limitative details.
  9. Whereas the Court may understand the difficulty confronted by the lawmakers in detailing all the kinds of the basic commodities, which are indispensable for the people at large, if the details of the Elucidation to Article 4A section (2) letter b of the Law 42/2009 are only intended to be examples. If such is the case, the lawmakers indeed have the choice, which can be justified from the perspective of the science of legislation namely by regulating further the details regarding the kinds of those basic commodities, which are indispensable for the people at large in the Government Regulation, and that does not contravene the Constitution of 1945. Nevertheless, with the formulation using the word “covering” in the Elucidation to Article 4A section (2) letter b of the Law 42/2009, there is no other understanding brought forward by such formulation save if it is a limiting understanding. Therefore, that provision contravenes the Constitution of 1945 as considered in number 8 hereinabove.

[3. 12] Considering that based on the whole consideration in paragraph **[3. 11]** hereinabove, the Court is of the opinion that the petition of the Petitioners are reasoned for a part, so that the Elucidation to Article 4A section (2) letter b of the Law 42/2009 shall be declared unconstitutional conditionally (conditionally

unconstitutional) namely to the extent that the details on the kinds of “Basic needed commodities, which are indispensable for the people at large” as regulated in that Elucidation to Article 4A section (2) letter b of the Law 42/2009 is not to be interpreted as not limited to the 11 (eleven) kinds mentioned in the Elucidation to Article 4A section (2) letter b of the Law 42/2009.

#### 4. CONCLUSION

Based on the assessment on the fact and law as described hereinabove, the Court concludes that:

- [4. 1] The Court is authorized to adjudicate on the petition as such (*a quo*);
- [4. 2] The Petitioners have legal standing to submit a petition as such (*a quo*);
- [4. 3] The subject matter of the petition is reasoned for a part according to law.

Based on the Constitution of the Republic of Indonesia of 1945, the Law Number 24 of 2003 regarding the Constitutional Court as has been amended by the Law Number 8 of 2011 regarding the Amendment to the Law Number 24 of 2003 regarding the Constitutional Court (State Gazette of the Republic of Indonesia of 2011 Number 70, Supplement to the State Gazette of the Republic of Indonesia Number 5226), and the Law Number 48 of 2009 regarding Judicial Powers (State Gazette of the Republic of Indonesia of 2009 Number 157, Supplement to the State Gazette of the Republic of Indonesia Number 5076);

#### 5. VERDICT OF THE JUDGMENT

##### Adjudicating,

1. To grant the Petition of the Petitioners for a part.
2. To declare the Elucidation to Article 4A section (2) letter b of the Law Number 42 of 2009 regarding the Third Amendment to the Law Number 8 of 1983 regarding Value Added Tax on Goods and Services and the Sales Tax on 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) contravenes the Constitution of the Republic of Indonesia of 1945 conditionally and has no binding legal force to the extent of the details “basic commodities indispensable for the people at large” contained in that Elucidation to Article 4A section (2) letter b of the Law Number 42 of 2009 regarding the Third Amendment to the Law Number 8 of 1983 regarding Value Added Tax on Goods and Services and the Sales Tax on 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) be understood limitatively;
3. To dismiss the petition of the Petitioners for the remaining;
4. To order the loading of the content of this judgment in the Official Gazette of the State of the Republic of Indonesia as it should be;

Thus has been decided in the Consultative Session of the Justices by eight Constitutional Justices namely Arief Hidayat being the Chief Justice concurrently as a Member, Anwar Usman, Suhartoyo, Wahiduddin Adams, Maria Farida Indrati, Manahan MP Sitompul, Aswanto, and I Dewa Gede Palguna, respectively as a Member, on the day of Thursday, dated **the nineteenth**, of January, **the year two thousand seventeen**, on the day of Thursday, dated the twenty third, the month of February, **the year two thousand seventeen**, pronounced in the Plenary Session of the Constitutional Court open for the general public on the **day of Tuesday**, dated the **twenty eighth**, **the month of** February, **the year two thousand seventeen**, fully pronounced at **10. 47 hours West Indonesian Time**, by eight Constitutional Justices namely Arief Hidayat as Chief Justice concurrently as a Member, Anwar Usman, Suhartoyo, Wahiduddin Adams, Maria Farida Indrati, Manahan MP Sitompul, Aswanto, and I Dewa Gede Palguna, respectively as a Member, in the presence of Ria Indriyani as Substitute Registrar, and attended by the Petitioners/their attorneys, the President or his representative, and the People’s Representatives Council or its representative.

**CHIEF JUSTICE,**

**(signed)**  
**Arief Hidayat**  
**THE MEMBERS,**

**(signed)**  
**Anwar Usman**

**(signed)**  
**I Dewa Gede Palguna**

**(signed)**  
**Maria Farida Indrati**

**(signed)**  
**Aswanto**

**(signed)**  
**Manahan MP Sitompul**

**(signed)**  
**Suhartoyo**

**(signed)**  
**Wahiduddin Adams**

**SUBSTITUTE REGISTRAR,**  
**(signed)**  
**Ria Indriyani**