

Confidentiality Guarantee of Tax Information Against The Property of Taxpayer in Management Examination and The State Financial Responsibilities Which Conducted by The Audit Board

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ABSTRACT

This research analysis meant to find out legal consideration used by Constitution judge, whether in accordance or not to legal principles, moral and social justice. Therefore, this article tend to place problems that linked to conflict of norm in term of The Audit Board (BPK) authorities over a good and compliance Taxpayer, and progressive related The Constitutional Court decision of The Audit Board (BPK) authorities of a good and compliance taxpayer in the context of The 1945 Constitution of The Republic of Indonesia at its proportion in order to straightening the consistency of rule of law in Indonesia's legal system, for the shake of completion of logical degree of optimal norm. Intrinsically, decision in the case of petition for Judicial Review of the Act Number 28 of 2007 on the Third Amendment to the Act Number 6 of 1983 on the General Taxation Provisions and Procedures against the 1945 Constitution of the Republic of Indonesia, can be made guidance (stelling) to the happening of opaqueness norm or obscurity norm (vague van normen) which flange at the happening conflict of norm (geschiljd van normen) related existence of two importance of law between The Audit Board (BPK) and Taxpayers which both of the same owning of rights which under the aegis of Constitution.

Keywords: Management, Examination, Financial, Audit Board, Taxpayers

INTRODUCTION

This study departs from the issue conceived from a conflict between two interests that are equally protected by the constitution that led to the occurrence of overlapping authority and conflicts of interest. Namely: *First*, the interest in the form of constitutional rights of the Taxpayer on his property as referred to Article 28G, Paragraph (1) of the 1945

Constitution¹. In this case, the guarantee of secrecy reserved for any information that has been given to the state (*tax authorities*) in respect of its obligations to pay taxes according to the principle of *self-assessment*; **Secondly**, the benefit in the form of the constitutional authority of the Audit Board (BPK) under Article 23E paragraph (1) of the 1945 Constitution to conduct an audit of state finances freely and independently² thus requiring them to check all the documents related to the audit of the management and financial responsibility of the state³.

Meanwhile, the elucidation of Article 34, paragraph (2a) of the Act Number 28 of 2007 on the General Provisions and Tax Procedures said to inhibit the authority of the Audit Board (BPK) in exercising his constitutional because not all the data and/or information can be provided to the Audit Board as "state institutions", but only information about the identity of the Taxpayer and general information on taxation. Thus, the provisions of Article 34, paragraph (2a) letter b and Elucidation of Article 34, paragraph (2a) of the Act Number 28 of 2007 on the General Provisions and Tax Procedures, by the Audit Board considered real and expressly deny and contrary to Article 23E paragraph (1) of the 1945 Constitution so it is very detrimental to the constitutional authority of the Audit Board, because the existence of such provision the Audit Board may not be able to examine the state revenue derived from the tax sector freely and independently, while a tax is a contributing taxpayer to the state, which is one form of revenue or at least part of the country's financial acceptance under Article 2 of the Act Number 17 of 2003 on the State finances.

For that the Audit Board filed a judicial review against the Act Number 28 of 2007 on the Third Amendment to the Act Number 6 of 1983 on the General Taxation Provisions and Procedures, in particular Article 34 paragraph (2a) letter b and the Elucidation of Article 34 Paragraph (2a), Problems arise when the Constitutional Court through its decision Number 3/PUU-VI/2008 on the Authority of the Audit Board to audit the management and financial responsibility of the state to tax information on the property taxpayer, stating that the Audit Board petition can not be accepted.

¹ The Article 28G, Paragraph (1) of the 1945 Constitution says that "*Every person has the right to protection of personal self, family, honor, dignity, and property under his control, and has the right to feel secure and protected from the threat of fear to do or not to do something is a human right*".

² The Article 23E, paragraph (1) of the 1945 Constitution stated, "*To check the management and accountability of state finances held an **Audit Board that is free and independent***". (bolding of Researchers).

³ The Article 9, paragraph (1) of the Act Number 15 of 2006 on the Audit Board stated "*In performing its duties, the Audit Board is authorized to request information and/or documents that must be provided by each person, an organizational unit of the Central Government, Local Government, State institutions other, Bank Indonesia, the General Services Agency, Regional owned enterprises, and institutions or other bodies managing state finances*".

Constitutional Court Decision Number 3/PUU-VI/2008 is one of the many Constitutional Court decision that by some quarters is considered quite controversial, that is still being debated, so for a while that decision may be regarded as a benchmark or as a pre-assumption of the above problems, because at first glance the decision assessed not accommodate the principle of transparency in an effort to implement the general principles of good governance.

Based on the problems mentioned above, there are two questions of urgency in the research related to the conflict norm constitutional authority of Audit Board to information on property tax taxpayer, namely:

1. Where is the conflict of norms related to the constitutional authority of the Audit Board (BPK) to information on property tax taxpayer?
2. How does the actual implementation of the Taxpayer confidentiality to information on property tax Taxpayers with the implementation of *self assessment system* in the Indonesian taxation system?

DISCUSSION

Constitutional Authority of the Audit Board (BPK) to Information of Property Taxes on Taxpayers

In Legal studies, we always faced with solving legal problems and how to solve the conflict. Similarly, against the decision of the Constitutional Court Number 3/PUU-VI/2008 on the Authority of the Audit Board (BPK) to audit the management and financial responsibility of the state to tax information on the property taxpayer. For that, Noll⁴ confirms that the Legal studies it is judicial science (*rechtspraakwetenschap*). It means that the legal studies when viewed from the glass eyes of the judge, containing at least three (3) characteristics, namely: **First**, with regard to individual events; **Second**, the application of a norm or rule (*rule of law*); and **Third**, the completion of a conflict.

In this case, the Constitutional Court is not only a "funnel law". If it must be the sound of the legislation, it must be interpreted as the Judge freedom in legal discovering (*rechtsvinding*) were considered fair⁵. So in order legal finding by the judge, in this case the

⁴ WG. Van der Velden, (1988) *De Ontwikkeling van de Wetgevingswetenschap*. Lelystad: Koninklijke Vermande, P.21-22

⁵ In this case if there is a **void norm**, then the Judge can undertake the legal construction, the trial Judge can employ several methods to legal discovery (*rechtsvinding*) namely with *argumentum a contrario*, *argumentum per analogiam* and legal rarefaction.

Judge of Constitutional Court was the subject of a major legal finding⁶.

The existence of the Audit Board as a state institution performing the examination and supervision of state finances are directed to perform corrective-strategic examination of the use of state money, as well as basically the Audit Board reflects the division of state power in the 1945 Constitution⁷. Determination of the Audit Board as a state institution should ideally be based on philosophical objectivity, that the authority of the Audit Board that the exercise should be equal and free from the influence of other state institutions, especially related to the one of the objects of the tests. However, the philosophical concept of objectivity that is supposed to run the Audit Board, it tends to be interpreted as "free and independent", as stated in Article 23E paragraph (1) the 1945 Constitution. In fact, for a financial audit institutions as well as the Audit Board, objectivity performance is considered more important precisely when compared with the meaning of "free and independent" in institutions, but in the exercise performance actually leads to subjective permanent assessment⁸.

Explicitly, the competencies of the Audit Board is the power legitimized by law so that the implementation of a state organ function defined by initiation and formulation of the laws and regulations. The authority is to be understood also as an authority which is a legitimate authority, in this case the authority was created because it used to shape the role, so that it appears right that is used to organize certain actions⁹.

The Judge of Constitutional Court in its decision confirms that in the Act Number 28 of 2007 on the Third Amendment to the Act Number 6 of 1983 on the General Taxation Provisions and Procedures set is the balance of rights and obligations between the state and taxpayers. This relates to the application of the principle of *Self*

⁶According to Paul Scholten, *legal invention* by Judges is something other than just the application of regulations on events, sometimes even very often the case that the rules must be found, either by way of interpretation or by way of analogy or legal concretization

(*Rechtsvervrijning*). Meanwhile, according to Sudikno Mertokusumo, legal invention (*rechtsvinding*) is the law-making process by the Judge or other legal officers were given the task of applying the law to the events of a legal concrete. In other words, the process of concretization or individualization of legal regulation (*das sollen*) that are common with the remembrance of concrete events (*das sein*) specific. What is important in the legal invention is how to find or legal discovering to concrete events. See: Sudikno Mertokusumo, (1993) *Chapters about Legal Invention*, Jakarta: Citra Aditya Bakti, P.4-12

⁷Jimly Asshiddiqie. (2006). *Development and Consolidation Post-Reformation State Institutions*, Jakarta: Constitutional Press, P.192

⁸Alberto Alesina, Nouriel Roubini, and Gerald D. Cohen. (1997). *Political Cycles and the Macroeconomy* Massachusetts: Massachusetts Institute of Technology, P.22

⁹Guy Benveniste. (1997). *Bureaucracy*, translated by Sahat Simamora, *Birokrasi*, Jakarta: Rajawali Press, P.42-43

*Assessment*¹⁰ used in the tax collection system in Indonesia. The application of the principle of *Self-Assessment* has consequences, namely that countries *in casu* the Government through the Minister of Finance (and officials in the environment) as the tax authorities **banned**¹¹ to notify the other party all she knew or to him by Taxpayers¹², while on the other hand there is an **obligation** to provide information to officials of state institutions or government agencies that have the authority to carry out checks in the financial sector where the state tax sector (in this case the right of the state to collect taxes) is included. (*bolding of Researchers*).

In the case of the above mentioned examination conducted by the Audit Board, the results will then be submitted to the House of Representatives (DPR), Regional Representative Council (DPD) and Regional People's Representative Assembly (DPRD) in accordance with the authority and after it declared **open to the public**¹³. Although there is a provision stating that the examination report declared open to the public shall not include a report containing state secret¹⁴, but still raises the question of whether the personal data Taxpayers may be regarded as a state secret? If it is considered a state secret, it continues to be unclear within the limits of which the Audit Board may enter personal data Taxpayer. Conversely, if the Taxpayer personal data is not considered state secrets, then it means he is subject to the requirement to be declared as data is open to the public, which means that **conflicting** to Article 34 paragraph (1) of the Act Number 28 of 2007 on the Third Amendment to the Act Number 6 of 1983 on the General Taxation Provisions and Procedures. (*bolding of Researchers*).

In such a situation then there has been a collision/conflict norm (*geschiljd van normen*) or conflict of legal norms (*antinomy*) between two legal interests are equally protected by the constitution. In its decision, the Judge of Constitutional Court considers that there is

¹⁰ Since 1983, the tax collection system in Indonesia adheres to the *Self Assessment System* replaces the original tax collection system is *Official Assessment System*. This matter stipulated in the Act Number 6 of 1983 which has undergone two changes, the first change of the Act Number 10 of 1994 and changes in both the Act Number 16 of 2000 on General Provisions and Procedures for Taxation. *Self Assessment System* adopted Indonesian tax laws provide the full confidence of Taxpayers to calculate, pay, and report tax obligations to the tax authorities, or in other words that Taxpayers were given full confidence to exercise the rights and obligation in accordance with the legislation in force.

¹¹ In principle, the disclosure of information **without** the owner's consent is *a form of tort*. Then the Directorate General of Taxation officials will open a document owned by Taxpayer will essentially exposed a criminal offense as stipulated also in the same legislation.

¹² Article 34 paragraph (1) of the Act Number 28 of 2007 on the Third Amendment to the Act Number 6 of 1983 on the General Taxation Provisions and Procedures.

¹³ Article 7 paragraph (1) in conjunction with paragraph (5) the Act Number 15 of 2006 on the Audit Board in conjunction with Article 19 paragraph (1) of the Act Number 15 of 2004 on the Management and State Financial Responsibility.

¹⁴ Article 19 paragraph (2) of the Act Number 15 of 2004 on the Management and Financial Responsibility State

disharmony between legislations, *in casu* the Act Number 28 of 2007 on the Third Amendment to the Act Number 6 of 1983 on the General Provisions and Tax Procedures and regulations related to finance state¹⁵, which was the cause of the clash between two legal interests are equally protected by the constitution, which on the one hand their legal interest in the form of constitutional rights of the Taxpayer on his property as referred to Article 28G paragraph(1) the 1945 Constitution¹⁶, in this case guarantee of confidentiality which are reserved for any information that has been given to the state (*tax authorities*) in respect of its obligations to pay taxes according to the principle of *self-assessment*.

But on the other side, there is a legal interest in the form of constitutional authority of the Audit Board (BPK) to audit state finances freely and independently¹⁷ so that requiring them to check all the documents related to the audit of the management examination and responsibility state financial¹⁸.

The Judge of Constitutional Court in its consideration, in the case of judicial review of the Act Number 28 of 2007 on the Third Amendment to the Act Number 6 of 1983 on the General Provisions and Tax Procedures, which is really not a matter of dispute over the constitutional authority of state institutions, which can not be determined loss on the constitutional authority of the Audit Board as a result of the enactment of Article 34 paragraph (2a) letter b¹⁹ and Elucidation of Article 34 paragraph (2a)²⁰ the Act Number 28 of 2007 on the Third Amendment to the Act Number 6 of 1983 on the General Provisions and Tax Procedures. Although the Audit Board qualify as a party may file a petition for a law against the 1945 Constitution, but therefore can not be determined any loss constitutional authority of the Audit Board, then the requisite *legal standing* conditions as referred to in Article 51A

¹⁵The Act Number 17 of 2003 on State Finance, The Act Number 1 of 2004 on State Treasury, The Act Number 15 of 2004 on the management examination and Responsibility State Financial, The Act Number 15 of 2006 on the Audit Board.

¹⁶ Article 28G (1) the 1945 Constitution stated that “*Everyone has the right to protection of self, family, honor, dignity, and **property under his control**, and has the right to feel safe and protected from the threat of fear to do or not to do something that is right basic*”.

¹⁷ Article 23E paragraph (1) the 1945 Constitution stated “*To examine the management and accountability of state finances held **the Audit Board of free and independent***”.

¹⁸ Elucidation of Article 9 paragraph (1) letter b of the Act Number 15 of 2006 on the Audit Board

¹⁹ The Norms contained in the provisions of Article 34 paragraph (2a) letter b the Act Number 28 of 2007 on the Third Amendment to the Act Number 6 of 1983 on the General Provisions and Tax Procedures, determines that “*Officials tax and/or experts **only** able to give information to the Audit Board **after** got the determination by **the Finance Minister***”.(bolding of Researchers).

²⁰Elucidation of Article 34 Paragraph (2a) the Act Number 28 of 2007 on the Third Amendment to the Act Number 6 of 1983 on the General Provisions and Tax Procedures are also considered to limiting the constitutional function of the Audit Board, because **not all** of the data and/or information can be given to the Audit Board as “state institutions”, but **only** information about the identity of the Taxpayer and general information about taxation.

paragraph (2) letter b of the Act Number 8 of 2011 on the Amendment to the Act Number 24 of 2003 on the Constitutional Court, not fulfilled so that the petition should be declared unacceptable (*nietontvankelijkverklaard*).

Writer considered that the practice of law in Indonesia showed that the situation is strongly influenced by legal positivism, positivism legislation (*legisme*), so that the legal profession also tend to think of positivistic or legistik in decisions. In the positivist view, the law is only what is *explicitly* stated in the valid legal rule (*legislation*).

According to Writer, the positive law on the one hand has the advantage of the guarantee of legal certainty (*rechtzekerheid*). However on the other hand, positive law has an ambiguous and paradoxical duality. These facts tend to give the impression that the existence of legal positivism is a law that does not have the constancy of the establishment. So the dualism of positive law is at once confusing substantive law although written (*law is written in the book*), but not necessarily a law practice (*law in practice*) in accordance with the substance of the law itself, but veered off from the teachings of the law, so sometimes the judge's decision (*judges made law*) is very contradiction and controversy with a sense of justice (*social justice unjustifiable*). Fitting the phrase that states "*the law actually made to be broken, if there is no violation, then the law does not become effective as a fact in the sense that the logical-rationalist, is the law*".

Legal arguments of the Judge of Constitutional Court in its decision, according to the author is not enough just by virtue of legal norms written and then directly applied to the legal facts, for the formulation of norms tend to be abstract caused opaqueness norm or obscurity norm (*vague van normen*) which leads to conflict norm (*geschiljd van normen*), so to the Constitutional Court can use one of several legal principles, including: the principle of *lex specialis*, the principle of *lex superior derogat legi priori* and *lex posterior derogat legi inferiori*. Given the legal principles greatly help judge (*rechter*) to sharpen interpretation and helped in the imposition of analogy and directed to provide corrections to the legislations.

Furthermore, the clash between two legal interests are equally protected by the constitution, is due solely because the strengthening of the application of *neo-conservatism*²¹

²¹*Neo-conservatism* is defined as a stream of philosophical schools of adapting the concept of the Law of Nature of Thomas Hobbes who want the law as a form of discipline and willingness desired some groups, particularly those owned by the state. Flow *neokonsevatisme* regard the State as institutions ruling against its citizens. *Neo-conservatism* looked at as a system of tax collection is holistic so as to raise awareness that is both concrete and substantif for the adherents of these states is a tax collection system and not stages. *Neo-*

that it has been formalized in the 1945 Constitution related to the understanding of state financial inspection, namely:

1. State as the highest power factor in the financial field in any country;
2. The requirement for the intervention of the state organs throughout all stages of investigation mechanism of state finances; and
3. The strengthening of the influence of the state bureaucracy in the examination in the taxation sector.

Finance the expanded definition of the object of a state that tends to have increased the role of the Audit Board as a state audit institution which would lead to the interesting paradox²².

In this case according to the researchers, the Audit Board actually has not authority to determine and take over the state financial audit in the tax sector, especially in the stages of management, given the management of an administrative nature so it has the discretion to determine the procedures for their management. Besides, can not be equated in the examination accountability contained in the State Budget (APBN).

Moreover *imperfektivitas* or imperfection of the State Finance Law after amendment of the 1945 Constitution seen in the legislation governing state finances. To that end, the legislations governing the state finances²³ should contain a cornerstone philosophy behind which a substance thought lawmakers on State Finances, including must be formulated in fundamental science (*het dekken der kennis*), as well as formulations also must be organized on the premise economical (*ekonomischedenkgesetz*), the formulation of the provision should avoid the substance that is repeated and/or conflicting between chapter one to chapter other (*wiedersprüchlos*), including the scope formulation of the substance of the legislation governing state finances must be comprehensive (*dekken het van de rechtsstof*), then the latter

conservatism that all processes in the tax collection should be checked by the agency inspectors. This means that the rationality of *neo-conservatism* also see taxation as an integrative state finance. *Neo-conservatism* examine the audit institutions of public as the institution should audit the levies that are, will be, and has collected country, and has been categorized as state finances, including taxes and other charges coercive. See: MDA Freeman, *Introduction to Jurisprudence* (London: Sweet & Maxwell Ltd., 2001), P. 146-147

²²Mark Moore in Robert D.Behn. (2001). *Rethinking Democratic Accountability*, Washington, DC: Brookings Institution Press, P.35

²³The Act Number 17 of 2003 on the State Finance, The Act Number 1 of 2004 on the State Treasury, The Act Number 15 of 2004 on the Management Examination and Responsibility State Financial, The Act Number 15 of 2006 on the Audit Board.

should be useful for their intended purpose (*doelmatig*)²⁴.

Writer added that the Academic Manuscript Draft Amendment the Act Number 17 of 2003 on the State Finance²⁵, also emphasized their efforts to change the paradigm related to the authority of the Audit Board is expected to emphasize his investigations on the evaluation of policies of government funds (*macro-strategic*) not on examination of technical (*micro technical*) to see the same function which is run by the *General Accounting Office* (GAO) in the United States and the *National Accounting Office* in the United Kingdom, the examination was conducted on the *financial audit, compliance audit, and internal control system*. Examination done is *post-audit* by implementing a *program evaluations*, no longer *voucher audits*²⁶.

B Implementation of taxpayer Confidentiality Guarantee Related to Tax Information against Property of Taxpayers with its Implementation of Self Assessment System

Taxpayers have the right to have all the data related to himself and his business kept secret by tax officials. In some countries these rules are clearly stipulated. Taxpayer data can only be granted if it is necessary to process the data necessary investigation as stipulated in legislation.

In the discussion of the OECD²⁷ entitled "*Taxpayers' Rights and Obligations – Practice Note*" by the OECD Committee of Fiscal Affairs on Tax Administration explained that in democracies, Taxpayers will have some basic rights and obligations in relation to the government and the ministries / agencies under the government. In a survey of member countries of OECD, held in 1990, summed up some of the basic rights granted to taxpayers, among others: (1) The right to be informed, assisted and heard; (2) The right of appeal; (3) The right to pay no more than the correct amount of tax; (4) The right to certainty; (5) The right to privacy; dan (6) **the right to confidentiality and secrecy**. (*Bolding of Researchers*)

In the paragraphs that discuss the right to confidentiality, stated that "...*the information*

²⁴Arifin P. Soeria Atmadja, *Law State Finance After 60 years of Indonesian Independence: Problems and Prospects for Indonesia*, Articles, Indonesian Judicial Monitoring Society, Faculty of Law, University of Indonesia, P.7

²⁵The participation of Researchers in activities Committee IV of Regional Representatives Council (DPD) Related of *Test Validity against Revised the The Act Number 17 of 2003 on the State Finance*, located in Building Rector University of Mataram, Tuesday, February 14, 2012, Pkl.09.30-13:00 pm

²⁶ Harry S.Heaven. (2011). *The Evolution of the General Accounting: Voucher From Audits to Program Evaluations*, 1990 in Academic Paper Draft Amendment the Act Number 17 of 2003 on the State Finance, the Expert Team Revised State Finance Act, the Regional Representative Council (DPD), Jakarta, in June 2011, P.68

²⁷OECD, (2003). *Taxpayers' Rights and Obligations – Practice Note. Tax guidance series: Centre for Tax Policy and Administration*

available to the tax authorities on the affairs of a taxpayer is confidential and will only be used for the purposes specified in tax legislation. Tax legislation usually imposes very heavy penalties on tax officials who misuse confidential information and the confidentiality rules that apply to tax authorities are far stricter than those applying to other government departments". From these statements may be taken several key points, among others: **First**, the information received by the tax authorization is confidential, and only used specifically for the tax legislation; **Second**, the absence of sanctions for those who misuse the tax information; and **Third**, the rules of giving confidential information to third parties more difficult than in the department of government (*executive*). Exemplified also *The Taxpayers Charter*, a statement about the behavior (the term refers to the *rights* and *obligations* if in Indonesia) is expected of officials and Taxpayers.

In order to better provide fairness in taxation is the balance of rights between the state and the rights of citizens Taxpayers. The Act on General Provisions and Tax Procedures has accommodated the various rights of taxpayers. One Taxpayer rights are poured into it is confidential Taxpayer data. Taxpayers have the right to protection of confidentiality on all information that has been conveyed to the Directorate General of Taxes in order to carry out the provisions of taxation. Besides, the other parties who perform tasks in the field of taxation are also prohibited from disclosing confidential Taxpayer, including experts, like-linguists, accountants, lawyers appointed by the Director General of Taxes to help the implementation of the Act Taxes.

The obligation to keep taxation data or data obtained from the Taxpayer has existed since the Act of Taxes before the reform of 1983, which in Article 44 of the Company Tax Ordinance (PPs) in 1925, under Articles 21 and 22 of the Income Tax Ordinance (PPd) in 1944 and Article 33 of the Sales Tax Ordinance (PPN) in 1951. As it grows, only then there are special rules governing the confidentiality of the taxpayer data that must be kept by the tax authorities as stipulated in the Act Number 28 of 2007 on the Third Amendment to the Act Number 6 of 1983 on the General Provisions and Tax Procedures (KUP) of the first published namely the Act Number 6 of 1983 and continues to experience improvements to the the Act Number 16 of 2009 on the Determination of Government Regulation in Lieu of Act Number 5 of 2008 on the Fourth Amendment Act Number 6 of 1983 on The General Provisions and Tax Procedures become Act. Taxpayer confidentiality regarding the data that must be kept by the tax authorities in Indonesia is regulated in the Act on the General Provisions and Tax Procedures (UU KUP). The Article 34 paragraph (1) and (2) of the Act on the General Provisions and Tax

Procedures, reads:

- (1) Each officer is **prohibited** notify the other party of everything known or disclosed to him by the taxpayer in order to position or the task to carry out the provisions of tax legislation. (*Bolding of Researchers*)
- (2) The prohibition referred to in paragraph (1) shall also apply to experts appointed by the Director General of the Tax to assist in the implementation of the provisions of tax legislations.

Furthermore, in Article 34 (2a), (3), (4) and (5) of the Act on the General Provisions and Tax Procedures (UU KUP) arranged that the specific provisions that are excluded from the provisions referred to in Article 34 paragraph (1) and (2) are as follows :

- (2a) Excepted from the provisions referred to in paragraph (1) and (2) are:
 - a. Officials and experts who act as a witness or an expert witness in court, or
 - b. Officers and/or experts appointed by the Finance Minister to give information to officials of state institutions or government agencies shall conduct checks in the field of public finance.
- (3) For the sake of the country, the Minister of Finance is authorized to give **permission in writing** to an officer referred to in paragraph (1) and the experts referred to in paragraph (2) in order to provide information and show written evidence from or about taxpayer to the person appointed. (*Bolding of Researchers*)
- (4) For the purpose of examination in court in a criminal case or civil, at the request of the judge in accordance with the Criminal Procedure Code and the Civil Procedure Code, the Minister of Finance can give **written permission** to the officials referred to in paragraph (1), and experts referred to in paragraph (2), to provide and demonstrate the written evidence and information available to him Taxpayer. (*Bolding from Researchers*)
- (5) Request the judge referred to in paragraph (4) shall mention the suspect's name or the name of the defendant, the information requested, as well as the link between criminal or civil cases concerned with the information requested.

Elucidation of Article 34 of the Act on the General Provisions and Tax Procedures (UU KUP) mentioned every office, both tax officials and those who perform tasks in the field of taxation, shall not disclose confidential taxpayer regarding tax issues, among others:

1. Notice of report finance, and others reported by the taxpayer,
2. The data obtained in the framework of implementation of the inspection,
3. Document or data obtained from third parties confidential,

4. The document and/or confidential of Taxpayer in accordance with the regulations provisions

Furthermore, the Act on the General Provisions and Tax Procedures set the penalty of taxation officials who violate the confidentiality obligations of the post, namely:

Does not fulfill the obligation secret as negligent.

In Article 41 paragraph (1) of the Act on the General Provisions and Tax Procedures (UU KUP) mentioned "*Officials who do not meet obligations due to negligence secrecy as referred to in Article 34 shall be sentenced to a maximum confinement of 1 (one) year and a maximum fine Rp.25.000.000,00 (Two thirty Five Million Rupiah)*". This is done to ensure the confidentiality of the tax will not be notified to the other party, so that the Taxpayer in delivering data and information do not hesitate, in the framework of the implementation of the Taxation Act. Disclosure of confidentiality is done because of negligence in the sense of neglect, not careful, or less heed to the obligation to keep confidential information or evidence Taxpayers who are protected by the Taxation Act violated.

Deliberately not meet the obligations of secrecy.

In Article 41 paragraph (2) of the Act Number 28 of 2007 on the Third Amendment to the Act Number 6 of 1983 on the General Provisions and Tax Procedures (KUP) stated that "*Officials who willfully fails to meet its obligations or someone who causes the non-fulfillment of the obligations of officials to conceal as referred to in section 34 shall be punished with imprisonment for a period of 2 (two) years and a maximum fine of Rp50.000.000,00 (Fifty Million Rupiah)*". The acts done intentionally this subjected to more severe sanction than the acts committed because of negligence that the concerned officials to be more careful and not do anything to divulge confidential in the interests of the individual Taxpayer.

Background the Audit Board (BPK) filed a judicial review to the Constitutional Court on the Act Number 28 of 2007 on the Third Amendment to the Act Number 6 of 1983 on the General Provisions and Tax Procedures, because in the article there is an article about the procedure that limits the Audit Board (BPK) to obtain data and tax information. Article in question is Article 34 paragraph 2a (letter b) which reads exempted from the provisions referred to in paragraph (1) and (2) are: officers and/or experts appointed by the Finance Minister to give information to officials of state institutions or agencies the government is authorized to make checks in the field of public finance.

This provision is further stipulated in Decree of the Finance Minister Number

539/KMK.04/2000 on Other Parties to Given Remarks by Officials and Experts Designated about Everything You Know or Informed to him by Taxpayers In order Position or his Job for To Running Provisions of Taxation Legislations, the provisions containing the terms under which the other party may request Taxpayer data, among others :

- (1) The Audit Board (BPK) or the Financial and Development Supervisory Agency (BPKP);
- (2) Delivering Letter of Assignment which must mention the name of the Taxpayer and information which want to know about the Taxpayer concerned; and
- (3) Information that can be known is information of a general nature concerning the taxation Taxpayers and his implementation set by the Director General of Taxation.

The Audit Board (BPK) has a mandate in accordance with Article 23 paragraph 1 of the 1945 Constitution of the Republic of Indonesia to carry out of Management Examination and Responsibility State Financial which is translated in the Act Number 15 of 2004 on the Management Examination and Responsibility State Financial, and the Act Number 15 of 2006 on the Audit Board.

According to the legislation above, the Audit Board is authorized to access the data and information related to the state finance management. While Article 34 of the Act Number 28 of 2007 on the Third Amendment to the Act Number 6 of 1983 on the General Provisions and Tax Procedures, there is a restriction that **only** officials and experts assigned the Minister of Finance who shall provide such information.

The Audit Board of the Republic of Indonesia (BPK) requested the phrase "established by the Finance Minister" is have no legal power so that the Audit Board can request data / information to the officers and tax officials wherever of related of examination the Audit Board. In addition to restrictions on the procedure, the Audit Board is more inhibiting assess again for the Audit Board as stated in the Explanation of Article 34 paragraph 2a.

The Articles specify a limited manner about the types of data / documents that may be provided to the Audit Board. The data and information contained in Elucidation of Article 34 paragraph 2a inadequate for the Audit Board to audit. The explanation contains restrictions on information that can be given to the Audit Board was contrary to Article 9 of the Act Number 15 of 2006 on the Audit Board.

Article 9 letter a assert the authority of the Audit Board to "... *define the object of inspection, planning and carrying out the inspection, determine the time and method of*

*inspection as well as prepare and present inspection report". While the its letter b is "... to request information and / or documents that must be provided by each person, an organizational unit of the Central Government, Local Government, other State institutions, Bank Indonesia, State-Owned Enterprises, General Services Agency, Regional-Owned Enterprises, and institution or other entity that manages state finances" (Bolding of Researchers). So that's it, the restriction information should be provided to the Audit Board clearly contrary to Article 9 of the Act Number 15 of 2006 on the Audit Board. In fact, Article 9 was the attribution of Section 23E the 1945 Constitution which is the *legal standing* of the Applicant.*

Results Decisions Judicial Review is the Judges of the Constitutional Court decided to rejects lawsuit "judicial review" the Audit Board of the Republic of Indonesia (BPK) because they did not have *legal standing* remembering there is no constitutional authority of the Audit Board which disadvantaged. The petition of examination of the Act Number 28 of 2007 on the Third Amendment to the Act Number 6 of 1983 on the General Provisions and Tax Procedures against the 1945 Constitution which submitted by the Audit Board according to the Researchers, actually is an attempt to legitimize the Audit Board examination of all stages of tax collection as the investigation authority that can be categorized as conduct coercive optimal taxation sector monopoly that tends motivated attempts to rule out other institutions to examine the state finances²⁸.

III. CONCLUSIONS

Departing from the issues that have been pointed out earlier, this paper reached the following conclusions:

1. Although the Audit Board qualify as a party may apply for judicial review of the Act Number 28 of 2007 on the Third Amendment to the Act Number 6 of 1983 on the General Provisions and Tax Procedures against the 1945 Constitution, however the case of examination the proposed actually problematic, because the Audit Board erroneously using the *argumentum a contrario* that lead to differences in interpretation about the authority of state institutions, instead using the mechanism of *judicial review*. Besides, in fact is not a matter of dispute over the constitutional authority of state institutions, so that the Constitutional Court decides it can not be determined any loss constitutional authority

²⁸Richard A. Epstein.(1989). *Skepticism and Freedom: A Modern Case for Classical Liberalism*. New York: McGraw-Hill Book, 1978, P.84. **See also:** Alfred J. Marrow, David Bowers and Seashore, *Management by Participations* (New York: Harper & Row), P.55

of the Audit Board as a result of the enactment of Article 34 paragraph (2a) letter b and Elucidation of Article 34 Paragraph (2a) of the Act Number 28 of 2007 on the Third Amendment to the Act Number 6 of 1983 on the General Provisions and Tax Procedures. Besides the requisite *legal standing* is not fulfilled so that the petition should be declared unacceptable (*nietontvankelijkverklaard*).

2. Legislation governing state finances, namely the Act Number 17 of 2003 on State Finance and the Act Number 15 of 2004 on the Management and State Financial Responsibility, and the Act Number 15 of 2006 on the Audit Board, has put the Audit Board (BPK) as the body tends to be *monopolistic* in conducting the examination of state finances, in addition to creating instability in the taxation sector.

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