

# Criminal Responsibility of Subsidiaries That Causes State Losses

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**Abstract:** - The existence of a State-Owned Enterprise (SOE's) is an implementation of Article 33 of the 1945 Constitution of the Republic of Indonesia. Where it has a strategic position to improve people's welfare. As time goes by, SOE's are required to change so the company has high competitiveness and creativity in global competition, one of which is by forming a state-owned holding. The phenomenon of the formation of state-owned holding in Indonesia raises interesting problems related to the legal responsibility of state-owned subsidiaries which result in state losses whether it is charged with corruption or not. This research is conducted using normative legal research. Types of data used in this research are secondary data with primary and secondary legal material. Based on the results of the study it can be concluded that the criminal liability of state-owned subsidiaries that causes state losses in which the loss is a business loss cannot be snared by corruption. This is in line with the Constitutional Court Decision Number 62/PUU-XI/2013 provided that the directors have implemented business judgment rule as stipulated in Article 97 paragraph (5) of the Company Law.

**Keywords:** liability, Subsidiary, SOEs, State losses, corruption.

## I. INTRODUCTION

The existence of a State-Owned Enterprise (SOEs) is an implementation of Article 33 of the 1945 Constitution of the Republic of Indonesia. Where it has a strategic position to improve people's welfare. The state controls natural wealth, but the state cannot carry out business activities or run the company directly.[1]

State-Owned Enterprises (SOEs) in running their businesses have two sides, one side as an element of the government and on the other hand as an element of business. How large the portion depends on the type of SOEs [2]. There are 2 types of SOEs, namely Companies (Persero) and Public Companies (Perum). Persero, is an SOE in the form of a limited liability company whose capital is divided into shares whose total or at least 51% (fifty one percent) shares are owned by the Republic of Indonesia whose main purpose is to pursue profits (Article 1 point 2 of the SOEs Act) Whereas Perum, is a BUMN whose capital is owned by the state and is not divided into shares, which aims at public benefit in the form of providing high quality goods and/or services while at the same time pursuing profits based on company management principles (Article 1 point 4 SOEsAct).

Over time, SOEs are required to change so that companies have high competitiveness and creativity in global competition. There are three references that are often used in changing company activities, namely restructuring, privatization and privatization. The key to successful SOE restructuring lies in the choice of restructuring methods. Referring to practices in other countries, such as Singapore and Malaysia for example, there are several options for restructuring methods, one of which is the establishment of a holding company. [3]

In contrast to the holding company in the private sector, the establishment of state-owned holding focused on creating maximum synergy from SOEs that have the same business but different market targets.[4] The parent company is a combination of several companies that are legally independent, but in the economic field is a unit that is subject to the parent company. Subsidiary is different from the branch of the company. In subsidiaries, each establishment of a subsidiary has business dependency but is legally separated, has a sustainable way, has the same business activities, enjoys certain autonomy in the world of economy and business. While the branch does not have a legal personality.[5]

The phenomenon of the formation of state-owned holding in Indonesia raises interesting problems related to the legal responsibility of state-owned subsidiaries that result in state losses whether it can be snared with corruption or not, as stated in Article 1 paragraph (1) of the SOEs Act that SOEs are all or part business entities the amount of capital is owned by the state through direct participation derived from separated state assets. So that State Owned Subsidiaries are no longer SOEs.

## II. PROBLEM

Based on the background above, the authors are interested in writing about how the criminal responsibility of state-owned subsidiaries has resulted in state losses?

## III. RESEARCH METHODS

This research is conducted using normative legal research. This research is legal research which is conducted by examine library materials or secondary data. This research is also called library legal research[6]. The nature of this research is prescriptive. Through the nature of prescriptive research, the author can evaluate the rightness or wrongness or what should be judged according to law towards the facts

or legal events as the results of the study[7]. The type of data used is secondary data with primary legal material, which is Act No. 19 of 2003 Concerning Stated-Owned Enterprises, Act No. 40 of 2007 Concerning Limited Liability Companies, and Government Regulation No. 72 of 2016 concerning Amendment of Government Regulation No. 44 of 2005 concerning Participation and Administration Procedure of State Capital on State-Owned Enterprises and Limited Liability Company. Meanwhile, secondary legal materials consist of book, journal, and scientific articles. Secondary data is the data gained from library material which is consisted of information indirectly obtained from literature studies.[8]

#### IV. DISCUSSION

There are 2 types of SOEs in Indonesia, that is Persero and Perum. Persero is an SOE in the form of a limited liability company whose capital is divided into shares whose total or at least 51% (fifty one percent) shares are owned by the Republic of Indonesia whose main purpose is to pursue profits (Article 1 point 2 of the SOEs Law). Whereas Perum is a SOEs whose capital is owned by the state and is not divided into shares, which aims at public benefit in the form of providing high quality goods and/or services while at the same time pursuing profits based on company management principles (Article 1 point 4 SOEs Law).

A holding company is a merger of some business entities by buying a large portion of shares (sero) from several business entities. So a holding company controls several business entities in the marketing and financial fields, because it has the most of the shares of each business entity that joins. Legally, these business entities are still independent, but because most of their shares are controlled by a holding company, then the directors of each business entity that joins are in the hands of a holding company. [9]

The existence of group companies is a representation of the relationship between economic unity and plural number juridically. [10] Parental control of subsidiaries through policies to direct the business activities of subsidiaries in supporting the economic interests of group companies as an economic entity. [11] The use of a single company approach to group company regulation has implications for the enactment of the parent company's legal principle as a subsidiary shareholder protected by limited liability for the responsibility of legal actions of subsidiaries.

Act Number 40 of 2007 does not define group companies, but in Act Number 1 of 1995 there are restrictions on the meaning of "subsidiaries" in Article 29 as follows:

"What is meant by" subsidiary "is a company that has a special relationship with other companies that occurs because of:

- a. more than 50% (fifty percent) of its shares are owned by the parent company;

- b. more than 50% (fifty percent) of the votes in the GMS are controlled by the parent company; and or
- c. control over the running of the company, appointment and dismissal of Directors and Commissioners is strongly influenced by the parent company."

The old limited liability company Act ( Act Number 1 of 1995) regulates the shares in the ownership of subsidiaries which is equal to 50%, meaning that to achieve control of subsidiaries, share ownership is required above 50%. This is different from the definition of the subsidiary in the regulation of the Minister of BUMN Number: PER-03/MBU/2012, which means that share ownership of subsidiaries is not only 50% more, but part of the shares of the subsidiary are owned by majority shareholders compared to other shareholders.

Government Regulation (PP) Number 72 of 2016 concerning Amendments to Government Regulation Number 44 of 2005 concerning Procedures for Participation and Administration of State Capital in State-Owned Enterprises and Limited Liability Companies states that most shares of state-owned subsidiaries are owned by other SOEs with a percentage of more than 50% (fifty percent) of shares. This is intended to keep the state able to exercise control through the Main BUMN and also to deal with "equated like BUMN" treatment.

Based on Act Number 17 of 2003 concerning State Finance, the scope of state finance consists of:

- a. State rights to collect taxes, issue and circulate money, and make loans;
- b. The obligation of the state to carry out public service tasks of the state government;
- c. Pay third party bills;
- d. State Revenue;
- e. State Expenditures;
- f. Regional Revenue;
- g. Regional Expenditures;
- h. State wealth/regional wealth managed by themselves or by other parties in the form of money, securities, accounts receivable, goods, and other rights that can be valued with money, including assets separated from state/regional companies;
- i. The wealth of other parties that are controlled by the government in the context of carrying out government duties and/or public interests;
- j. Wealth of other parties obtained by using facilities provided by the government

Business decisions are decisions based on optimal consideration for profit, giving profit or loss with business operations. Business decisions must not take higher profits, but rational decisions, and that depends on the internal (financial and resource conditions) and external factors (competition and economic conditions).

In the management process, SOEs (especially those in the form of Persero) are subject to Act Number 40 of 2007 concerning Limited Liability Companies. Furthermore, the question is whether it includes state losses if there is a loss in a transaction with a BUMN. BUMN losses can be caused by corrupt behavior or purely business loss. If referring to the definition of state losses in the State Treasury Law, it will cause many BUMN managers to be accused of corruption. Of course if the loss is caused by corrupt behavior not because of business loss, because it includes state losses.

Relating to the status of a subsidiary of SOEs. Agus Pambagio in Toto Pranoto added that based on Act Number 19 of 2003 concerning SOEs, state-owned subsidiaries are not included in SOEs so they cannot be treated appropriately by SOEs, especially in terms of assignments and strategic resource management. [12] In addition, the Minister of State Owned Enterprises Regulation No. Per-03/MBU/2012 concerning Guidelines for Appointment of Members of the Board of Directors and Board of Commissioners of State-Owned Enterprises, Article 1 point 2 confirms that "The Subsidiaries of SOEs are limited liability companies whose shares are owned by SOEs or controlled companies by SOEs". [13]

The subsidiaries of SOEs are no longer included in SOEs, but based on Article 2A paragraph (2) Government Regulation Number 72 of 2016 concerning Amendments to Government Regulation Number 44 of 2005 concerning Procedures for Participation and Administration of State Capital in State-Owned Enterprises and State Limited Liability Companies hold shares in a subsidiary of a BUMN with special rights stipulated in the articles of association. The privileges stipulated in the articles of association include the right to approve:

- a. Appointment of members of the Board of Directors and members of the Board of Commissioners;
- b. Amendment to articles of association;
- c. Changes in share ownership structure;
- d. Merger, consolidation, separation and dissolution, as well as corporate takeovers by other companies. [14]

Besides of the existence of state privileges in the articles of association of state-owned subsidiaries, state-owned subsidiaries are treated equally with SOEs in the following matters:

- a. Get government assignments or carry out public services; and/or
- b. Obtain state and/or government specific policies, including in the management of natural resources with certain treatment as applied to SOEs. [15]

The same treatment in Government specific policies, among others, relates to the processes and forms of licensing, the right to obtain management right, land expansion activities and/or participation in state or government activities involving SOEs. As a result, state-owned subsidiaries get government

assignments or carry out public services or get state specific policies and/or the government is a state-owned subsidiary that has responsibility to the state as the owner of capital.

BPK as the state financial examiner has the task of examining the management of funds flowing from the use of the APBN/APBD to the parties concerned. BPK will examine state-owned subsidiaries if the object of the BPK examination uses State finances in the form of APBN/APBD or purely corporate management.

The loss of SOEs or state-owned subsidiaries that get special assignments from the state due to business loss does not constitute a state loss based on the Constitutional Court Decision Number 62/PUU-XI/2013, which tests The Act Number 17 Year 2003 about State Finance and Act Number 15 Year 2006 about the Supreme Audit Agency (BPK), stating that state-owned finance is state finance, but managed under the principle of business judgment rule. Based on the ruling, the SOEs must be able to realize its vision as a public legal entity that serves the public interest and at the same time runs business activities. The provisions that must be met by directors in order to implement the business judgment rule are to fulfill the requirements as stipulated in Article 97 paragraph (5) of the Limited Liability Company Act, namely:

- a. Decision in accordance with applicable law;
- b. Done in good faith;
- c. Done with the right purpose (proper purpose);
- d. The verdict has rational grounds (rational basis);
- e. Performed with due care as done by someone who is careful enough in a similar position; f. Done with a reasonable belief as the best interest for the company. [16]

If these requirements are not met, the directors of state-owned subsidiaries can become entangled in corruption due to losses suffered by state-owned subsidiaries that get assignments from that country.

Rudi Dogar Harahap limits the definition of good faith. Good faith in managing SOEs has an element of transparency (disclosure of company performance information both timeliness and accuracy), accountability (accountability for the implementation of functions and tasks in accordance with the authority possessed by all corporate organs), responsibilities (corporate responsibility), independence (independence) and fairness (equality of treatment from the company towards interested parties). [17]

## V. CONCLUSION

The criminal liability of state-owned subsidiaries that result in state losses where the loss is a business loss cannot be snared by criminal acts of corruption in line with the Constitutional Court Decision Number 62/PUU-XI/2013, which tests Act Number 17 Year 2003 about State Finance and Act Number 15 of 2006 about the Supreme Audit Agency (BPK), provided that the directors have implemented the

business judgment rule as regulated in Article 97 paragraph (5) of the Limited Liability Company Act.

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