

FORMS OF PROTECTION AGAINST SEPARATED STATE ASSETS IN PT (PERSERO)

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ABSTRACT

This study aims to find out and analyze the legal protection for the board of directors in carrying out legal actions for the benefit of PT (Persero). This study uses a normative legal research type with a Philosophy of Law Approach, Morality or Ethics Approach, Conceptual Approach, a study of the views of legal scholars and doctrines, a normative approach or a juridical approach, a statute approach, and comparative approach (comparative approach). Data collection is done through literature study. The data were analyzed qualitatively which resulted in descriptive data.

The results of this study indicate that legal protection for directors in carrying out legal actions for the benefit of PT (Persero) is based on the principles of business judgment rule and piercing the corporate veil, both of which are regulated in Law Number 40 of 2007 concerning Limited Liability Companies.

Keywords: Protection, Law, PT Persero.

INTRODUCTION

There are often differences of opinion regarding the existence of state finances that are separated from a State-Owned Enterprise. The difference of opinion is basically part of freedom of opinion in the concept of a democratic state, because essentially every citizen is given the freedom to express opinions as mandated by the constitution. Article 28E paragraph (3) reads "Everyone has the right to freedom of association, assembly and expression". Therefore, the law must be present to provide a solution, because Indonesia as a country adheres to *rechstaats* as mandated by Article 1 paragraph (3) of the 1945 Constitution (Juliani, 2018).

Separate state assets are essentially an inseparable part of state finances. In a sense, state finances contain legal substance or material in the form of separated state assets. This is implied in Article 1 point 1 of Law Number 17 of 2003 concerning State Finances (abbreviated as the State Finance Law) which stipulates that state finances are all state rights and obligations that can be valued in money, as well as everything in the form of money or goods. Which can be used as state property in connection with the implementation of these rights and obligations?

However, in relation to a State-Owned Enterprise in the form of a Limited Liability Company, hereinafter referred to as PT (Persero), it gives rise to a different interpretation. The difference is focused on the separated state assets as state capital participation in the relevant PT (Persero). An understanding of the participation of state capital into PT (Persero) requires careful

attention so that the separated state assets can be identified, remain as part of state finances or turn into PT (Persero) assets independent of state finances.

Separated state assets should not be seen as separate from state finances (Harun, 2019). When there is separation, it is only to facilitate business and business management, not to release the separated state assets from state finances. This is intended so that the separated state assets as capital for PT (Persero) can create legal certainty for the managers of PT (Persero).

Even though it is understood that state assets separated as capital of PT (Persero) are still an inseparable part of state finances. However, there are still legal experts who think or view that separated state assets are no longer part of state finances. In a sense, PT (Persero) which obtains capital from separated state assets is essentially the assets of the State-Owned Enterprise (Persero) and is no longer part of the State finances.

Rudhi Prasetya argues that the state separates its assets in the formation of a legal entity, then these assets are no longer state assets, but have become the property and property of the legal entity that was established (Prasetya, 2011) as a legal entity is not part of the wealth of the state. This is because the separated state assets in PT (Persero) are only in the form of shares, meaning that the assets of PT (Persero) do not become state assets (Rajagukguk, 2022).

The directors of PT (Persero) who act in the interests of the company cannot be charged with the Corruption Eradication Act because the company's losses are not necessarily state losses. This refers to Article 66 paragraph (2) of Law Number 30 of 2007 concerning Limited Liability Companies (abbreviated as the Limited Liability Company Law) which stipulates that financial statements which consist of at least the balance sheet at the end of the fiscal year that has just passed in comparison with the previous financial year. Previous book, income statement for the relevant financial year, cash flow statement, and statement of changes in equity, as well as notes to the financial statements. If the balance sheet shows a loss figure, it does not mean it will automatically become a state financial loss because there may be profits that have not been shared in the past year or are closed from the company's reserve funds.

Constitutional Court Decision Number 48/PUU-XI/2013 and Constitutional Court Decision Number 62/PUU-XI/2013. The two decisions of the Constitutional Court emphasize that state assets that are separated as state capital participation in PT (Persero) are state finances. The presence of the two decisions of the Constitutional Court became the basis for ending differences in interpretation of state assets which were separated as state capital participation in PT (Persero). Thus, PT (Persero) may no longer assume that state assets that are separated as state capital participation are PT (Persero)'s capital (Saidi, 2017).

There appears to be a difference in the legal interpretation of SOEs' capital and finances between the two high legal institutions in Indonesia, namely the Supreme Court's fatwa and the Constitutional Court's decision, so that the state finance regime which was previously based on the Supreme Court's fatwa stated that capital separated as participation in BUMN-BUMN is separate from state finances and not as a system of accountability for state finances, but in its development the Constitutional Court gave the opposite decision, which actually strengthened the previous rules by strengthening the position of state capital or the inclusion of state finances in SOE capital (Aminuddin, 2012) the state finance department and must also follow the accountability of state finances, so that the juridical consequence of this decision is that it can be punished for corruption for BUMN directors who take actions that are detrimental to the state's finances even though this may be due to the reasonable business testimony. The purpose of this study is to analyze the form of protection of State Assets that are separated in PT (Persero).

METHOD

This study uses the method normative juridical research (Irwansyah, 2020) which is carried out to identify and describe a limitation of the definition of state finances on state capital participation as the capital of State-Owned Enterprises Persero.

For this reason, this type of research uses normative legal research which emphasizes the object of research on the study of legal sources in accordance with the legal issues in this research study. Furthermore, in an effort to understand more fully the legal issues that will be studied in this research, several approaches are used with the aim of supporting and complementary approaches

RESULTS AND DISCUSSION

Protection in Court Trials

Indonesia which is a state of law guarantees legal rights and legal protection for every citizen, one of the goals of the state of law is to realize legal certainty, legal certainty is one that must be achieved in law enforcement in Indonesia. Contradictory arrangements related to the position of state assets that are separated in BUMN, especially in BUMN Persero whose capital is divided into shares of which all or at least 51% (fifty one percent) of the shares are owned by the State. Conflicting arrangements so that of course lead to different legal interpretations.

On a contrario basis, the provisions in the BUMN Law regulate different principles from the provisions in the KN Law. The definition of State Assets (UU KN) which is separated in the provisions of Article 1 number 10 of the BUMN Law that separated state assets are state assets originating from the APBN to be used as state capital participation in state-owned companies and/or public companies and other limited liability companies.

According to the provisions of the KN Law, state assets that are separated from BUMN-Persero are included in the scope of state finances. There are two different principles in the two laws, in which the BUMN Law adheres to the principle that BUMN is a legal entity, so that BUMN capital originating from state assets is separated from the APBN with the aim that BUMN management is not tied to the APBN system. Meanwhile, the principle adopted in the KN Law states that there are 2 (two) kinds of state finances, namely separated state assets and non-separable state assets. Separated state assets are only regulated in the provisions of Article 2 letter g in the form of separated state assets in state companies/regional companies.

As a result of the conflict in the determination of the position of state assets that are separated in BUMN Persero in two related laws, namely the BUMN Law and the KN Law, there is legal uncertainty regarding whether the separated state assets in BUMN Persero are separate from the scope of state finances. As in the provisions and principles adopted by the BUMN Law or included in the scope of state finances as stipulated in the KN Law. Thus, there is a need for the role of judicial power actors to strengthen the position of separated state assets in BUMN Persero so that legal certainty can be achieved in accordance with the concept that the Indonesian state is a legal state.

On August 16, 2006, the Supreme Court issued a Fatwa Number WKMA/Yud/20/VIII/2006. The Supreme Court issued the fatwa by referring to the Letter of the Minister of Finance of the Republic of Indonesia Number S-324/MK.01/2006 dated July 26,

2006. The Minister of Finance asked the Supreme Court to issue a fatwa on the separation of SOE assets from state assets related to the management of state/regional company receivables that contained in Government Regulation Number 14 of 2005 concerning Procedures for Write-off of State/Regional Receivables (hereinafter referred to as PP 14/2005).

The Supreme Court then in its fatwa stated that the capital of BUMN is derived from state assets that have been separated from the APBN and its guidance and management are no longer based on the APBN system but are based on the principles of good corporate governance. Regarding state receivables, the Supreme Court stated that BUMN receivables were not state receivables. Then the PP 14/2005 can be amended as necessary, and related to state-owned Persero bank bills to comply with the Law of the Republic of Indonesia Number 1 of 1995 concerning Limited Liability Companies (which has now been replaced by the Law on PT).

According to the author, with the consequence of the status of SOEs as legal entities, SOEs should have their own assets that are separate from state assets. This means that state assets that have been separated from the state budget when included as capital into SOEs at that time also switch their ownership rights to SOEs. State in relation to BUMN, its status as founder and as holder of BUMN capital. The capital that has been invested in the BUMN cannot be withdrawn because it has become the wealth of the BUMN to be managed based on good corporate governance.

However, on 18 September 2014 there was also a decision of the Constitutional Court, which gave two decisions related to the position of separated state assets in BUMN, namely the decision of the Constitutional Court Number 48/PUU-XI/2013 and the decision of the Constitutional Court Number 62/PUU-XI/2013.

The contents of the decisions in the two decisions, the Constitutional Court in essence rejected the petition for a judicial review of Article 2 of the KN Law, especially Article 2 letters g and i of the KN Law. From the two decisions of the Constitutional Court, both the decision of the Constitutional Court Number 48/PUU-XI/2013 and the decision of the Constitutional Court Number 62/PUU-XI/2013, in principle, they state the same thing that the separated state assets in BUMN are included in the scope of state finances. Thus, the second decision of the Constitutional Court indirectly confirms the position of separated state assets in BUMN is included in the scope of state finances. So this can be interpreted legally that the position of Article 2 of the KN Law remains constitutional and indirectly confirms that state finances within the scope of SOEs are also state finances.

The Supreme Court recognizes the existence of a fatwa, but the Law on the Supreme Court itself does not explicitly state the existence of a fatwa. As a basis, if traced, the product of the Supreme Court's fatwa refers to the provisions in Article 37 of the Law of the Republic of Indonesia Number 14 of 1985 concerning the Supreme Court (hereinafter referred to as the MA Law), which states that the Supreme Court can provide legal considerations, whether requested or not. Or not to other high state institutions.

Meanwhile, the nature of the decision of the Constitutional Court based on the provisions in Article 10 paragraph (1) letter a of the Law of the Republic of Indonesia Number 24 of 2003 concerning the Constitutional Court which has been amended by the Law of the Republic of Indonesia Number 8 of 2011 (hereinafter referred to as the Constitutional Court Law), states that the Constitutional Court has the authority to adjudicate at the first and final levels whose decisions are final and binding to examine the Act against the 1945 Constitution of the Republic of Indonesia.

Legal protection (Riza et al., 2020) for business actors in PT Persero and BUMN for the possibility of being ensnared by the law of criminal acts of corruption because if there is a loss, the KPK can certainly be prosecuted for harming state finances as in the case of Insurance Loss carried out by BUMN PT Jiwasraya, for example, is through the business judgment rule doctrine which is one of the rules of the game in corporate governance. This means that whoever denies the application of the business judgment rule to the board of directors, or says that the business judgment rule does not apply to the board of directors in a decision or certain business action on behalf of the company, that person must prove it. What must be proven is that the directors in making decisions or actions do not base them solely on the interests of the company (there are personal interests in it), do so with reasonable prudence or in good faith (Harun, 2019).

In connection with the suspicion and prosecution of a number of former directors or directors of PT BUMN (Persero) for their actions that were detrimental to PT BUMN (Persero) so that they were categorized as detrimental to state finances, it is necessary to provide in-depth understanding to investigators and prosecutors. Including the judge who will make a decision on the case. If investigators and prosecutors suspect/charge them with Article 2 or Article 3 of Law no. 31 of 1999 in conjunction with Law no. 20 of 2001 each article contains one element because it can harm the state, then according to the applicable criminal law principles, the directors of PT BUMN (Persero) should be released. This is because the finances of PT BUMN (Persero) based on legal theory and environmental theories of attorneys are not state finances so that losses to PT BUMN (Persero) are also not state losses. The imposition of a criminal offense of corruption which one of the elements of the article reads "*is detrimental to state finances*" for unlawful acts/abuse of authority by the directors of PT BUMN (Persero) is inappropriate.

In general, this imposition should not be based on the theory of legal entities and the theory of the legal environment. Based on the reasons mentioned above, if the directors of PT BUMN (Persero) commit acts against the law and consequently harm the finances of PT BUMN (Persero), then the directors of PT BUMN (Persero) cannot be suspected/prosecuted under Article 2 or Article 3 of Law no. 31 of 1999; UU no. 20 of 2001. Because the allegations and accusations against the directors of PT BUMN (Persero) do not fulfill a criminal act, because in criminal law the general principle applies that if one element of an Article is not proven, then the elements of another Article do not need to be proven and a criminal act is not fulfilled, so that the defendant should be acquitted.

Protection outside the Court

To protect from the management of SOEs that are detrimental to SOE finances based on business decision making, apply the paradigm of business judgment rules. If it has an identification theory, mistakes made by members or other corporate officers can only be charged to the corporation if it meets the requirements, namely first, the actions taken by the corporate management are within the limits or instructions given. Second, the act is not a fraud committed against the corporation. Third, actions that is important to generate or finance for the corporation. In other words, if one of these conditions is not met, then the blame cannot be borne by the corporation, but borne personally by the corporate management who took the action (Hafizh, 2019).

The Board of Directors is responsible for all actions and decisions made (Sulistiowati, 2012), even to the point of personal responsibility. However, to ensure that personal liability can

be avoided if the library can prove the basis and reasons as referred to in Article 97 paragraph (5) of the PT Law. The Business Judgment Rule is one of several doctrines in corporate law that must be carried out by obligations in order to fulfill fiduciary obligations. This doctrine, developed and used in the United States

BJR is responsible for the responsibility for losses arising from a decision-making action, if the action is taken properly and with the principle of prudence. It stated that with the existence of BJR, the business considerations of the members could not be contested or contested or rejected by the court or shareholders.

Based on various expert opinions regarding BJR above, it can be interpreted that BJR basically adheres to the principle that the directors of a company are free from responsibility for losses that arise as a result of a decision-making action, as long as the action is based on good faith and the decision is fully in the interests of the company.

The actions of the board of directors that are not based on good faith and such actions cause losses can be categorized as a violation of fiduciary duty which gives birth to personal responsibility. Article 82 of the Limited Liability Company Law stipulates that the board of directors is fully responsible for managing the company for the interests and objectives of the company, as well as representing the company both inside and outside the court. This is also confirmed in Article 85 paragraph (1) of the Limited Liability Company Law which stipulates that members of the board of directors must in good faith and full responsibility carry out their duties for the interests and business of the company.

In essence, the BJR Principles protect the Directors from personal responsibility as a result of the business decisions they make as long as the decisions are made in good faith and with prudence, but the BJR principles will not be able to protect the Directors from personal responsibility if in carrying out their duties they ignore the fiduciary duty principle. The BUMN Law does not stipulate in a separate article regarding the duties and authorities and responsibilities of the board of directors, but as based on the provisions of Article 11 of the BUMN Law which states that all provisions and principles that apply to limited liability companies are applied to the Company Law, then related to the provisions of the duties and authorities as well as the responsibilities of the directors of SOEs referring to the provisions related to the duties and authorities and responsibilities of the directors in the provisions of the Law on PT. The duties and authorities of the board of directors are as stipulated in Article 92 paragraph (1) of the Company Law which states that the board of directors carries out the management of the company for the benefit of the company and in accordance with the aims and objectives of the company.

When the directors of BUMN Persero make business decisions that result in losses for BUMN. When state assets are separated from BUMN, it is included in the scope of state finances; it means that if BUMN suffers losses, it is also detrimental to state finances. The Board of Directors is a BUMN organ that is responsible for managing BUMN for the interests and objectives of BUMN, as well as representing BUMN both inside and outside the court

The polemic of the separation of state assets in equity participation in SOEs, although it is clear with the Constitutional Court's decision, in this case the DPR RI actually wants the separation of state assets in SOEs with another model, namely the establishment of a Holding Company system, or Super Holding.

According to the author, there is a need for a clear definition of state assets as equity participation in PT (Persero) which is juridical clear through new norms/regulations in the

revision of the Law on state finances to ensure the realization of the principles of legal certainty, justice, and benefit, in realizing the concept of a welfare state (Welfare state) for the sake of advancing the country's economy.

The Indonesian government needs to adopt more legal advances on regulations regarding state assets and companies from Britain and America, including incorporating the Holding system or the super Holding concept as discoursed by the Indonesian House of Representatives in the new BUMN Bill.

CONCLUSION

Legal protection of state assets in PT (Persero) is based on the principle of business judgment rule and piercing the corporate veil, both of which are regulated in the Law on Limited Liability Companies, so that the board of directors in this case is responsible for the management of such assets in good faith, if not in good faith. If it is good, legal action, both criminal and civil, can be carried out for the state if it feels aggrieved by capital investment that is not managed properly.

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