

THE CASE SETTLEMENT AGAINST GENERAL CONFISCATION LINKAGES ON BANKRUPTCY WITH CRIMINAL CONFISCATION RELATING TO DEBTOR'S BUSINESS CONTINUITY (ON GOING CONCERN)

Vanly Vincent Pakpahan, Tarumanagara University
Mella Ismelina Farma Rahayu, Tarumanagara University
Ariawan Gunadi, Tarumanagara University

ABSTRACT

Economy growth in Indonesia doesn't always run well. Often times, businessmen's, in this case debtor's financial circumstances is unstable. However, debtor's business continuity should be concerned. By the existence of either general confiscation or criminal confiscation, it becomes a method to carry out confiscation against debtor's assets. But since there is always issue between general confiscation and criminal confiscation which render difficult for each party, in this case a curator and investigator. Because of that, there should be a construction of settlement against general confiscation linkage on bankruptcy and criminal confiscation that is by a legal product as a mediator if general confiscation and criminal confiscation occurred simultaneously in a case or legal issue.

Keywords: Bankruptcy, On Going Concern, General Confiscation, Criminal Confiscation, Linkages

INTRODUCTION

Economy growth in Indonesia can not be separated from the growth and development of economic businessmen who run their businesses in business world. However, a business doesn't always run well and smoothly. Often times, businessmen financial circumstances is in such a condition where they can no longer pay their debt that is past due, with the result that creditors try their best to find a way to get their money back. Generally in practice, creditors will strive for various legal effort to get back their accounts receivable. Such as taking civil legal action through Suspension of Payment or Bankruptcy, and taking criminal legal action by reporting alleged criminal acts.

By taking civil legal action and criminal legal action against the same legal issue, a new problem occurred in its application, which is an obstacle for law enforcement for the case settlement itself.

Because there is no other solution or other method to collect debt, usually a creditor reporting alleged criminal act of fraud and/or embezzlement by a debtor.

Usually, this criminal legal action is intended to give debtor a pressure to immediately pay off debts. However, if it turned out that debtor was having a hard time and not capable to pay that debt, criminal legal process would be continued. On the other hand, that creditor or other creditor applied for bankruptcy against debtor and Commercial Court granted it. This condition is what will cause new problem in its practice.

As a legal consequence from bankruptcy declaration, then confiscation of all debtor's assets that present at the time of bankruptcy and assets gained during bankruptcy. This is what is called general confiscation (public attachment). That bankruptcy asset would be taken care of or managed by a curator who was appointed by court in order to pay off debtor's bankruptcy debts. However, there is an often difficulty or obstacles in that settlement

of assets because debtor's assets were confiscated by investigator on the occasion of criminal law enforcement on criminal report submitted by the whistle blower (creditor).

New problem would arise when confiscation by investigator occurred, where the linkage between general confiscations as a result from bankruptcy declaration and criminal confiscation by investigator as criminal law enforcement process occurs.

THEORETICAL CONCEPTS

In terms of history, bankruptcy law in Indonesia has undergone a lot of changes and substitutions. Formulation given by previous bankruptcy law didn't give one formulation that can explain the meaning or definition of bankruptcy or bankrupt itself.

Then there was an update where the Law No. 37 of 2004 on Bankruptcy and Suspension of Payments (UUK-PKPU) gave definition that bankruptcy is general confiscation on all bankrupt debtor's assets which management and settlement is done by a curator under supervision of supervisory judge (Article 1 of UUK-PKPU).

Bankruptcy itself comprises all debtors assets at the time of bankruptcy declaration verdict was pronounced and everything gained during bankruptcy started since Zero Hour Rules, that is the verdict date as referred to in paragraph (1) counted since 00.00 local time (Article 24, paragraph 2 of UUK-PKPU).

On a priori basis, bankruptcy is considered as failure caused by debtor's fault in running the business so that debts can not be paid off. If the elements of bankruptcy are drawn, they can be seen as follows:

There is confiscation and execution on all debtor's assets. The confiscation is solely regarding the assets and the confiscation or execution is for the common interest of the creditors.

On going concern is a principle of an entity or business entity's continuity. On going concern shows that an entity or business entity is considered capable of maintaining its business activities in a long term, and won't be liquidated in a short term.

Potency and survivability of a business entity or company can be proven in the form of auditor's report as competent party in assessing whether a company can continue its business or has to be bankrupt. Therefore, a going concern company is a company that will continue to operate in the future and is assumed that it doesn't intend or willing to liquidate or reduce its business scale significantly.

Dumitru Matis was also giving his view about going concern principle which is defined as an assumption that in the future a company will continue its business activity without impossibility of a company continuing its business or reducing its business activity drastically.

Commercial Court is a specialized court established under jurisdiction of general court with authority to hear and decide the case of bankruptcy declaration petition and Suspension of Payment.

Bankruptcy declaration petition can be filed if terms as referred to Article 2, Paragraph (1) of UUK-PKPU had been fulfilled, that is the debtor has two or more creditors and that debtor didn't pay off at least one debt which is past due and collectible.

In the law of bankruptcy, creditor is divided into three, that is Separatist Creditors (creditors who have materials debt guarantee), Preferred Creditors/Preferential Creditors (creditors who has priority in being paid of their account receivable according to law), and Concurrent Creditor (creditors who have no special priority).

Bankruptcy declaration verdict by commercial court (first class) is an immediate verdict, that is a verdict which could be executed first even if there was a legal action against it (Article 8 Paragraph (7) of UUK-PKPU).

Therefore, curator can start the duty since bankruptcy verdict was pronounced (first class) even if there was legal action.

If bankruptcy declaration verdict was invalidated on cassation level, then every bankruptcy curator's action before cassation verdict was known would still be considered legal and binding.

As for legal consequences from bankruptcy is that debtor lost the right to control and manage assets included in bankruptcy assets for the sake of the law, since the bankruptcy declaration verdict was pronounced (Article 24 Paragraph (1) of UUK-PKPU).

Bankruptcy comprises all debtor's assets at the time the bankruptcy declaration verdict was pronounced and every assets gained during bankruptcy, as of present this time or during bankruptcy. This is according to Article 21 of UUK-PKPU which is the embodiment from Article 1131 of Indonesian Civil Code, which regulates that all debtor's assets, both movable and immovable assets, both existing and future ones, would become insurance (collateral) for all debtor's debts.

According to the clause of that Article 1131 of Indonesian Civil Code, debtor's assets is not only limited to immovable assets such as land, but also movable assets, such as jewelery, vehicle, machines, building, including physical and non-physical assets, and assets that was in control of third party where the debtor has rights over those assets.

The term confiscation comes from the terminology *beslag* (Dutch), and Indonesian term *beslah*, but the standard term is confiscate or confiscation. The meaning contained therein is an action of putting defendant's assets forcefully into state of guard (custody) which is done formally (official) according to judge or court order. Main purpose of confiscation is for defendant's assets not to be transferred to other person through transaction or grant etcetera, and not burdened with lease or collateralized to third party. That way, defendant's assets remain intact as before during the case settlement process takes place, so that when the verdict had permanent legal force, the disputed items can be fully submitted to the plaintiff.

Confiscation in Criminal Code Procedure is mainly regulated in Chapter V Part 4, start from Article 38 through Article 46, while fraction is regulated in Chapter XIV Part 2, start from Article 128 through Article 130 of Criminal Code Procedure (KUHAP).

Definition of confiscation is regulated in Article 1 Point 16 KUHAP, which mentions that confiscation is a series of actions by investigator to take over and/or take control of movable or immovable property, physical or non-physical, for the sake of proof in investigation, prosecution, and trial.

Based on above confiscation definition, then a confiscation is a forced attempts by investigator to deprive certain property from a suspect, holder or saver, where that deprivation is justified by law and has to be executed according to law.

After the property was taken or deprived by investigator, then it will be put or saved under control of the investigator next. Therefore, the purpose of confiscation is for the sake of proof, primarily intended as evidence in front of the court. Without evidence, a case is most likely unable to be filed to the court. Because of this, for a case to be complete with evidence, an investigator carried out a confiscation to be used as evidence in investigation, prosecution, and trial. What is meant by evidence in criminal case is evidence which is object of a delict, means to commit a delict, and result of a delict. As for obtaining evidence, one of the ways is by confiscation, as is regulated in Article 1 Point 16 of KUHAP.

Generally, property that can be confiscated is divided into:

- 1) Property that was used as an instrument of criminal act (it is called "Instrumenta Delicti" in legal studies);
Property that was gained from or a result of a criminal act (also called "Corpora Delicti");
- 2) Other properties that is indirectly connected to a criminal act, but has strong reason as evidence material;
- 3) Substitute evidence, for example the object in search is money, but the money was used to buy a radio. In this case, the radio is confiscated as substitute evidence.

Procedures for implementing court verdict (execution) are generally regulated in Chapter XIX of KUHAP. Execution can only be done if a verdict had permanent legal force. Execution of criminal case verdict is carried out by a prosecutor as regulated in Article 1

Point 6 *vis* 270 KUHAP, Article 30 Paragraph (1) letter b of Law No. 16 of 2004 on Public Prosecution Service of the Republic of Indonesia.

Article 1 Point 6 of KUHAP regulates the following:

- a) Prosecutor is an official who has been granted authority by the law to act as public prosecutor and carried out court verdict which gained permanent law force;
- b) Public prosecutor is a prosecutor who has been granted authority by law to carried out prosecution and carried out judge stipulation.

Duties and authorities of the prosecutor's office in this field of criminal law is carried out by the prosecutor's office organ itself, that is the Public Prosecutor.

From that formulation, it is concluded that the definition of prosecutor is related to position, while Public Prosecutor is related to function against prosecution and court verdict implementation which has law force (execution).

Article 55 Paragraph (1) and Paragraph (2) of Law No. 48 of 2009 on Judicial Power regulates the following:

1. Court verdict execution in criminal case is carried out by prosecutor;
2. Supervision of that court verdict execution on Paragraph (1) by related chairman of the court is regulated further by the law.

Supervision by chairman of the court is considered necessary to guarantee that the verdict is carried on as it should be.

Further regulation on execution of criminal judge verdict is regulated in Article 270 KUHAP which regulate that court verdict execution which already has permanent law force is executed by prosecutor, where a clerk of the court send the verdict copy to. Article 2 Paragraph (1) of Law No. 16 of 2004 on Public Service of the Republic of Indonesia also emphasized that Public Service of the Republic of Indonesia is a government institution that carries out state authority in the field of prosecution and other authorities according to the law.

The prosecutor's office as the controller of the case process (*Dominus Litis*) has a central position in law enforcement, because it is the only institution that can determine whether a case could be filed to the court or not based on legal evidence according to the Criminal Procedure Code.

RESEARCH METHODOLOGY

The research methodology used for this writing is normative legal research, which is a research done by studying the law regulation that is valid or applied against certain legal issues. This legal research method uses legal research methods which are normative juridical, that is legal writing which is done with normative law study focus. Normative law is an inventory of positive law in Indonesia, legal principles, legal doctrine, and law discovery.

In a case, a judge implements law regulation into real things faced to sentence and put on trial.

Legal systematic is a series of regulations compiled in an orderly manner according to its principles.

Legal synchronization level is how far an existed written positive law suited or supported each other with other law regulations. Legal comparison and history of law is the basis for the formation of regulations. In normative law research, written law is studied from various aspects such as theory aspect, philosophy, structure/composition, consistence, synchronization, general explanation and every article's explanation, formality and binding force of a law, and the language used is legal language.

So, it is expected that by using normative juridical law method of research in this research, Conclusions and suggestions can be drawn on a linkage of general confiscation in

bankruptcy with criminal confiscation, and what action should be implemented by law enforcer for settlement of bankruptcy case with that linkage related to business continuity principle (on going concern) in bankruptcy law.

RESULT AND ANALYSIS

The Case Settlement and Solution Which Should Be Implemented for Law Enforcement Harmonization in Achieving Legal Purpose Against General Confiscation Linkages on Bankruptcy With Criminal Confiscation Related to Debtor's Business Continuity (On Going Concern)

This linkage of general confiscation in bankruptcy and criminal confiscation often occurs in practice, where there are more than one kind of confiscation imposed to a property. That existing linkage between general confiscation and criminal confiscation is causing legal uncertainty occurred, and in order for legal certainty to be realized, it has to be decided on which kind of confiscation should be prioritized, and how is the criminal confiscation standing to general confiscation in bankruptcy. To give legal certainty about which confiscation should be prioritized and how is the criminal confiscation standing to general confiscation, then according to writer, it can be viewed from two aspects. Legal basis of criminal confiscation on civil confiscation (general confiscation or bankruptcy) is emphasized in Article 39 Paragraph (2) of KUHAP, which mentioned that a property which is in confiscation state because of civil case or bankruptcy can also be confiscated for investigation purpose, prosecution, and criminal case trial. Through that stipulation, then the law stated that criminal confiscation has a higher public urgency than individual interest in civil field.

Because of that, the interest of plaintiff/claimant and revindicatoire beslag holder, conservatoire beslag or executorial beslag, general confiscation in bankruptcy has to be cast aside for the sake of common interest, by confiscating that property in criminal case, if related property fulfilled the category described on Article 39 Paragraph (1) of KUHAP.

Both criminal confiscation and general confiscation in bankruptcy legal standing can not just conclude which confiscation has to be prioritized. A judge has to be objectively conduct examination against that asset, does it contain criminal element or solely just common bankruptcy asset. On one hand, general confiscation on bankruptcy is carried out to add bankruptcy boedel and to protect creditors' rights according to the purpose of bankruptcy law, while on the other hand criminal confiscation is carried out for interest of proof, especially addressed as evidence in front of the court. However, definition of bankruptcy based on UUK-PKPU is general confiscation on all bankrupt debtors' assets which management and settlement is carried out by a curator under supervision of supervisory judge.

Bankruptcy stipulation is a regulation which purpose is to distribute debtor's assets to creditors by conducting general confiscation on all debtors' assets which would be distributed to creditors based on its proportion rights. Therefore, it is correct if general confiscation standing was higher than criminal confiscation. The essence from bankruptcy law is general confiscation on all debtors' assets.

Article 31 of UUK-PKPU regulates that bankruptcy declaration verdict causes every stipulation of court execution against part of debtor's assets that started since bankruptcy has to be stopped immediately. Even, debtor also has to be released from custody. Meanwhile, a court verdict can only be invalidated by a court verdict too. General confiscation on bankruptcy occurs immediately when a bankruptcy declaration verdict pronounced, while criminal confiscation is just a stipulation. Therefore, criminal confiscation stipulation should not be able to invalidate general confiscation because general confiscation on bankruptcy is in the form of Commercial Court judicial panel verdict.

Based on above description, then confiscation on a property which is part of bankruptcy boedel that would be used for paying off creditors' account receivable can be considered as erroneous act and violates the law. The law gives guarantee to creditors that all debtors' assets will be guarantee for all bonds done by debtor. However, by confiscating property which is part of bankruptcy boedel criminally, creditors is deemed forgotten of its rights. Whereas creditors have the most rights to get paid off of its account receivable from debtor's assets. A judge needs to consider debtor's condition in settling bankruptcy case when related debtor still has hopes to rise again, able to pay off its debts to creditor, if there was enough time and the large amount of employees rely their living on related company. In certain cases a chance to make effort needs to be granted to an honest debtor at the same time creditors interest and people needs can be protected by that verdict. This is in line with main purpose of Indonesian bankruptcy law which is created in order to give balanced legal protection (just) to creditor, debtor, and people.

Based on that description, it is clear that the result of general confiscation where criminal confiscation can not be carried out will inflict greater impact on public interest, compared to the result if a criminal confiscation could be carried out on a property that had undergone general confiscation.

Solution Which Should Be Implemented for Law Enforcement Harmonization in Achieving Legal Purpose Against Linkage of General Confiscation on Bankruptcy With Criminal Confiscation Related to Debtor's Business Continuity (On Going Concern)

Just as we studied before that going concern is a principle of an entity or business entity's survivability. Going concern shows an entity or business entity is considered capable of maintaining its business activity in long term and won't be liquidated in short term. As regulated on Article 46 Paragraph (2) of KUHAP, that a property that is put on criminal confiscation can be returned before case verdict or when a case already settled.

If a case was settled, a confiscated property would be returned to those who were mentioned on that verdict, except if that property was deprived for the state according to judge verdict, to be destroyed or to be broken until it is no longer usable, or if that property is still required as evidence for other case. Based on stipulation of Article 46 Paragraph (2) of KUHAP, a confiscated property is determined to be returned or deprived for the state is a judge's authority.

As for legal basis of confiscation by a curator is mentioned in UUK-PKPU, while confiscation by investigator is based on KUHAP. A curator can file a nullification lawsuit on criminal confiscation to Commercial Court to put general confiscation against bankruptcy assets which has been put on criminal confiscation firsthand by investigator, because Commercial Court has absolute competence to examine and to settle bankruptcy case and other things related to bankruptcy.

As for linkage or clash between general confiscation on bankruptcy and criminal confiscation is a form of other things related to bankruptcy, because that clash fights over confiscation state on the same object, that is debtor's assets which is declared bankrupt through Commercial Court verdict, so that the assets become bankruptcy assets as its legal standing. Beside that, a curator's rights is born from a Commercial Court verdict, so that everything done by a curator, be it in order to lift criminal confiscation on debtor's assets, has to get consent from Commercial Court through a legal product in form of a verdict.

The difference on opinion and disputes that happens often in bankruptcy practice related to both confiscation state, has actually gone against main purpose of bankruptcy itself, that is settling debts case fairly, quick, open, and effective. The longer this condition will certainly affecting public trust to settle cases through bankruptcy institution. After all, as described before, that there would be clashes between a curator and investigator against general confiscation and criminal confiscation. In line with that, public and businessmen in

Indonesia need a legal product that can give legal certainty and justice in debts settlement through bankruptcy and Suspension of Payment, especially when it is clashed with criminal confiscation. So that sociologically, public and businessmen needs on an instrument of a fair bankruptcy debts settlement for each party, giving legal certainty, avoiding fraudulence, and capable of responding to global development.

CONCLUSION

Against linkages of general confiscation and criminal confiscation, then the construction of case settlement against linkages of general confiscation on bankruptcy with criminal confiscation related to debtor's business continuity (on going concern) is that a curator and investigator need to synergize without preceding each other to eliminate overlapping between law implementation and law enforcement. By medium/law protection existence for both parties to carry out each duty should be able to execute without going against each other and heeding on going concern principle for the sake of public interest and creditor party including all parties related to the following legal issue.

For the sake of legal certainty, then the solution should be implemented for the harmonization of law enforcement in achieving legal means against linkage of general confiscation on bankruptcy with criminal confiscation related to debtor's business continuity (on going concern) is there has to be a legal product to reduce long and complicated legal process from the overlapping between general confiscation and criminal confiscation by making changes to Article 31 Paragraph (1) and (2) of UUK-PKPU. As for that changes is regulating that in case of bankruptcy declared before criminal confiscation carried out, then the criminal confiscation execution has to be approved by supervisory judge first or a judge examining the bankruptcy case, so that case settlement where the linkages between general confiscation and criminal confiscation occurs, gives security and legal certainty for creditors from government arbitrariness. Legal certainty is not only a statement origin in the law, but also is a consistence in judge verdict, between one judge verdict and the other judge verdict against similar settled case. Besides that, the principle of *Pari Passu Prorate Parte*, where debtor's bankruptcy asset is common guarantee for creditors and the payoff should be distributed proportionally between them, and the state, which billing has to be prioritized according to the law, can also be given.

RECOMMENDATIONS

A bankruptcy case which process takes too long also has impact on the value of bankruptcy assets because there are some assets depreciate from year to year. Moreover, the confiscation purpose itself is to protect each party's rights so that debtor won't embezzle or take away the properties from creditor. And so the criminal confiscation. There is no difference between these two things. It is just for bankruptcy; debtor's assets confiscation in bankruptcy case has a purpose to add bankruptcy boedel and to protect other concurrent creditors. While criminal confiscation is solely for evidence only, when related debtor still has hope to rise again, capable to pay off debts to creditor, if there was enough time and a large number of employees rely their living to that related company. In certain cases, a chance to keep making efforts need to be given to an honest debtor and by the same verdict, creditor's interest and public needs can be protected. Then, norm/principle is needed as a bridge for accommodating curator and investigator in carrying out their duty which gives good benefits in law implementation and enforcement for the sake of justice. This thing is in line with basic purpose of Indonesian Bankruptcy Law which is made to give balanced legal protection (just) to creditor, debtor, and public. Besides that, for a law enforcement harmonization, *Pari Passu Prorate Parte* principle needs to be heeded, where debtor's bankruptcy asset is common guarantee for creditors and the payoff should be distributed

proportionally between them, and the state, which billing has to be prioritized according to the law, can also be given.

There should be a legal product which is aspired to be applied to simplify long legal process so it would cost less, simple with acknowledging entitlements issues outside of bankruptcy regulation, such as social interest that is in line with the purpose of UUK-PKPU which should give fair protection not only for creditor, but also for debtor and other parties, with oriented to the values of Pancasila and UUD NRI Year 1945. This institution is expected to give fair settlement for businessmen, by heeding business capability aspects and to avoid disputes among experts and practitioners in bankruptcy against investigator in criminal case investigation.

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