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Status of Implementation of Corruption Criminal Offices Related to State Financial Loss in Soe Subsidiaries

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Abstract

The purpose and objective of this legal research is to identify the principles and principles of a rule of law as well as the concepts used to examine how the implementation of the Special Offenses for Criminal Acts of Corruption which ensnares the leadership of a subsidiary of a state-owned company in the form of a Persero. This type of legal research is normative, using a statutory approach and also using a comparative approach. The results of this study indicate that the losses suffered by subsidiaries are not state losses and the application of criminal acts of corruption to the leadership of SOE subsidiaries is irrelevant.

Keywords
subsidiary; BUMN; limited liability company; corruption

I. Introduction

The preamble to the constitution in the fourth paragraph states that "the unitary state of the republic of Indonesia aims to protect the entire Indonesian nation and the entire homeland of Indonesia, promote public welfare, educate the nation's life and participate in carrying out world order based on freedom, eternal peace and social justice". In terms of promoting general welfare, the government forms a state company or what is known as BUMN as an extension of the state to manage all production matters that are considered important for the state and control it, be it water, earth, and other natural resources for the life of many people and improve the quality of life economy in the country.

The economic condition of the population is a condition that describes human life that has economic score (Shah et al, 2020). Economic growth is still an important goal in a country's economy, especially for developing countries like Indonesia (Magdalena and Suhatman, 2020).

SOE capital comes from state assets sourced from the state budget (APBN), state equity participation in SOEs is direct and some is separated in the capital participation. The main functions of BUMN are commercial functions and social functions. The purpose of the commercial function is to seek profit as cooperatives in general, the purpose of the social function is to extend the hands of the state to realize general welfare. BUMN consists of Persero and Perum, BUMN in the form of a company as mentioned in Article 1 paragraph 2 of Law No. 19 of 2003 "*A limited liability company, hereinafter referred to as Persero, is a BUMN in the form of a limited liability company whose capital is divided into shares of which all or at least 51% (fifty one percent) of the shares are owned by the Republic of Indonesia whose main purpose is to pursue profit.*Meanwhile, Perum is a BUMN whose capital is entirely owned by the state and is not divided into shares. BUMN as an economic actor that plays an important role for the welfare of the Indonesian people, therefore efforts to optimize its role must be carried out in a professional manner both in supervision and management must follow the principles of good company.

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The consequence of a BUMN company in the form of a limited liability company is following the principles contained in the provisions of the limited liability company regulations, this is stated in Article 11 of the BUMN Law of 2003, namely "Against Persero all provisions and principles that apply to limited liability companies as regulated in Law Number 1 apply. 1995 concerning Limited Liability Companies". For this reason, state-owned companies, state-owned companies, have limitations in terms of separate responsibilities and assets. In contrast to the provisions of Law No. 17 of 2003 concerning state finances, Law No. 31 of 1999 explains that the assets of state companies whose shares/capital are separated include state finances. For this reason, some of these provisions have conflicting norms on state finances. There is a decision of the Constitutional Court number 62/PUU-XI/2013 which explains that the wealth in BUMN is the wealth of the state. The explanation in the decision is that when a state-owned company suffers losses, including state losses and the position of directors can potentially be entangled in corruption in Article 2 paragraph 1 and Article 3 of Law No. 31 of 1999 in conjunction with Law No. 20 of 2001. For this reason, the Constitutional Court's decision is clearly contradictory. with the principle of a limited liability company which is a legal entity that has separate assets from shareholders.

Causing a debate by legal experts on the offense of criminal acts of corruption that ensnared the management of state-owned companies, there are parties who have explicitly stated that losses to state-owned companies are part of state losses so that the perpetrators of criminal acts of corruption can be charged, and from the other side there are also those who state that losses to state-owned companies in the form of a limited liability company are not losses to the state so that they cannot be charged with criminal acts of corruption because it is seen from the principle of limited liability companies which have separate assets to shareholders. Law enforcement officials do not understand the basic concept of a legal entity company such as a company related to state capital participation which is separate from state assets in the form of shares.

The state capital that enters the state-owned company (Persero) belongs to the company itself which will be managed properly to get the maximum profit. So for this case, private companies or state-owned companies in the form of companies must comply with company regulations which are specifically regulated in Law No. 40 of 2007 concerning Limited Liability Companies. The company is essentially an ordinary business whose shares are separated from state assets with share ownership status either partially or wholly by the state, with the aim of pursuing profits whose shares come from BUMN or it can be from the public. A limited liability company is a legal entity, so the shares or assets of a BUMN subsidiary in the form of a company become the property of the legal entity company, not the BUMN or shareholders.

The journey of BUMN in its development gave birth to a company called the parent company and subsidiaries. The main objective of the holding company is to carry out investments in subsidiaries and carry out supervision over activities in the management of subsidiaries. The establishment of the subsidiary is actually an effort from the government to increase the credibility of BUMN. Which in this strategy is to increase the attractiveness for investors to invest some of their shares in the parent company so that the task of the subsidiary plays a role in optimizing the value of goods in sales.

The explanation of BUMN subsidiaries is stated in article 1 1 paragraph 2, namely "Subsidiary of BUMN, hereinafter referred to as Subsidiary is a limited liability company whose shares are mostly owned by BUMN or a limited liability company controlled by BUMN". In this article it states that a subsidiary of a BUMN is a limited liability company, in article 1 paragraph 1 of law no 40 of 2007 a limited liability company is "a legal entity which is a capital partnership, established based on an agreement, conducting business activities with authorized capital which is entirely divided into shares and fulfills requirements stipulated in this law and its implementing regulations”.

The number of cases and decisions of criminal acts of corruption that ensnared state-owned companies within the scope of SOE subsidiaries. Of the several cases that ensnared SOE subsidiaries, law enforcement officials have always linked assets owned by BUMN or BUMN subsidiaries, including part of state finances. A BUMN subsidiary is a company which is subject to the regulations of a limited liability company. Related to criminal acts of corruption on the part of BUMN subsidiaries that cause state financial losses. For this reason, what is meant by state finances based on Law No. 17 of 2003 is "all the rights and obligations of the state that can be valued in money, as well as everything in the form of money or in the form of goods that can be used as state property in connection with the implementation of these rights and obligations".

Part of the capital in BUMN subsidiaries comes from the parent company, namely BUMN. The form of the company in a BUMN subsidiary, namely a company, in principle from the company has the principle of a separate entity from the finances of the owners of capital and this is stated in article 3 paragraph 1 of law no 40 of 2007. The purpose of article 3 paragraph 1 is to imaginary stretch a wall of separation of shareholders shares with the company, this purpose is actually to protect shareholders from all actions, activities and actions of the company.

II. Research Method

The research used by the author uses normative research. Normative legal research is a legal research that puts the law as a building system of norms. What is meant by a system of norms is regarding the rules of legislation, principles, norms, doctrines and agreements, as well as court decisions. The aims and objectives of this legal research are to identify the principles and principles of a rule of law as well as the concepts used to examine how the implementation of the Special Offenses for Criminal Acts of Corruption which ensnares the leadership of a subsidiary of a state-owned company in the form of a Persero. This study uses a statutory approach and also uses a comparative approach. As for the excerpt of this research, there are similarities with research from Julio Thimotius Kapitan Smaud Natun which examined the ownership status of BUMN subsidiaries, which is the difference articles on criminal acts of corruption with sources obtained through decisions and other journals.

III. Results and Discussion

3.1 Loss of SOE Subsidiaries is not a State Loss

BUMN subsidiaries are also known as limited liability companies, in this case BUMN subsidiaries also follow the rules contained in the company regulations, namely Law No. 40 of 2007 concerning Limited Liability Companies. The explanation of a limited liability company is referred to in Article 1 paragraph 1 of Law No. 40 of 2007 namely "Limited Company, hereinafter referred to as a company, is a legal entity which is a capital partnership, established based on an agreement, conducting business activities with authorized capital which is entirely divided into shares and meets the requirements stipulated in this law and its implementing regulations”. In this case, the company is a legal entity that was born from a legal process and must meet the following requirements:

a. It is a capital partnership, meaning that in the deed of every establishment of the company there must be authorized capital which is entered by the shareholders as members of the company by paying their shares to the company.
b. Established based on an agreement means that the company is born from an agreement between 2 or more people which has a contractual and consensual nature and is also stated in Article 7 paragraph (1) of Law No. 40 of 2007 concerning Limited Liability Companies.
c. Carrying out business activities means that the company's purpose, objectives and business activities must be stated in the company's articles of association in accordance with article 18 of the limited liability company law.
d. The birth of the company through a legal process in the form of government approval means that the company is a legal entity created through a legal process so that for its ratification there must be a decision from the minister as stated in article 7 paragraph (4) of law no 40 of 2007 concerning limited liability companies. The minister who can ratify the company is the minister of law and human rights.

A company in the form of a limited liability company from the statement of law is a company with a legal entity. Therefore, a company in the form of a company can perform an act like a human being who has its own assets and debts. the company in legal subjects as a supporter of rights and obligations and as a legal entity has an independent position and is not dependent on shareholders. Companies in the form of a company have assets separate from their owners (shareholders). A limited liability company which is a legal entity also has the principle of a separate entity and limited liability, the purpose of a separate entity is as an act and action in the company's activities not as an act of shareholders,

State finances for SOE subsidiaries are a question, because the capital for the formation of SOE subsidiaries comes from wealth in the parent SOEs, not directly from the state. Article 1 paragraph 1 of the state finance law states 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 in the form of goods that can be used as state property in connection with the implementation of these rights and obligations." And in Article 2 it also states that "State finances as referred to in Article 1 point 1, include: state assets/regional assets managed by themselves or by other parties in the form of money, securities, receivables, goods, and other rights that can be valued in money, including assets separated from state/regional companies. "When viewed from the regulation, the finances of SOEs are included in the scope of state finances. That there is a similarity regarding the definition of state finances with the financial auditing agency as referred to in regulation number 15 of 2006 article 1 number 7 which states that "State finances are all rights and obligations of the state that can be valued in money, as well as everything in the form of money or in the form of goods that can be used as state property in connection with the implementation of these rights and obligations. For this matter, BPK also has the authority to audit SOE finances. That there is a similarity regarding the definition of state finances with the financial auditing agency as referred to in regulation number 15 of 2006 article 1 number 7 which states that "State finances are all rights and obligations of the state that can be valued in money, as well as everything in the form of money or in the form of goods that can be used as state property in connection with the implementation of these rights and obligations. For this matter, BPK also has the authority to audit SOE finances. That there is a similarity regarding the definition of state finances with the financial auditing agency as referred to in regulation number 15 of 2006 article 1 number 7 which states that "State finances are all rights and obligations of the state that can be valued in money, as well as everything in the form of money or in the form of goods that can be used as state property in connection with the implementation of these rights and obligations. For this matter, BPK also has the authority to audit SOE finances.

That there is a contradiction related to the laws and regulations regarding wealth in SOEs. For this reason, overcoming these problems must provide an answer between legal theory and legal principles. So if there is a legal problem, then general regulations can be overridden by special regulations. According to the principle of lex specialis derogat legi generalis.

BUMN subsidiaries arise as a result of the merger process in the form of a limited liability company as a legal entity that has an independent position and has its own assets from its shareholders. Most of the finance or shares in BUMN subsidiaries come from the parent company, therefore the relationship that arises between the parent company and subsidiaries as shareholders and the company. The existence of the parent company's participation related to the responsibility for the loss of its subsidiary caused by an unlawful act or a default by the subsidiary against the loss of another party, therefore the form of responsibility of the parent company can be in the form of personal or joint responsibility.

The assets of a SOE subsidiary are separated from its parent company because the SOE subsidiary is a limited liability company as a legal entity. As for the theory related to legal entities, namely the theory of financial transformation put forward by Arifin P. Soeria Atmadja. This theory explains that there is a change in theory related to the legal status of finance because of the consequences of legal actions in the transfer and separation of finances from one legal subject to another. There is a transformation of financial law which causes a legal entity to change rights and obligations so that in terms of responsibility, risk and management, they are subject to new laws. There are differences in accountability and management between public finance and private finance.

Losses to SOE subsidiaries are not classified as state losses. The form of SOE subsidiary mentioned in Article 1 paragraph 2 of the Regulation of the Minister of State-Owned Enterprises of the Republic of Indonesia Number Per-04/Mbu/06/2020 is a limited liability company which is a legal entity and has the principle of a separate entity and limited liability from the shareholders. the purpose of a separate entity is such as an act and actions in the activities of the company not as an act of the shareholder, while what is meant by limited liability is that if there is a loss to the company the shareholder is not responsible for more than the amount of his investment in the company.

3.2 Status of the Application of Criminal Offenses of Corruption in BUMN Subsidiaries

Corruption has problems with the impact of economic development in every country, both in developed and developing countries. The danger of corruption has become a concern for every country so that the formation of an international organization to anticipate these crimes is due to their harmful effects on the economy of the country. Corruption is an extraordinary crime, which is an extraordinary crime, so that in terms of eradicating it, in order to anticipate this crime, it requires a serious handling of law enforcement officers from the police, prosecutors and the KPK. There are differences of opinion regarding the criminalization of the SOE leadership of a corporation among law enforcement officers. In particular, it is related to the position of state finances in BUMN as a corporation.

There are differences of opinion regarding losses to state finances in state-owned companies which state that losses to state-owned companies are losses to state finances. It is clarified in the explanation of criminal acts of corruption number 31 of 1999 which states that "State finances in question are all state assets in any form, separated or not separated, including all parts of state assets and all rights and obligations arising from: i) are in the control, management, and accountability of state agency officials, both at the central and regional levels; and ii) are under the control, management, and accountability of BUMN, foundations, legal entities, and companies that include state capital, or companies that include third party capital based on agreements with the state". in the explanation states that the wealth in BUMN is included as state wealth. So if there is a financial loss to the BUMN, it is part of the state's financial loss and the perpetrators of the leadership of the BUMN company can be charged with the article on corruption.

Basically a BUMN subsidiary is a "limited company whose shares are mostly owned by BUMN or a limited liability company controlled by BUMN". That it is clear that the shares acquired in the establishment of a BUMN subsidiary come from BUMN not from the state and in principle must also comply with the regulations that exist in the limited liability company. The definition of a limited liability company is "a legal entity which is a capital partnership, established based on an agreement, conducting business activities with authorized capital which is entirely divided into shares and fulfills the requirements stipulated in this law and its implementing regulations".

A limited liability company is a legal entity that basically can have the rights and obligations to take actions that resemble humans, have their own wealth and can be sued and sued in court. A legal entity is a subject that can be referred to as an independent body or independent of the founders, members, or investors of the agency. This agency can also perform on its own behalf in conducting business activities. Companies that are legal entities such as limited liability companies have assets separate from their shareholders, this trait in corporate status is considered important as a form to distinguish it from other companies. The conditions that must be met in establishing a company as a legal entity are:

a. Is a capital partnership
b. Established by agreement
c. Doing business activities
d. The company was born through a legal process in the form of government approval

Regarding the leadership of a BUMN subsidiary, such as directors or other high-ranking officials who are suspected of having caused state financial losses in managing their companies, they cannot be charged with corruption crime regulations as explained in Article 2 paragraph 1 of Law No. 31 of 1999 concerning the eradication of corruption. "Every person who unlawfully commits an act of enriching himself or another person or a corporation that can harm the state's finances or the state's economy, shall be punished with imprisonment for life or imprisonment for a minimum of 4 (four) years and a maximum of 20 (twenty) years.) years and a fine of at least Rp. 200,000,000.00 (two hundred million rupiah) and a maximum of Rp. 1.000.000.000,00 (one billion rupiah)".

That because the SOE subsidiary is a limited liability company in which the company is a form of independent legal entity corporation which has substantive characteristics attached to itself, namely:

1. Limited liability means that the shareholders or founders and members are not responsible for the debts or losses of the cooperative. So if the business entity is a limited liability company, the shareholders are only responsible according to the shares they own in the event of a loss or debt.

2. Owning your own wealth means that the wealth in a company that is a legal entity belongs to the company itself, not the property of the directors, shareholders or other members and officials.
3. Has contractual authority and can also be sued or sued on his own behalf.

The existence of the Supreme Court Circular Number 10 of 2020 concerning the implementation of the results of the 2020 Supreme Court plenary meeting as a guideline for carrying out duties for the court in part A of the formulation of the Criminal Chamber number 4 alludes to "losses arising from BUMN/BUMD subsidiaries whose capital is not sourced from APBN/APBD or non-capital participation from BUMN/BUMD are not included as state losses". It is known that the capital of a BUMN subsidiary comes from its parent, as well as the status of a BUMN subsidiary as a limited liability company as stated in Article 1 paragraph 2, namely "Subsidiary of BUMN, hereinafter referred to as Subsidiary, is a limited liability company whose shares are mostly owned by BUMN or company. which are controlled by SOEs". Based on the character of the legal entity theory which has also been regulated in the BUMN Law, PT Law, and the Civil Code, it can be explained that the assets in the company are the assets of the company itself. because as a legal entity the company has an independent position and has its own wealth from its shareholders, can sue and be sued on its own behalf. So the concept will be related to the rights and obligations that will arise in an agreement made by the legal entity. can sue and be sued in his own name. So the concept will be related to the rights and obligations that will arise in an agreement made by the legal entity. can sue and be sued in his own name. So the concept will be related to the rights and obligations that will arise in an agreement made by the legal entity.

Regarding the element of implementing the criminal act of corruption that ensnares the leadership of a subsidiary of a BUMN, the implementation is irrelevant, because the shares in a subsidiary of a BUMN are not qualified as state finances but belong to the subsidiary of the BUMN whose capital is from BUMN, not from the state budget. The company is in principle binding contractually or by agreement, the state finances in the company have changed in the form of shares. In this case the state has carried out business activities by investing its shares in the company and the state must also directly know the impacts that arise in business competition.

BUMN subsidiaries in carrying out their business have not been able to fully exercise their freedom in a professional manner, because if there is a risk that causes losses in the company, it can be categorized as a state loss which affects the leadership of the subsidiary, it can be subject to sanctions in the article on corruption. In running a business, you should have some flexibility or freedom in making business decisions so that these actions can be protected on the principles of the Business Judgment Rules (BJR) doctrine.

The BJR principle is a protection for the board of directors from legal entanglement in making business decisions if there is a loss to the company in making the decision, it must be based on good ethics and full of prudence. The doctrine on the BJR principle is protection in every business decision making for the directors and this doctrine is known in company law. Every management and management as well as in making decisions aimed at the interests of the company, therefore the directors can be protected by the doctrine on the BJR principle.

IV. Conclusion

Based on the problems and explanations that have been discussed above regarding the Status of Application of Corruption Crimes Related to State Financial Losses in BUMN Subsidiaries, it can be concluded that:

1. Losses of BUMN subsidiaries are not state losses. This can be understood based on the understanding of Article 1 Paragraph 1 of Law no. 40 of 2007. A company in the form of a limited liability company from the statement of the law is a company with a legal entity. Therefore, a company in the form of a company can perform an act like a human being who has its own assets and debts. the company in legal subjects as a supporter of rights and obligations and as a legal entity has an independent position and is not dependent on shareholders. Companies in the form of a company have assets separate from their owners (shareholders). A limited liability company which is a legal entity also has the principle of a separate entity and limited liability, the purpose of a separate entity is such as an act and action in the company's activities not as an act of the shareholders, while what is meant by limited liability is in the event of a loss to the holding company. shares are not liable for more than the amount invested in the company.
2. Regarding the element of implementing the criminal act of corruption that ensnares the leadership of a subsidiary of a BUMN, the implementation is irrelevant, because the shares in a subsidiary of a BUMN are not qualified as state finances but belong to the subsidiary of the BUMN whose capital is from BUMN, not from the APBN.

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