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State-Owned Enterprises Restructuring Through Holding Company in Responding to Bankruptcy in Subsidiaries

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***Abstract*-The present study aims to determine State-Owned Enterprises (SOEs) restructuring through holding companies in responding bankruptcy in subsidiaries. It is also initiated by the issue of bankruptcy as a risk that can occur both on holding company and its subsidiaries in a holding company of the SOEs. If subsidiaries are in bankruptcy, the SOEs are not a trivial matter to face this possibility since the position of the subsidiaries and holding company are separate. The present study was conducted using normative juridical. It concludes that, first, although a holding company was formed, the holding company and its subsidiaries as separate and independent companies in carrying out their activities were each limited by the existence of separate legal entities and limited liability. Second, bankruptcy in subsidiaries included in SOEs holding companies could occur and the form of liability of holding companies which are that of in SOEs were limited to the shares. Besides, if the SOEs holding companies caused bankruptcy in subsidiaries in managing financial management, the liability could expand.**

Keywords- Bankruptcy, Subsidiaries, Holding.

I. INTRODUCTION

In general, the main purposes and mission of a State-Owned Enterprise (SOE) established by the Government are as mandated in the Preamble to the 1945 Constitution which is the juridical foundation of its establishment. As a realization of the mandate of the 1945 Constitution in economic field, the government established SOEs which is a government facility to realize public welfare and social justice for all Indonesian people. SOEs are a business entity that the entire or most of its capital is owned by the state through direct participation from the separated state assets. According to Law of the Republic of Indonesia Number 19, 2003 on State-Owned Enterprises, there are 2 (two) forms of SOEs, namely State-Owned Companies and Public Corporation.[1]

The purpose of establishing SOEs based on the Law of the Republic of Indonesia on State-Owned Enterprises is to contribute to the development of the national economy and state revenue in particular, pursue profits, organize public benefits in the form of providing high-quality and adequate goods and/or services for the fulfillment of the lives of many people, becoming a pioneer business activities that cannot yet be carried out by the private sector and cooperatives, actively provide guidance and assistance to entrepreneurs of the economically middle-lower group, cooperatives, and communities (Article 2 of Law on Stated-Owned Enterprises). The implementation of the purposes of SOEs is realized in business activities in almost all sectors of the economy, such as agriculture, fisheries, plantation, forestry, manufacturing, mining, finance, post and telecommunications, transportation, electricity, industry and trade, and construction. However, in fact, achieving the purposes of SOEs has been relatively high cost so far and the company's performance is considered to be inadequate. [2]

In order to optimize its role, SOEs must improve their management and supervision to be more efficient and productive. Steps that can be taken by SOEs are restructuring, that is, an effort made in the framework of SOEs restructuring, which is one of the strategic steps to improve the company's internal conditions in order to improve performance and company values (Article 1 point 11 of the BUMN Law). One form of restructuring is the formation of a Holding Company. The formation of a Holding Company as an option for restructuring SOEs becomes a management optimization and increasing the flexibility of the company, which in turn, will move the subsidiary as a pure corporate. In addition, the Holding Company has the obligation to act like a modern company that concentrates on increasing the competitiveness through restructuring, increasing efficiency, and expanding business. The grouping of SOEs business units is based on sectors and business characteristics, purely in business or public services. [3]

In the formation of holding SOEs, it cannot also be separated from bankruptcy act. The reason is that, if the holding company is declared bankrupt, its execution of bankruptcy will be different from that of in non-holding company. Therefore, it needs to be further seen the influence of Bankruptcy Act on holding SOEs. The risks faced by the holding company are also increasingly diverse, one of which is bankruptcy. It has become a common need, even though small companies have been formed, even one or a number of subsidiaries. Moreover, the holding company itself will make a loan called credit to hold it. If the credit cannot be repaid and can be billed due to the due date, the company can, of course, be filed for bankruptcy. It has become a common need, even though small companies have been formed, even one or a number of subsidiaries. Moreover, the holding company itself will make a loan called credit to hold it. If the credit

cannot be repaid and can be billed due to the due date, the company can, of course, be filed for bankruptcy. [4]

Shi Jianzhong revealed a number of possible bankruptcy in holding companies related to a bankrupt subsidiary such as, *first*, the holding company and several bankrupt subsidiaries; *second*, all the bankrupt subsidiaries, not the holding company; *third*, some bankrupt subsidiaries, not the holding company and other subsidiaries that are not; *fourth*, the holding company and all the bankrupt subsidiaries. Holding SOEs companies which are incidentally limited companies have also the potential for bankruptcy in the future. Bankruptcy is a condition that is very much avoided for legal entities with business activities. Bankruptcy, as explained in Article 1 section 1 of Law of the Republic of Indonesia Number 37, 2004 on Bankruptcy and Suspension of Debt Payment Obligations, is a general confiscation of all the assets of a Bankrupt Debtor whose management and settlement is carried out by the Curator under the supervision of the Supervising Judge as regulated in the related Act. The bankruptcy effect does not only affect the Company's assets, but also the credibility of the directors and/or commissioners who hold positions in the bankrupt Company, even though the directors and commissioners are not always taken for responsibilities of their personal wealth to pay off the Company's debts. [5]

The bankrupt of subsidiaries will have some impacts. *First*, all debtors' assets of bankrupt subsidiaries are confiscated for the creditors' interests regardless the status of the *Persero* or *non-Persero* in holding subsidiaries. However, the bankrupt subsidiaries will lose the right to control and manage its assets. All commitments when the verdict of the bankruptcy cannot be paid from the bankruptcy *boedel*, and all decisions regarding the conduct of the court before bankruptcy must be terminated and the debtors cannot be subject to forced money. *Second*, the directors and board of commissioners in the bankrupt subsidiaries will find it difficult to occupy similar work since the requirements to be appointed as both must be free from the bankrupt black record of the previously led company. *Third*, the bankrupt subsidiaries will influence public trust, especially shareholders in (private) SOEs, for the development of SOEs business by establishing new subsidiaries. *Fourth*, SOEs as shareholders will lose profits from the amount of capitals deposited in investments. *Fifth*, the employees will automatically experience Employment Termination if there is no company restructuring until the liquidation after the bankruptcy ends. This condition has consequences for employees who are higher than concurrent creditors, that is, becoming preferred creditors.[6]

Article 2 Section (5) of Law of the Republic of Indonesia on Bankruptcy and Suspension of Debt Payment Obligation only briefly reviews bankruptcy in SOEs, in the case that the debtor is an insurance company, pension fund, or SOEs engaged in the public interest sector, then the request for bankruptcy can only be issued by the Minister of Finance. The regulation shows that the law does not provide a more detailed description since the form of SOEs based on the Law of the Republic of Indonesia on State-Owned Enterprises are *Perum* and *Persero*. Bankruptcy in *Persero* is not explicitly regulated in the Law of the Republic of Indonesia on Bankruptcy and Suspension of Debt Payment Obligation. An analysis of the Law of the Republic of Indonesia on State-Owned Enterprises and Bankruptcy and Suspension of Debt Payment Obligation can be obtained by understanding that the formulation of Article 2 section (5) of the Law of the Republic of Indonesia on Bankruptcy and Suspension of Debt Payment Obligation the states that SOEs in the public interest sector is a business entity whose entire capital is owned by the state and is not divided into shares. [7]

It can be seen that the SOEs is that of in the form of *Perum*. Having said that, based Article 1 number 4 of the Law of the Republic of Indonesia on State-Owned Enterprises stipulates, a Public Company, hereinafter referred to as Perum, is a SOEs that the capital is fully owned by the state and not divided into shares, aiming at public benefit in the form of providing high quality goods and/or services while simultaneously pursuing profits based on company management principles. The SOEs Act determines the limitation referred to the SOEs as *Perum* so that a request for bankruptcy for *Perum* can only be issued by the Minister of Finance. This means that there is no specific regulation regarding the insolvency of SOEs *Persero* at present.

II. RESEARCH METHOD

Legal normative with regulation approach, legal principles and theories are the type of research. Empirical approach is a research approach based on data and legal facts obtained from the field. Both are simultaneously used in the present study to analyze various laws and regulations related to wages and also use primary data obtained from the field. The research material is secondary legal material in the form of laws and regulations. Descriptive-qualitative method was used to analyze the results. Descriptive-qualitative analysis was carried out by examining the object based on the collected materials. Analysis using a qualitative approach according to Soerjono Soekanto is a research procedure that produces descriptive data. [8]

III. FINDINGS AND DISCUSSION

Holding company is a holding company that aims to own shares in one or more other companies and/or control, set, manage one or more other companies. Munir Fuady states that holding company is a company that aims to own one or more shares in another company and/or regulates one or more other companies, but the company is engaged in a different business field. This is referred to as vertical holding. Meanwhile, if the business is in a similar line, it is called horizontal holding. Holding

company is a business entity that aims to control most of the shares of the business entity that will be affected. Holding company, as a combination or composition of various companies which are legally independent, is closely related to one another in forming an economic unit that is subjected to a leader, namely a holding company as the central leader. [9]

Holding companies and subsidiaries have legal entities, so limited rights and obligations are applicable in the field of assets (limited liability). The principle of limited liability regarding separate assets means that the assets of shareholders' assets are truly separate. If legal entity has a debt, shareholders cannot be held liable for the payment of the legal entity's debt, and vice versa. In addition, losses incurred by shareholders are limited to capital paid to the company. SOEs have the advantages as a subsidiary, that is, the status is the same as that of holding company itself. The purpose of being equal, in this case, is in the form of the advantages of running and developing certain businesses related to the livelihoods of many people or natural resources that are important to the state. [10]

Although the holding companies are included in SOEs and the subsidiaries are not necessarily SOEs. However, the legal status of the subsidiaries that is not *Persero*, both as organization and procedure of its establishment, they are still subjected to the Company Act. SOEs is regarded as a business entity that the entire or most of its capital is owned by the state through direct participation of the separated state assets. It is divided into two types; *Persero* and *Perum*. Th former is also divided into two types; closed *Persero* and open *Persero* that plunges on the trading using capital and the number of shareholders must meet certain criteria or *Persero* that conducts a public offering in accordance with laws and regulations in the capital market sector. *Holding company* is liable for the subsidiaries in authority given to it, both in management and other company policies. [11]

However, if the subsidiaries are independent Limited Companies, the holding company cannot be legally accounted for. The shareholders are also only liable for the value of the paid-in capital in the company. The principle of piercing the corporate veil changes the concept of liability, that is, the liability of shareholders is unlimited if they are involved in problems that could result in losses to the *Persero* as stated in Article 3 section (1) of the Law on Company concerning shareholders. The principle "piercing the corporate veil" contains three elements which must be proven by the claimant in applying this principle, such as; (1) control and dominance, (2) improper purpose or usage, and (3) generate losses. [12]

In addition to being able to ensnare the shareholders, this principle can also ensnare the Directors (Article 97 of the Company Act) and the Board of Commissioners (Article 114 section (2) of the Company Act). The holding company, in the common legal system, is not liable for the debt of its subsidiaries, but there are some risks of liability for relationships consisting of: Regarding the bankruptcy in holding company, it is legally protected from losses. If one of the subsidiaries goes bankrupt, the holding company suffers from capital losses and decreases in net assets, but the bankrupt debtors and creditors cannot sue or even charge the holding company for compensation. [13]

The presence of principle *separate legal entity* means that the holding company and each subsidiary stand independently as a legal entity. This is because each subsidiary and holding company is a separate legal entity. If there are lawsuits against a company, then the claim cannot be directed to other subsidiaries that are members of the holding company or to the holding company, and vice versa. The requirements for a company to declared bankrupt are regulated in Article 2 section (1) of the Law of the Republic of Indonesia Number 37, 2004 on Bankruptcy and Suspension of Debt Payment Obligations, that the debtors who have two or more creditors and do not pay off at least one debt which is due and collectible, are declared bankrupt by a court decision, both at their own request or request petition for one or more creditors.[14]

Debtors who are proven to meet the above requirements can be declared bankrupt, both individual debtors and legal entities. One party that can be declared bankrupt is the holding company (i.e. Law of the Republic of Indonesia Number 37, 2004 on Bankruptcy and Suspension of Debt Payment Obligations), which does not provide specific requirements for bankruptcy applications for holding companies and their subsidiaries to be submitted in the same document. This means that, in addition to being claimed in one request, these requests can also be issued separately as two requests. Also, the applicant is given the flexibility in claiming for bankruptcy of the holding company along with its subsidiaries.

The explanation above shows that the juridical separation of relations between the holding company and the subsidiaries organizationally occurs. It is different when it comes to the existence of shareholders. The principle piercing the corporate veil allows the shareholders of a subsidiary to be responsible. It must be emphasized that the shareholders in a SOEs are not the state, but the SOEs itself. The GMS shareholders in SOEs subsidiaries are the SOEs directors. If the liability reaches shareholders in the bankruptcy of a holding subsidiary of SOEs, the SOEs directors will be involved as the shareholders.

The construction of Article 4 and Article 11 of the Company Act which is related to the directors' responsibilities according to Article 92 of the Company Act confirms that running a company for the benefits of the Persero and in accordance with the purposes of the

Persero, the directors are authorized to carry out management according to appropriate policies within the limits regulated in laws and articles of association. Likewise, the directors' authority in the *Persero* is also subjected to the laws and regulations governing the company and its articles of association. [15]

In addition, if the subsidiaries experience bankruptcy, the SOEs directors shall be able to prove that its influence and decisions in the management of its subsidiaries have been based on careful consideration and not due to negligence. They may be free from liability for the bankruptcy of the subsidiaries as long as they can prove this. The holding company can still be liable if it is proven that: *first*, there is the involvement of the holding company in determining the company's management, finance, business decisions that cause losses in the company, for example, taking credit from banks to determine the amount, allocation and usage so that the *Persero* suffers from bankruptcy. *Second*, actions done by the subsidiaries for the advantages of the holding company. *Third*, the holding company improperly ignores the problems of financial adequacy occur in the subsidiaries.

IV. CONCLUSION

Based on the above discussion, the authors conclude that the legal relationship between the holding company and its subsidiaries is an affiliate relationship. Although the subsidiaries are legally a separate and independent company unit from the holding company, but if they go bankrupt, the SOEs holding company can still be liable. Second, if the subsidiaries go bankrupt, the holding company is only liable for the shares owned in the subsidiaries since both of them are separate legal entities. However, the holding company is liable to pay if it can be proven that the holding company contributed to the loss of a *Persero*, that is, its subsidiary company (the principle *piercing the corporate veil*).

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