

The Practical Settlement of Norm Dispute Upon Separated State Assets in The Limited Company of Stated-Owned Enterprise

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Abstract-The development of law in Indonesia is still questioning the position of the State-owned Enterprises (SOEs) in the theoretical and practical level of the State Finances. There has been no a similar understanding in determining whether there should be a separation between the state assets with the SOEs, considering that all or most of the SOE's capital still comes from the State Wealth. This contradiction emerged as a result of the dual concepts of the private law and the public law in discerning the SOE's assets. The private law sees that every state assets in the SOEs considered as state assets, but on the other hand the public law perceives the state assets in the SOEs as an integral part of it and not a state wealth. This legal dualism leads to a discussion on how to position the SOEs when it comes to the SOEs legal obligation when their business activities harm the State Finances. Therefore, this paper tries to conduct a research by using a qualitative approach in analyzing the implementation of the SOE's legal practices in the judicial process. The correlation between the practice process and the theory in responding to the legal norms that are related to the State Wealth especially in the criminal justice process will be the expected research finding.

Keywords- *State-owned Enterprises, SOEs, State Finances, Corporate Legal Obligation*

I. INTRODUCTION

Does a separated state's assets in the State-Owned Enterprises (SOEs) in the form of Limited Liability Company still can be classified as a state's assets? To date, the debates among scholars on that issue are still not over. The debate does not only occur at the theoretical sphere, but also at the practical level.

First of all, the theoretical debates on this issue are related to the status of a legal entity from an Indonesian SOEs in the form of a Limited Liability Company itself, where as a legal entity, an Indonesian SOEs must have its own wealth as required in theory and positive law. Specifically, law No. 40 of 2007 concerning Limited Liability Companies (hereinafter referred to as LLC Law) stipulates that a limited liability company is a legal entity which is a capital partnership, established under an agreement, conducts business activities with authorized capital which is entirely divided into shares and meets the requirements stipulated in this law and its implementation rules (*see* Art. 1 para. (1) of the LLC Law). That being said, every business entity in the form of a limited liability company is a legal entity, if the requirements which is regulated by the law have been fulfilled.

Law no. 19 of 2003 concerning State-Owned Enterprises (hereinafter referred to as the SOEs Law) in Article 11 specifically regulates that all provisions and principles applicable to LLC as stipulated in the LLC Law [1]. Considering both of the SOEs Law and LLC Law, an SOE in the form of Limited Liability Company is also a legal entity. That being said, it is important to note the fact that a business entity, in this case in the form of LLC, can be recognized as a legal entity as long as the company has its own wealth and the wealth is separate from the assets of the owner or the management of the business entity.

According to the SOEs Law, the establishment of an SOE in the form of Limited Liability Company is carried out through direct participation from a separated asset of the state, and that assets will be used as a capital of the SOE. In return of its participation of the company capital, a state whose assets has been separated to fund the company, has a right to have shares based on the percentage of its equity participation in the company. By the ownership of their own wealth, SOEs have capitals and assets which is separated from the managements' wealth, and thus gaining its status as a limited liability company. Therefore, the SOEs Law has accommodated the principles of the establishment of a business entity that has a legal entity status in the form of Limited Liability Company, which is the separation of the assets of the business entity from the wealth of its owner and the management of the business entity.

Problems occur when the General Explanation of law no. 31/1999 jo 20/2001 concerning Eradication of Corruption Crime Act (hereinafter referred to as the anti-Corruption Law) [2][3] and also in the article 2 of the law in the General Explanation section and Article 2 para. (g) of the State Finance Law include the separated state assets of the SOEs as part of the state finances itself [4]. This condition seems like repeating the property's own ownership status by the company and obscuring the boundary of ownership of property between the owner / shareholder and the assets owned by the company itself. The arrangement in Article 2 para. (g) of the State Finance Law seems to be inspired or even intentionally harmonized with the General Explanation of the anti-Corruption Law. It is also possible that when the State Finance Law was drafted, it was still in the spirit of

securing the state's wealth and its assets from the corruptors.

By knowing this problem, we can concur that there is a conflict between the rules of private law and public law related to the problem of state wealth separated by the state. The Constitutional Court strengthens the norms that the separated assets of the state, as still a part of state finances. This ruling can be seen in the Constitutional Court decision No. 48 / PUU-XI / 2013 and decision no. 62 / PUU-XI / 2013. In regards to this issue, the Supreme Court issued a legal guidance (*fatwa*) No. WKMA / Yud / 20 / VIII / 2006, which basically confirms that the position of state assets that has been invested in the SOEs is separated from and hence not included in the scope of state finance. It is important to note that this *fatwa* is related to the Republic of Indonesia's Minister of Finance Letter No. S-324 / MK.01 / 2006 which was assigned in July 26th, 2006.

The legal disorder has been completed. On the one hand, this legal turmoil in the issue of SOEs assets' position in the state finances has raises many doubts from the directors in the SOEs to set its step on controlling the SOEs. This is due to the fact that their bad business decisions are overshadowed by the fear of being classified as a corruption, since law enforcement officials may consider a conduct which may result a state-losses as a criminal act of corruption. On the other hand, the law enforcement officers are more confident to carry out investigations and prosecutions to those SOEs' directors whose company that they lead suffer economic losses due to unintentional mistakes made by the SOEs' directors, and the law enforcement officers unilaterally may classify it as a corruption.

In addition to the *fatwa* from the Supreme Court which responded to requests from the Minister of Finance, the Ministry of SOE also actively conduct a socialization and discussion by inviting experts to convince stakeholders that the state's investment on the SOEs company is separated and not included in the state finances. To date, however, law enforcers (ranging from investigators, public prosecutors and judges), continue to carry out investigations, prosecutions and still punish the directors of the SOEs. They usually charge the directors using the article 2 and 3 of the anti-Corruption Law, because the losses of the SOEs assets, are considered detrimental to state finances.

Inevitably, it will affect the performance of the directors on controlling the SOEs in order to achieve its objectives, and it certainly can even reduce the competitiveness of the SOEs to private businesses, or even other countries' state-owned enterprises. What is the impact of this conflict of laws, in the issue of the position of state's assets over its investment on the SOE and how to resolve these problems?

II. RESEARCH METHOD

This research by using a qualitative approach in analyzing the implementation of the SOE's legal practices in the judicial process. The correlation between the practice process and the theory in responding to the legal norms that are related to the State Wealth especially in the criminal justice process will be the expected research finding.

III. DISCUSSION

1. *Legal Impact of The Conflict of Norms in The Issue of The Separated Assets of The State on The Soes*

As previously mentioned, the SOEs in the form of LLC shall apply all the provisions and principles that is required for an ordinary LLC as regulated in the LLC Law. Thus, the LLC is a legal entity in which its capital is formed through an investment of the investors. If the establishment of an ordinary LLC at least must be carried out by 2 investors or more. However, the exception applies to the SOE, where the shareholders can be owned by a single-handedly by state. (*see* art. 7 para. (7) letter a of the LLC Law).

The consequence of SOEs in the form of LLC is the company must have its own wealth which separated from the wealth of its owner and its management. For this exact reason, if a government wants to establish an SOE, it have to make a direct participation of investment at the time of the SOE's establishment, by separating the government assets so that assets may be used as a state capital. As soon as the SOE gets its own capital that comes from an investment of the separated asset of state, so that the SOE has its own wealth. Consequently, the SOE shall meets the requirements as a limited liability company automatically, which is having an asset that separated from the wealth of its owner and its management. The ownership of the assets has complement the status of SOEs as a legal entity, which have a legal rights and obligations.

Subsequently, what about the state's position of an SOE? According to the doctrines and the written-law, because an LLC is a legal entity which is formed through an alliance of the investors' capital and divided into shares, the state ownership of the company is in the form of shares in accordance with the amount of government / state capital participation. In practice, an SOE in the form of LLC runs its business like an ordinary LLC in general, namely producing goods or services by using its own capital, without depending on the state's budget which proposed every year by the government. An SOE in the form of LLC runs its business in the realm of private law. In certain cases, an SOE may also receive assignments from the government to carry out a public interest tasks, for example to provide a government subsidized fuel which usually provided Pertamina LLC. This government's assignment must be in accordance with the laws and regulations, and in return the government have to provide the budget that Pertamina has requested, and

that financing comes from by the government's state budget, which is planned and enacted annually.

The legal problems occur once the norms governing state finances, in this case the State Finance Law, regulate that a separated state finances (SOEs capitals) are still a part of state finances. This provision has severe implications for the SOE's management. Law enforcement officers, such as investigators, prosecutors and even judges, may consider that if there is a financial loss in the SOE, it shall be considered as a loss of state finances. As soon as the law enforcement officers find an SOE having a financial loss, they will just find a way to prove if there are any illegal acts carried out by the management, so that the board can directly be prosecuted and punished by the anti-Corruption Law. To date, there are already several SOEs' directors and officials that have been prosecuted and convicted for committing criminal acts of corruption, simply because they mismanaged the company.

In addition, this legal dilemma creates an obscure and vague boundary of the SOEs' assets ownership. SOEs' assets are obtained from the state's asset that has been separated, which according to the LLC Law and SOEs Law, that assets belong to the company itself and the ownership of it is separated from the owners or officials wealth, because the state's losses which is suffered by the SOE may be also considered as a state financial losses, at least from the point of view of law enforcement. If this is the case, the debt or receivable of the SOE must also be considered as state debt and receivable. Furthermore, there is no limitation between the wealth of SOEs' and the wealth of a state, for all of it has been merged into a single entity; a state wealth/ finance. Whereas in the realm of private law, there is already a mechanism to resolve a fraud which made by the board of executives. For example, if the directors have made a decision that is not based on the business judgment rule principle, one may sue the directors on the basis of civil claims, and the directors shall pay a sum of money as a compensation.

The criminal law approach which carried out by the law enforcement officers in resolving a fraud in the SOE has a negative effect that is indirectly "reunite" the wealth that once was already "separated". The attitude of law enforcement officers who stiffly consider a state investment in an SOE which originated from the state's assets that has been separated from the state finances, has resulted an understanding and way of thinking that the loss of SOE assets is tantamount to the losses of state finances, and hence "reunite" the wealth of the SOEs' wealth into the state wealth. Ultimately, according to the corporate law doctrine, such thing may eliminate and obscure the clear boundary between the wealth of the state as a shareholder of the SOE, and the wealth of the SOE as a legal entity of and the owner of the assets itself. This article argues that this condition may unable the SOE to obtain its status as a limited liability company or even worse. Because, it can make the legal entity lose the ability

to act lawfully due to the failure of SOE to uphold a legal entity principle, which is owning its own wealth.

This condition creates an opportunity for any parties who has a legal dispute with SOE to file a civil lawsuit not only to the SOE, but also to the state, if the SOE defaults or commits an illegal conduct. This erroneous understanding, according to Jafar Saidi, could make a state to bear a responsibility for the losses which caused by an SOE, or even any form of private business that is also categorized as state finance according to Article 2 letter g and letter i of the State Finance Law. In line with Jafar Saidi, Ridwan also stated that if the law enforcement officer still argues that SOEs' assets are still part of state assets, the state must also be responsible for all the SOEs' debts which is owned by BUMN [5].

In economical perspective, the impact is also quite problematic. Because this legal chaos shall discourage the creativity of the company management in developing its business and inhibits decision making process in the company, because the management is obliged to be very cautious on determining the business decision in order to avoid a corruption charges that may be brought by the law enforcer. After all, this problem will inevitably hinder the achievement of the objectives of the establishment of the SOE itself.

2. Alternative Settlement According to Experts

As mention earlier, the debate among legal experts and scholars on this particular issue is still unsettled. The debate has been continuing not necessarily since the enactment of the State Financial Law and SOE Law, but since the enactment of the anti-Corruption Law.

Erman Radjagukguk, in the National Law Conference where he and other scholars had discussing about "the State Financial Law in the Perspective of Rule of Law, Legal Theory and Practice in Indonesia" which were held in University of Indonesia Law School (10/31/2012), firmly stated that the separated wealth of the state has become the wealth of SOE and no longer classified as a part of state finances anymore. The state ownership of the SOE is in the form of shares, and hence the assets of the SOE is not necessarily an asset of the state. Further, he argued that this misconception happened because of a mistake in understanding the matter of state finances. The meaning of "separated state wealth" in the SOE is actually in the form of shares which shall be owned by the state as an investor of the SOE. However, the assets that is owned by the SOE, is not a part of the country's asset anymore. This misunderstanding of state finance has resulted in many SOEs' directors being accused to conduct a corruption, simply because the SOE has been mismanaged and have suffered a loss in business [6].

Erman Rajagukguk, as quoted by Ridwan Khairandy, stated that there was nothing wrong with the formulation of the definition of state finance in the anti-Corruption Law, because the assets of the states on the SOEs company was not in the physical form but rather in the form of

shares [5]. Thus, the company's assets anymore is owned by the SOE itself rather than a state. According to Erman, allegations of corruption against SOEs' directors occur because of the misunderstanding and application of what is meant by the state finance itself [5]. Muhammad Jafar Saidi eloquently realizes that the concept of state finances, even though they are in the realm or area of public law, but still intersect with private law, especially in the management of separated asset of the state in SOEs companies [7]. Furthermore, as quoted by Jafar Saidi, Jimly Asshiddiqie, stated that a state finances are related to state revenues and expenditures only, which according to Jafar Saidi is financial in the strict sense, while in a broader sense it also includes separated state assets in SOE [7]. It is fair to expect that the law enforcement's lack of understanding to differentiate a state finances in the strict sense and in the broad sense is the cause that triggers this confusion. In addition, Hadian Afriyadi considered this dilemmatic yet chaotic problem of the state finances' position occurs due to a logical fallacy, the existence of *fested interests* and sectoral arrogance from the government institutions [8].

In regard to that, the Supreme Court has issued a *fatwa* No. WKMA / Yud / 20 / VIII / 2006 on 16 August 2006 at the request from the Minister of Finance of the Republic of Indonesia in letter No. S-324 / MK.01 / 2006 which is assigned in 26 July 2006. In general, The Supreme Court affirms the position of the SOEs' assets are different from the state assets and not within the scope of state finances, even though the SOEs' capital comes from the state assets that has been separated.

On the contrary, the Constitutional Court ruled the same thing differently and the ruling of the Constitutional Judges may be seen in two separate decisions, which is Constitutional Court decision Number 48 / PUU-XI / 2013 and the decision Number 62 / PUU-XI / 2013. Both of the decision basically does not separate nor differentiate the SOEs' assets from the state's assets, and thus it ruled that SOEs' assets is included in the scope of state finance. The existence of this Constitutional Court ruling strengthens the law enforcement officers' view to stick on his opinion that a losses incurred in an SOE company can be categorized as state losses, and hence can be prosecuted and punished by corruption, as long as they can proof that the loss is caused by either mismanagement or illegal acts or abuse of function by the SOEs' managements and directors. Thus, the conflict of norms on the issue of the separation state financial has been institutionalized by the existence of a conflicting decision between *fatwa* Supreme Court and the Constitutional Court ruling. On the one hand, the Supreme Court has an authority to provide a legal guidance (*fatwa*) on a problematic issue. On the other hand, the Constitutional Court has an authority to interpret the law.

Related to this conflict many alternative solutions have been proposed by legal experts, including Ridwan Khairandy who argues that this conflict of norm should be

resolved by the basic principle of *lex specialis derogat legi generali* and the principle of *lex posteriori derogat legi priori* [5]. Specifically, the State Finance Law and the anti-Corruption Law acting as a *legi generali* and *legi priori*, while the LLC Law and the SOEs Law as *lex specialis* and *lex posteriori*. Adrian Sutedi also shares the same opinion. He adds that it is important to return to the nature of the criminal law which is an *ultimum remedium*. Considering the damage that may cause by its application, especially for the financial and banking institution, thus the enforcement of criminal law should be used as the last resort [9].

3. Practical Solution

Although there have been many expert opinions expressed and the Supreme Court has also issued its *fatwa* in regards to the position of state assets that must be separated from the state as previously discussed, but law enforcement officials, both Police investigators and KPK investigators, and public prosecutors continue to investigate corruption against SOEs that suffered a financial losses. The court opinion is no different despite of the *fatwa* that has been issued by the Supreme Court. The court still trials the cases of corruption whose perpetrators are the SOEs directors, and the court always convicts the SOEs director for an unlawful conduct or abuse of authority which resulting a state financial loss.

Expecting the investigators to change their mindset so that they may be in line with these experts seems too difficult to be done, considering the fact that to date, every charge that they have done on the SOEs' directors has been successfully prosecuted by the prosecutors and convicted by the court. Despite of the theoretical flawed, the court never acquit any SOEs director that has been investigated and prosecuted. Moreover, the investigation into the cases that involves an SOE has always received a considerable amount of attention from the public, especially the anti-corruption activists and the mass media. The investigators and their institutions have received an appreciation from various groups who appreciate their effort to investigate and prosecute that SOEs' directors.

In its sincere opinion, this article believes that the only hope is left to the judges. The judge should have more audacity in its ruling by stating that the loss of the SOE is not the same as the financial losses of the state, or at least not all of the SOEs' financial losses is not tantamount to the loss of state finances. Even though it is indeed a risky opinion for a judge to declare such thing in the verdict, due to the criticism that may be expressed by the anti-corruption activists and mass media. Nonetheless, if the judge has a courage to make such a decision, then an investigation into the criminal acts of corruption against the executive board of the SOE will no longer be carried out.

IV. CONCLUSION

The occurrence of a conflict of norms on whether or not an SOEs' assets is a part of state assets, comes from the conflict between the rules of private law that governing the establishment of a business entity, especially a limited liability company (in this case the SOE in the form of LLC) which is affirmed by the *fatwa* from the Supreme Court, and its intersection with the public law that requires separated state assets to be considered as part of state finance, as stipulated in the anti-Corruption Law and the State Finance Law which is corroborated by the decision of the Constitutional Court. In short, both stances have its own legal basis and supported by an authoritative and legitimate body.

LLC Law, as one of the legal basis of SOEs as a legal entity in the form of LLC. A legal entity can only be recognized as one as long as it have fulfill its main conditions, which is having and owning its own assets and wealth. The investment of state to an SOEs' capital in is to fulfill its own requirements, so that it meets the requirements to obtain a status of a legal entity.

On the one side, however, the rules of private law regulate an LLC to have its own assets which are separated from the wealth of its managers and owners. Thus, it can be conclude that in this case, where the LLC is an SOE, the wealth of the state/ government as its owner must be separated from the wealth of the company itself. On the other hand, the anti- Corruption Law and the State Finance Law which are supported by the Constitutional Court's ruling, state that the separated state assets that have become the SOEs' assets are still considered as a part of state finances. In short, the rule of public law requires that SOEs' assets are remain still a part of a state finances.

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