Legal Smuggling of Share Ownership Using Nominee Arrangements Associated with a Violation of the Negative Investment Lists

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ABSTRACT
This paper analyzes whether or not there is legal smuggling in the nominee arrangement when it is associated with the negative investment list that applies in Indonesia. The normative law is used in this paper. The result is that the nominee arrangement is part of smuggling law against investment law. Moreover, if the nominee arrangement is carried out, it can potentially violate the negative investment list. The principle used in the nominee arrangement depends on the freedom principle of contract as stipulated in the Civil Code. An agreement on the freedom principle of contract must comply the requirements contained in the Civil Code, thus the agreement becomes valid. The practice of nominee arrangements must be managed through giving the strict sanctions, like administrative sanctions.

Keywords: *Investment, Legal smuggling, Negative list of investments, Nominee arrangement*.

1. INTRODUCTION

Indonesia, as a developing country to do a development sometimes requires foreign investors [1]. Thus, foreign investors are used to supplementing domestic capital. Since Indonesia is the law country, the state of law means a power and it is as subject to the law, and everyone is equal before the law. In the field of investment, the rules with regard to the investment in Indonesia apply the same rules.

Investment is often made to improve the capital of company. Investment is all the forms of investment activities, to conduct the business in the territory of Indonesia. This investment is made in two ways, that is domestic and foreign investments.

Those who can create investments are domestic investors as well as the foreign investors. Article 1 of Law Number 25 in 2007 regarding the investment explains domestic investment, which has the meaning of investing activities to conduct the business in the territory of Indonesia conducted by domestic investment by using domestic capital. The parties that can be Domestic Investment are:

1. Indonesian citizens, and or;
2. Indonesian business entities, and or;
3. Indonesian legal entities.

Foreign investment is in Article 1 of Law Number 1 in 1967 with regard to foreign investment. Foreign investment is only foreign direct investment conducted based on the law provisions and used to conduct business in Indonesia. Article 1 point 3 of Law Number 25 in 2007 concerning investment states that foreign investment is an activity to invest capital in conducting business in the territory of Indonesia which carried out by foreign investors, both those who use foreign capital with the investment in the country.

Judging from the preceding, the elements of Foreign Investment can include, as follows: 1. Conducted directly, meaning that the investor directly bears all the risks experienced from the investment. 2. According to the law, foreign investors' foreign capital invested in Indonesia must be based on the substance, procedures, and conditions determined in the prevailing laws and regulations and are stipulated by the Indonesian government. 3. Used to run a company in Indonesia, meaning that the capital invested by foreign investors used to run a company in Indonesia must have the status of a legal entity.

Assume that the foreign investor wishes to invest in Indonesia. They must follow several rules with regard to investment in Indonesia, like Law Number 25 in 2007 on the Investment, Presidential Regulation Number 49 in

2021 with regard to alteration to Presidential Regulation Number 10 in 2021 concerning The Field of Investment, etcetera. The Presidential Regulation Number 49 in 2021 with regard to alteration to Presidential Regulation Number 10 in 2021 concerning The Field of Investment or as the Negative Investment List. In this regulation, all business fields are opened for the activities of investment, except for the business fields that are declared closed. The opened business field is a priority business field. The allocated business field or partnership with cooperatives and MSMEs is as the business field with specific requirements. The entire business sector is described in detail in the attachment of the Negative Investment List.

In the practice of investing in Indonesia often arises some agreements based on the principle of freedom of contract. For instance, arises nominee arrangement in the share ownership. Even, this is strictly prohibited in practice, it is still often done.

From the description above, it can be determined that the problems discussed in this research are as follows:

- How are the shareholders using the nominee arrangements when related with the violations of negative investment list?
- Is it valid to own shares if done with nominee arrangement in Indonesia?

2. METHOD

The term "legal research" consists of two words, namely: "research" and "law." The origin of the word "research" is "research," which means an action full of prudence and accuracy. Meanwhile, "law" is interpreted very diversely according to the point of view of each school of legal philosophy. Neutrally and straightforwardly, the law can be interpreted as norms formed, enforced, and recognized by public authorities to regulate the state and society, enforced by sanctions.

The object of the study of legal science is the norm and not the attitude or behavior of humans, as the object of study is, for example, sociology, anthropology, psychology, economics, and politics. This study belongs to normative law. Soerjono Soekanto's benchmark in his discussion of normative legal research from the nature and scope of the legal discipline, in this respect, discipline means teaching system about reality, which usually includes the analytical discipline and prescriptive discipline. Legal discipline covers the normative aspect. However, in the same writing, Soerjono Soekanto wants to emphasize that legal discipline can be interpreted as the system of teaching about law as the norm and reality or even as something aspired to as reality or law life. [2] Normative legal research whose research objects are legal norms, legal concepts, legal principles, and also legal doctrines. Legal research is in a narrow sense. The choice of this method is because legal research as the process to discover the rule of law, legal principles, and legal doctrines to answer the legal issues. [3] The research specification used in this research is descriptive-analytical; that is, the descriptive-analytical method is as the development of the descriptive method.

The analytical descriptive research explains the laws and regulations associated with the legal theories and the implementation of the favorable laws with regard to the problems faced. The data collection method used in writing this law uses library research, namely studying and gathering written data to encourage the research.

3. RESULT AND DISCUSSION

Investments are those people who have income, that is used not for the need of consumption, but as an investment. Investment is also can be said as investing money now to get more benefits in the future. In other words, investment is the beginning of business activity. In this matter, investments can include both direct and indirect investments. What is meant by direct investment as an investment in the assets or factors of production to conduct business. For instance, the investment in plantations, fisheries, factories, shops, and other types of businesses. In everyday conversation, this type of investment is intangible investment assets. This direct investment produces significant multiplier effect for the wider community. This direct investment will produce backward effect in the form of business input and forward, in the form of business output, which is an input for the other businesses.

In comparison, indirect investment refers to an investment in the financial assets, not in the assets of the production. Examples of indirect investments are deposits, investments in securities, such as stocks and bonds, CP (Commercial Paper), mutual funds. Investments in the financial assets also aim at obtaining future benefits. The future benefits of this investment are the investment fees.

Based on the discussion above, the term investment has connotations as the direct investment [3]. Investment in Indonesia has various rules related to investing in Indonesia, especially for the foreign investors. Some regulations on this could trigger a nominee arrangement for a shareholding in a company. A nominee has two different meanings. First, nominee refers to a proposal or nomination of a candidate or candidate to occupy a particular position, obtain a specific award, or other types of candidacy. Second, the nominee provides an understanding as someone who represents the interests of other parties. [4] The definition of a nominee agreement, also known as a name-borrowing agreement, is one type of innominate agreement or an anonymous agreement that is not known in the Civil Code but appears and develops in the community.

Nominee arrangements include several agreements. First, an unnamed agreement, and in the nominee arrangement itself. There are two parties: nominees and beneficiaries. The nominee is the owner who borrowed his name to represent the actual owner. The beneficiary is the actual owner. In th term of share, ownership is a nominee officially listed as the shareholder and beneficiary their name is not recorded. Thus, the beneficiary has desire to acquire shares beyond the restrictions on the share ownership in Indonesia. The beneficiary also covers foreign investors where the regulation on the limitation of share ownership also regulates the restrictions on the ownership of shares that foreign investors may own. This restrictive regulation is known as the Negative Investment List, regulated in Presidential Regulation number 44 in 2016 with regard to the list of closed business fields and business fields that are opened with the conditions in the investment sector.[5] The Negative Investment List (DNI) is a regulation that forbid the investors from investing in the specific sectors in Indonesia. This list serves as the information base for the investors, especially foreign direct investors, before investing in Indonesia. The DNI policy is the government step to save the business and investment interests of Indonesian people and provide business opportunities for the foreign investors. The DNI policy is not rigid since the list can be changed at the discretion of the President of Indonesia through Presidential Regulation.

The legal basis for DNI is contained in Article 12 of Law Number 25 in 2007 with regard to the investment, which has now been changed to the Law Number 11 in 2020 regarding Job Creation. The article states that the real sector investment in Indonesia is divided into three groups. These can be seen as follows:

1. Opened business fields;
2. Opened business fields with conditions;
3. Closed business fields, which then recorded in the list of negative investment.

In the law, the government has also prohibited foreign investors from investing in sectors that could threaten national defense and security, such as weapons, munitions, explosive devices, and war equipment. All of these business fields are automatically included in the investment blacklist under the Act. However, the same rule states that the government can give other business sectors to the list of negative investment, which is 100% closed to the foreigners, through Presidential Regulation. The government can consider some aspects, such as health, morals, culture, environment, national defense and security, and the other national interests.

The main characteristic contained in the use of the nominee concept is the existence of nominee agreement between the beneficiary and the nominee. The nominee agreement is about the trust born from an agreement and the form of an anonymous agreement born based on the principle of freedom of contract, the principle of binding force, and good faith contained in book ii of the Criminal Code. Based on this nominee agreement, the elements in the use of nominees show that there are two parties, namely the legally recognized party and the party behind the legally recognized party, where these two parties are in ownership. Shares or land ownership gives birth to the separation of ownership of an object, namely the legally recognized owner (the nominee) and the actual owner of the object (the beneficiary).

The covenant itself is an agreement between the two parties to do something, thus, the agreement and the agreement have the same meaning [6]. In the agreement, it is known by the principle of freedom of contract. However, this principle must also fulfill applicable requirement that is the validity of the agreement. Contained in Article 1320 of the Civil Code. Article 1320 of the Civil Code reads:

1. There is a consensus for those who bind themselves;
2. The ability of the parties totally;
3. Particular thing; and
4. Legal cause.

The first and second conditions are subjective, while the third and fourth conditions are objective conditions. For the first and second terms, if not fulfilled, then the agreement may be requested in cancellation. However, if the third and fourth conditions are not met, it will be null and void. Null and void are as the absence of such agreement, or the agreement is deemed to have never existed. About the fourth condition, which is a lawful reason contained in Article 1337 of the Civil Code, an agreement is essentially prohibited if it is contrary to the laws, decency, and also public order. [7]

Ownership of shares in the company can lead to legal smuggling through agreements made. This smuggling law occurs since parties attempt to avoid enacting a statutory regulation that has been in force for a particular purpose and a nominee arrangement in the ownership of shares. The existence of a nominee arrangement has violated the fourth condition of an agreement as stipulated in Article 1320 of the Civil Code, which is a legal cause because it violates the prevailing laws and regulations.

The nominee arrangement in this share ownership has been prohibited quite firmly in Law No. 25 in 2007 on Investment (Investment Law). Namely, in Article 33 paragraph (1), which states, in essence, the investors, both domestic and foreign in limited liability companies, are prohibited from making an agreement or statement related to the ownership of the company's shares for and on behalf of others. If it continues to be done, it will be null and void, as mentioned in Article 33 paragraph (2) of the Investment Law.

Article 52, paragraph (4) also states that, in essence, the shareholders are a right that cannot be shared. Thus, in the nominee arrangement of share ownership, who can enjoy the benefit rather than the share ownership itself is the nominee and not the beneficiary.

The legal smuggling of this also often causes variety of problems, both for nominees and beneficiaries. For instance, in the verdict number: 375/PDT/2018/PT. DKI, in essence in this ruling, explains that there is a nominee arrangement between the nominee and the beneficiary. In the end, the nominee must bear personal income tax, which is quite burdensome for the nominee because of the stock trading transaction that occurred between the beneficiary and a third party. However, the shareholding is still on behalf of the nominee.

In addition, the examples that have been given, smuggling laws on this subject also violate the provisions of the Negative Investment List. Furthermore, there are rules regarding the amount of capital invested by domestic investors or foreign investors in the Negative Investment List. For example, in appendix III Negative Investment List is related to the field of business with specific requirements, namely the Navy For Tourism. In the field of business, the top foreign capital is 49% (forty-nine percent). It means foreign investors can only invest 100% (one hundred percent). However, precisely, this restriction can also cause violations of the Negative Investment List by using nominee arrangements against share ownership because there can be a tendency to control the whole.

4. CONCLUSION

The conclusion is shareholding based on a nominee arrangement as legal smuggling. The smuggling laws relating to this matter can be null and void and result in the agreement being deemed never to exist because it does not meet the fourth requirement of the terms of the validity of the agreement, namely lawful reason in terms of violating the prevailing laws and regulations, both violations of Law Number 25 in 2007 on Investment and Presidential Regulation Number 49 in 2021 with regard to the amendments to Presidential Regulation Number 10 in 2021 concerning to the Field of Investment in particular. According to the author, the regulation on nominee arrangements has not prevented the practice from occurring because of the lack of strict sanctions of the actors of nominee arrangement practices, especially in the regulation in investment. However, the nature of the nominee arrangement is in the realm of civility. Of course, this is very detrimental if the legislation has been violated. The consequences of the practice of nominee arrangements should be not just declared null and void, for example, and imposed administrative sanctions such as fines. The government needs to pay more attention and adjust regulations to prevent the practice of nominee arrangements.

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