

The Problem Of The Authority To Determine The Financial Losses Of The State On State Owned Enterprises (BUMN)

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Article Info

Received: 2024-01-05

Revised: 2024-12-01

Accepted: 2024-12-20

Keywords:

Determining Authority,
State Losses, BUMN,
BPK

Abstract

This paper discusses the problems in determining which institutions have the authority to determine the financial losses of the state to state-owned enterprises. Even though in existing legislation such as Law No. 15 of 2006 on the Supreme Audit Agency which regulates the authority of the Supreme Audit Agency (BPK) and the decision of the Constitutional Court (MK) No. 25 of 2016 basically states that related to the calculation of state financial losses carried out by the BPK or other institutions as long as declared by the BPK, but in practice it is still found the fact that law enforcers such as investigators and public prosecutors ignore this provision for various reasons. Therefore, this paper aims to reaffirm the authority of institutions that have the authority to determine state financial losses to state owned enterprises based on existing legislation. This study uses the type of normative legal research. The problem approach used in this study includes statute approach, conceptual approach and case approach.

I. Introduction

As a country that has sovereignty over the people and conducts state government based on the Constitution, a comprehensive state financial management system must be in accordance with the basic rules set out in the Basic Law. The provisions of the Constitution (hereinafter abbreviated as "UUD") 1945 both in the original text and the post-Fourth Amendment text in 2002 greatly accommodate this, by formulating it in a special chapter entitled Financial Matters.

In the original text of the 1945 Constitution, financial matters were formulated in Chapter VII which only consists of 1 article, namely Article 23 which is detailed in 5 paragraphs. The real manifestation of the implementation of the mandate of Article 23 C of the 1945 Constitution is the promulgation of Law No. 17 of 2003 on State Finance, on April 5, 2003 (hereinafter abbreviated as "state finance law"). This state finance law has a very distinctive meaning because it is the first law on state finance that is a product of the legislative institution (DPR) of the Republic of Indonesia.

Philosophically and sociologically, the law on State Finance was formed as a response to the demands of reform and to accommodate the various developments that occurred in the institutional system of the state and financial management of the government of the Republic of Indonesia. This can be seen in the definition and scope of state finance as stipulated in Article 1 Paragraph (1), Article 2 and the general explanation of the third paragraph of the law on State Finance, Article 1 Paragraph (1) of Law No. 1 of 2004 on State Treasury, Article 3 Paragraph (1) of Law No. 15 of 2004 on State Financial Management and responsibility examination and Article 6 paragraph (1) of Law No. 15 of 2006 on Audit Board.

Based on the provisions contained in Article 10 paragraph (1) of Law No. 15 of 2006 concerning the Supreme Audit Agency (BPK) has been regulated on the authority of the Supreme Audit Agency (BPK) to, "assess and determine the amount of State losses caused by illegal acts either intentionally or negligently committed by the treasurer, the manager of SOEs/BUMD, and other institutions or bodies that organize the management of state finances."The provisions regulate the norm, the CPC is a state institution authorized to assess and establish state losses, and not another body or institution that does not have the authority to carry out such actions. Thus, if the elucidation of Article 32 paragraph (1) of Law No. 31 of 1999 as amended by Law No. 20 of 2001 is associated with Article 10 paragraph (1) of Law No. 15 of 2006, the Competent Authority is the Supreme Audit Board.

In addition, in addition to the provisions contained in Law No. 15 of 2006 concerning the Supreme Audit Agency which regulates the authority of the Supreme Audit Agency (BPK) and the decision of the Constitutional Court (MK) No. 25 of 2016 basically states that

related to the calculation of state financial losses carried out by BPK or declare by BPK.

However, in practice, it is often found that many other institutions carry out the same actions that are owned by the BPK to assess and determine the amount of State losses caused by illegal acts either intentionally or negligently committed by the treasurer, BUMN/BUMD managers, and other institutions or bodies that carry out state financial management. These institutions include; the financial and development Supervisory Agency (BPKP), the Corruption Eradication Commission (KPK), the prosecutor's office and Public Accountants.

In fact, based on the provisions of Article 1 Paragraph (3) of the 1945 Constitution: "the state of Indonesia is a state of law" and Article 28 d paragraph (1): "Everyone has the right to recognition, guarantee, protection and fair legal certainty and equal treatment before the law". A state of law is a state characterized by the rule of law on the basis of the principle of legality. The principle of legality emphasizes the certainty and clarity of the law in regulating certain legal acts or legal status. Legal arrangements should not contain ambiguity of meaning and understanding. Roelof Haveman categorizes the principle of legality into four main things, namely the existence of *lex scripta*, *lex certa*, *lex stricta* and non-analogous. Related to these four things, Haveman argued: though it might be said that not every aspect is that strong on its own, the combination of the four aspects gives a more true meaning to principle of legality.

Based on the above description, it is necessary to elaborate further on the problems that occur in terms of the authority of the parties entitled and authorized to calculate losses as well as in terms of state finances and state losses, especially against state owned enterprises (BUMN) in conducting their business which is often indicated to intersect with corruption.

2. Research Method

This paper uses normative research method conceptualized as a symptom that can be observed in real life. In this study used the approach in the form of legislation approach (the statute approach), through the study of legislation and regulations that are related to the issues being discussed, and in this case the various rules of law are the focus as well as the central point of the study. In addition, the conceptual approach is also another approach used in this study. This study begins by describing the legal facts, then looking for a solution to a legal case with the aim to resolve the legal case. In this study used legal materials as contained in the act. Then for secondary legal materials in the form of books, journals and other literature related to the discussion of authority in determining state financial losses to state-owned enterprises (SOEs). The collection technique used is the study of documents carried out by reviewing legal materials that are relevant to the discussion of research.

3. Results and Discussion

Efforts to rescue the state's finances through various regulations that have existed, among others, with the issuance of Law No. 17 of 2003 on State Finance which is the first law on state finance is intended as an effort to rescue the state's finances from irregularities. But the problem is when correlated with other statutory provisions. Among others, for example, the issuance of Law No. 19 of 2003 on state-owned enterprises (BUMN) has created new problems in the form of contradictory climate and caused polemic on the financial status of the state in the BUMN both in terms of ownership and management and supervision.

The problem of the concept of wealth that is separated in the formulation of Article 4 paragraph (1) of Law No. 19 of 2003 on SOEs above actually departs from the concept of BUMN independence as a private legal entity both Soe Persero and Perum. This independence is regulated in Article 11 and Article 34 of Law No. 19 of 2003 concerning BUMN. Article 11 reads: "To Persero apply all provisions and principles applicable to limited liability companies as stipulated in Law No. 1 of 1995 concerning Limited Liability Companies". While Article 34 states: "for Persero, the provisions of this law and Law Number 1 of 1995 apply as long as there are no other regulations in the capital market". Because Law No. 1 of 1995 on Limited Liability Companies has been replaced with a new law and declared invalid, the reference from the provisions of Article 11 and Article 34 of Law No. 19 of 2003 on BUMN is Law No. 40 of 2007 on Limited Liability Companies. The legal consequences of the regulation on the status of BUMN Persero as a legal entity is that BUMN persero must be subject to one of the doctrines about legal entities, namely having its own property that is separate from the owner's property.

Meanwhile, if the above problems are associated with the provisions contained in Law No. 31 of 1999 as amended by Law No. 20 of 2001 concerning the eradication of corruption (hereinafter referred to as the "law on corruption"), then this opens a gap for law enforcement to make BUMN become the subject of perpetrators of corruption, where there is a State loss as one element of corruption. Apart from the impact of unclear status of state finances within BUMN Persero, it is difficult to categorize an action within BUMN as a corruption crime or not and the limits of which an action is classified as a corruption crime. Another difficulty that is also generated is the doubt to state definitively about the correlation between losses in the BUMN environment and state losses and with corruption. This condition certainly affects the government's efforts to resolve the issue of corruption as an extra ordinary crime in order to realize a fair, prosperous and prosperous Indonesian society.

If there is a crime committed by SOEs that is suspected that the action is related to corruption that causes state financial losses, then the next problem will arise, namely which institution has the authority to calculate state financial losses based on existing provisions? Although there have been several provisions that express

verbis states that the authority in calculating the financial losses of the state is by the BPK or other institutions that perform calculations with The declare by the BPK, but nevertheless at a practical level, especially in the practice of law enforcement, often this provision is ignored.

As for example, in the case of the determination of the former Minister of state-owned enterprises (SOEs) Dahlan Iskan to be a suspect by the Attorney General's Office (ago) in the case of the procurement of electric cars in 2017 where the pre-trial application of the South Jakarta District Court judge has rejected as contained in the pre-trial verdict No. 17/Pid-Prap/2017/PN.JKT.Cell. which is based, among other things, on the existence of state financial losses calculated by the Attorney General's Office itself. In his statement, the Attorney General, represented by the head of the investigation sub-directorate at the Special Criminal Prosecutor's Office (JAM Pidsus), Yulianto stated that the attorney general had ruled out the Supreme Court Circular (SEMA) number 4 of 2016, especially related to the Supreme Audit Agency (BPK) which is constitutionally authorized to declare state financial losses in corruption cases because according to him, the SEMA is only binding on the Supreme Court. Mana's statement was refuted by Dahlan Iskan's lawyer, Yusril Ihza Mahendra in his pre-trial application which stated that BPK had never audited state losses regarding electricity procurement that ensnared his client as a suspect. In accordance with SEMA number 4 of 2016, the determination of suspected clients is considered invalid because the only institution authorized to calculate state losses is only BPK, while BPKP and other auditors are considered not authorized.

In addition to the pre-trial decision in the case above, there are also many other pre-trial decisions that adjudicate the application for the determination of suspects based on calculating state financial losses through institutions other than the BPK that rejected the pre-trial application. Among others, the pre-trial decision of the Palembang District Court Case Number 15/PID.Pre/2023 / PN PLG with applicant Syaiful Islam as Marketing Director of Bukit Asam Prima, pre-trial decision of the Palembang District Court Case Number 16 / PID.Pre / 2023 / PN PLG with applicant Anung Prasetyo as President Director of Bukit Asam Prima, as well as other similar decisions.

In short, from several cases of corruption involving state-owned enterprises, there are several reasons used by the Attorney General's office including but not limited to the KPK and the District Court which adjudicates other pre-trial applications by excluding the calculation of state financial losses through the BPK or the BPK as a basis for determining suspects against BUMN administrators who are suspected:

1. Set aside SEMA number 4 of 2016 on the grounds that this SEMA is only binding on the Supreme Court institution, not for other institutions.
2. In the laws and regulations in Indonesia, it is not clearly regulated about a necessity to calculate state financial losses committed by BPK or BPKP or other agencies. However, the investigator is given the right to ask for help

from the BPK or BPKP or other agencies to calculate state financial losses due to suspected criminal acts. Similarly, in practice so far the BPK or BPKP or other agencies perform calculations of state financial losses that are suspected as a result of criminal acts, always based on the request of the investigator.

3. In the context of assessing State losses, not all cases heard related to corruption must go through the BPK or BPKP audit process. If it is easy to calculate, just direct the investigator, or the public prosecutor. New calculations are made if needed, or when entering expert testimony to add or give his opinion before the trial.
4. There is no rule that prohibits or allows the prosecutor to calculate the state's own losses, but in accordance with Article 30 of Law No. 16 of 2004, one of the duties and authority of the prosecutor's Office is to investigate corruption (explanation of Law No. 16 of 2004). Where here it is clearly implied that one of the duties of the investigator is to search for data and collect evidence and evidence. Prosecutors in conducting investigations and investigations can be obtained from the results of data in the form of documents and other evidence that in the case of corruption how much state losses caused it is clear that the losses are already completely real and the calculation is easy, so that state losses can be determined.
5. Under Article 184 of the Criminal Code, allowing law enforcement including prosecutors to find and collect evidence to make light of a criminal case.
6. Several pre-trial decisions that tried the application for the determination of suspects based on the calculation of state financial losses through institutions other than BPK have also been rejected.

According to state administrative law, Authority is a public power established by law. Assessing and calculating state losses is included in public actions that must be based on the law because such actions are the basis for other state authorities to carry out public and other coercive actions, especially by the legal apparatus. Thus, the institution authorized to assess, calculate, and determine state losses must also be regulated by law for the purpose of maintaining legal certainty and maintaining the process of assessment, calculation, and determination is not influenced by any power and influence because it is part of the due process of law. This is then regulated in elucidation of Article 32 paragraph (1) of Law No. 31 of 1999 as amended by Law No. 20 of 2001 which states, "what is meant by "there has been a real state financial loss" is a State loss that can be calculated based on the findings of the competent authority or the appointed public accountant."

In the context of law enforcement, both in the process of Investigation and prosecution, investigators and public prosecutors basically do not have the competence and do not have the authority, ability, expertise, and knowledge to determine and assess state losses

that result in the power of law to bind the public or have the power to force out. The assessment and accounting of State losses should be based on clear and definite methods, standards, terms and procedures, and if applied to the outside due to public power should have a legal basis of authority by law, and not by legislation under the law. This is because the attributive authority that has public coercive power must be attached to the supervision of the people through the establishment of laws.

Constitutionally, the institution authorized to determine state financial losses is the Supreme Audit Agency (CPC) as mandated in the 1945 Constitution. However, in practice it turns out that not only the BPK, but the financial and development Supervisory Agency (BPKP) is often used by law enforcement as an inspection agency for state financial losses. This is certainly a constitutional deviation, as determined in Article 23 E paragraph (1) of the Constitution of the Republic of Indonesia 1945 that: "to examine the management and financial responsibility of the state, an independent and independent audit board is held". This means that the body authorized to examine the management and financial responsibilities of the state, namely the BPK as an independent and independent institution, is not the BPKP. This is also in line with the opinion of Charles Bohlen Purba who said that the follow-up activities of the BPK audit recommendations on Local Government Financial Statements (LKPD) are orders from the Constitution of 1945, especially Article 23 E paragraph (2) and (3), and the law of the Republic of Indonesia number 15 of 2004 on the examination of State Financial Management and responsibility, especially Article 21 paragraph (1). In the law of the Republic of Indonesia number 15 of 2006, the BPK is instructed to provide recommendations on the results of the examination, so that if irregularities are suspected, they can be followed up by the local government.

The regulation on BPK as an institution that has the authority to examine the management and accountability of State losses is also emphasized in Article 10 paragraph (1) of Law No. 15 of 2006 concerning the Audit Board which states that: "BPK assesses and/or determines the amount of State losses caused by illegal acts either intentionally or negligently committed by the treasurer, BUMN/BUMD managers and other institutions or bodies that carry out state financial management". Article 10 paragraph (2) states that: "the assessment of state financial losses and/or the determination of the parties obliged to pay compensation as referred to in Paragraph (1) shall be determined by the decision of the BPK." Both articles in this law clearly stipulate that the BPK as an institution authorized to assess and determine the amount of State losses and in terms of assessment and determination of State losses are determined by the BPK decision. Calculation of state financial losses is often a polemic in the trial of corruption cases, the problem that often arises is which institution is actually the most authorized to declare the presence or absence of State losses.

Regarding other bodies or institutions that formally assess, calculate, and determine state losses based on a memorandum of understanding or investigator's request, as long as they obtain the approval of the Supreme Audit Agency (BPK) as a public body with

authority, other bodies or institutions may do so for and on behalf of BPK based on the provisions of Article 9 paragraph (3) of Law No. 15 of 2004 concerning the examination of State Financial Management and responsibility. That is, the CPC provides a mandate or delegation to the body or institution in accordance with its authority.

Thus, in relation to other bodies or institutions that formally carry out assessments, calculations, and determination of State losses based on a memorandum of understanding or investigator's request, as long as they obtain the approval of the Supreme Audit Agency (BPK) as a public body with authority, other bodies or institutions can do so for and on behalf of the BPK based on the provisions of Article 9 paragraph (3) of Law Number 15 of 2004 concerning the examination of State Financial Management and responsibility. That is, the CPC provides a mandate or delegation to the body or institution in accordance with its authority.

In addition to the provisions of the BPK law above, there is also a decision of the Constitutional Court Number 25 of 2016 which has the same degree as the law which essentially requires the calculation of state financial losses made or declared by the BPK. As long as it is not based on these provisions, the actions taken by the investigator or public prosecutor basically do not have a strong legal basis and are contrary to the principle of legality in criminal law. The calculation of state financial losses must be carried out by the institution authorized for it by meeting inspection standards and must be accompanied by confirmation or assertion to the parties concerned appropriately. If this kind of calculation is not fulfilled, then, of course, there is no means of evidence about the financial losses of the state.

The decision of the Constitutional Court No. 25 of 2016 has also basically overruled the previous Constitutional Court decision, namely the Constitutional Court Decision No. 31/PUU-X/2012 on the application for testing of Law No. 30 of 2002 in the case of corruption procurement Roll Out Customer Information System-Master Plan of Information Systems (CIS-RISI) at PT. PLN (Persero) distribution Jakarta Raya and Tangerang as in the explanation of the case above that in the verdict the judge rejected the application for testing the law submitted by the defendant, namely the president director of PT. PLN Edidie Widiono Suwondho and acknowledged the authority of BPKP in conducting an audit of state financial losses. But even though there has been a decision of the Constitutional Court Number 25 of 2016, law enforcers including judges who try similar cases still use arguments that deviate from the decision of the last Constitutional Court.

That further from the above, in the case of proof of a criminal case as contained in Article 183 of the Code of Criminal Procedure (KUHAP) it is stated, the judge may not impose a crime on a person unless with at least two valid pieces of evidence he obtains confidence that a criminal act actually occurred and that the accused was guilty of committing it. The purpose of the validity of this evidence is of course interpreted if the acquisition of evidence that is not in accordance with the procedure in the rules of Criminal Procedure, causing the item can not be a valid means of evidence and does not have the power of

proof. This is also stated in the explanation of Article 183 of the Criminal Procedure Code, namely this provision is to ensure the establishment of truth, justice and legal certainty for a person.

Other problems will also arise if the acquisition of evidence obtained through a process that is not in accordance with the provisions of the law. Which things against SOEs that are suspected of causing state losses cannot be held criminally liable. In the context of the occurrence of an act that the act is a criminal act, a necessary condition is that the maker must be able to take responsibility, in other words there must be a responsible ability of the maker. For the existence of criminal liability, it must be clear in advance who can be held accountable. This means that it must be ascertained in advance who is declared the author of a particular action. This problem concerns the subject matter of criminal acts which in general have been formulated by the legislator for the criminal act in question. In short, by quoting Alf Ross, Roeslan Saleh gave the answer that being responsible for a criminal act means that the person concerned can legally be punished for that act.

In the context of criminal liability in criminal law, Moeljatno separates strictly between criminal acts and criminal liability. The basis of a criminal act is the principle of legality and the basis of criminal liability is that there is no crime without fault. The principle of legality in criminal law in Indonesia as expressed in Article 1 Paragraph (1) of the Criminal Code which reads: "No act can be punished, except based on the strength of the provisions of criminal legislation that has existed before". As for the concept of guilt often elaborated as *geen straf zonder schuld*, there is no crime without guilt as a basis for holding someone accountable. Guilt is an important element in determining criminal liability. In this concept, there are 2 conditions to be able to convict someone, namely there is a prohibited external Act or criminal act (*actus reus*) and there is an attitude of evil/despicable (*mens rea*).

Related to this principle of legality, in line with Muladi's thoughts in "a collection of writings on the draft law on Criminal Law " and Moeljatno in "principles of Criminal Law" as quoted by Jonaedi Efendi and Johnny Ibrahim explained that the application of the principle of legality is consistent in the application of criminal law by enforcing four prohibition signs, namely:

1. Prohibition of sentencing on the basis of Unwritten Law (*nullum delictum nulla poena sine lege scripta*)
2. Prohibition of analogies (*nullum crimen nulla poena sine lege stricta*)
3. Prohibition of retroactive enforcement of criminal law (*nullum crimen nulla poena sine lege praevia*)
4. Prohibition against vague formulation of criminal law (*nullum crimen nulla poena sine lege certa*)

Violation of the principle of legality in determining the institution that has the authority to determine the financial losses of the state in SOEs, has implications for legal certainty itself, especially for justice seekers when they are dragged into corruption cases in a business act carried out in SOEs that are indicated to harm state finances. Even the calculation of State losses carried out by institutions that technically do not have the scientific competence for it also results in invalidity of the results of the calculation of the loss itself.

For example, institutions that have the authority to conduct investigations and prosecutions such as the prosecutor's office and the KPK certainly do not have the scientific technical ability to conduct a comprehensive audit which is the competence of BPK. As an example, among others, according to Tuanakotta, in terms of the method of calculating state financial losses, which can be divided into six concepts, which consist of:

1. Total loss (actual loss);
2. Total loss with adjustment;
3. Net loss (net loss);
4. Reasonable price;
5. Opportunity cost (oppurtunity cost);
6. Opportunity cost method, if there is an opportunity or opportunity to obtain the best, but it is precisely this opportunity that is sacrificed, then this sacrifice is a loss; and
7. Flowers (interst.

The real and definite nature is also stated in the decision of the Constitutional Court Number 25/PUU-XVI/2016 which states that state losses must meet their nature in Article 1 number 22 of Law Number 1 of 2004. Assessment and calculation of State losses that are not carried out procedures and standards of examination and not by experts and authorities cause a lot of invalidity, namely:

1. does not explain the inspection standards and data used;
2. The Conclusion that there are irregularities that cause State losses, whereas according to the standard, they are non-compliance with laws and regulations and inadequate internal control;
3. there is no assertive response from the suspect or the suspect or related officials contained in the report;
4. deviations from administrative regulations are considered as legislation;
5. any non-compliance with authority, terms and procedures is considered a deviation from the law, whereas legal criteria must pay attention to the principles of accuracy, accuracy, compliance, and Justice.
6. according to Article 56 paragraph (2) of Law No. 30 of 2014, government administration bodies or officials who determine decisions or actions of government administration are not in accordance with procedures, resulting in decisions and actions become null and void or can be canceled.
7. an obviously null and void action that subsequently creates a loss to the civil rights of

a person or a civil legal entity is in essence an unlawful act by that body or official. The results of the assessment, calculation and determination of State losses not by an authorized body or institution according to state administrative law are categorized as actions that contain juridical deficiencies (geen iuridische gebreken), so they do not have binding legal force because they are null and void (nietig van rechtwege). Thus, BPK is a state body or institution that has the authority to assess, calculate, and determine state losses based on the provisions of Article 23E paragraph (1) of the Constitution of the Republic of Indonesia 1945 jo. Article 10 paragraph (1) of Law No. 15 of 2006, which is reinforced by the Supreme Court Circular No. 4 of 2016.

Thus, other bodies or institutions that do not have the authority can assess, calculate, and determine state losses unless they get a delegation or mandate from the Audit Board as stipulated in Article 9 paragraph (3) jo. Audit Board Regulation No. 1 of 2008 on the use of Auditors and/or experts from outside the Audit Board. If based on Article 56 paragraph (1) of Law Number 30 of 2014, if there is a government administration body or official without having the authority to use government administration actions, then the decisions and actions *mutatis mutandis* become invalid.

4. Conclusion

The conclusions of this study are as follows:

- a. Based on the mandate of Article 23 C of the 1945 Constitution which was later realized by the promulgation of Law No. 17 of 2003 on State Finance and Law No. 15 of 2006 on the Supreme Audit Agency (BPK) has been regulated on the authority of the Supreme Audit Agency (BPK) to assess and determine the amount of State losses caused by illegal acts either intentionally or negligently committed by the treasurer, the manager of state-owned enterprises/BUMD, and other institutions or bodies that carry out state financial management. This provision is also further strengthened by the issuance of the Constitutional Court Decision No. 25 of 2016 which has the same degree as the law which essentially requires the calculation of state financial losses made or declared by BPK. 2)
- b. Although in *stadia* legislation there have been arrangements regarding institutions that have the authority to calculate state financial losses through the BPK or other institutions as long as they are declared by the BPK, but in practice these arrangements are often ignored by law enforcers both in the process of investigation, prosecution and in the process of trying the case. Even though this clearly contradicts the principle of legality adopted in the Indonesian criminal law cell.

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