Responsibility of The Board of Directors in Management of State Assets in Capital Participation of State-Owned Enterprises Based on Legal Certainty

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Article Info
Received: 2024-10-23
Revised: 2024-12-31
Accepted: 2024-12-31

Keywords:
Directors, State Assets, Enterprises .

Abstract

Overlapping related to state finances also occurs in several judicial decisions, namely the decision of the Constitutional Court of the Republic of Indonesia No. 77/PUU-IX/2011 on the judicial review of Law No. 49 Prp of 1960 concerning the State Receivables Affairs Committee. The substance of the Judicial Review of this Law is to ask the Court to cancel the provisions of Article 4, Article 8, Article 10, and Article 12. In the ruling of the Constitutional Court, it is stated that the assets owned by BUMN are separate from state assets, so that the authority to manage assets, businesses, including the settlement of BUMN debts is subject to limited liability company law based on Law No. 40 of 2007 concerning Limited Liability Companies. The *formulation of state financial losses is interpreted as the same as state losses. This can be seen in the provisions of Article 35 paragraph (1) and paragraph (4) of Law Number 17 of 2003 concerning State Finance; Article 1 number 22, and Articles 59 to 67 of Law Number 1 of 2004 concerning State Treasury; Article 20 paragraph (4), paragraph (5), and paragraph (6) of Law Number 30 of 2014 concerning Government Administration. These regulations regulate Treasury Claims (TP) and Compensation Claims (TGR) for non-treasurer state/regional finances. Based on Supreme Court Regulation Number 4 of 2015 concerning Guidelines for Proceedings in the Assessment of Elements of Abuse of Authority, the PTUN has the authority to assess before a criminal process. It is clear that the actions of BUMN directors that result in state financial losses can be subject to administrative and/or criminal sanctions.*

I. Introduction

The presence of State-Owned Enterprises (BUMN) has a vital role as a pioneer and/or trailblazer in business sectors that have not been of interest to private businesses. State-Owned Enterprises are government instruments in opening up sectors that are considered important and relevant to improving people's welfare on the one hand, but require resources that may not be provided by the private sector.[1]

Overlapping related to state finances also occurs in several judicial decisions, namely the decision of the Constitutional Court of the Republic of Indonesia No. 77/PUU-IX/2011 on the judicial review of Law No. 49 Prp of 1960 concerning the State Receivables Affairs Committee. The substance of the Judicial Review of this Law is to ask the Court to cancel the provisions of Article 4, Article 8, Article 10, and Article 12. In the ruling of the Constitutional Court, it is stated that the assets owned by BUMN are separate from state assets, so that the authority to manage assets, businesses, including the settlement of BUMN debts is subject to limited liability company law based on Law No. 40 of 2007 concerning Limited Liability Companies.

Thus, BUMN receivables are no longer state receivables whose settlement is carried out by the State Receivables Affairs Committee, but can be settled independently by the management of each BUMN bank based on sound principles. Therefore, the provisions of Article 8 of the State Receivables Affairs Committee Law are contrary to the 1945 Constitution and have no binding legal force. If we follow the legal logic of the Constitutional Court's decision above, then directly or indirectly it can be interpreted that the assets of BUMN which are not separated at all are no longer objects of state finance as referred to in the provisions of Article 2 of the State Finance Law.

The existence of the Constitutional Court Decision No. 77/PUU-IX/2011 above, it turns out that there are differences in interpretation in interpreting the provisions of Article 2 letter g of the State Finance Law. On this basis, a petition was filed for judicial review of Law No. 17 of 2003 concerning State Finance as recorded in case No. 48/PUU-XI/2013. Where the applicants questioned the constitutionality of the provisions of Article 2 letters g and i of the State Finance Law. According to the view of the Constitutional Court judges, state-owned legal entities of higher education (BHMN PT), state-owned enterprises (BUMN), regional-owned enterprises (BUMD) or other names, or more specifically others carry out the constitutional mandate of Article 31, Article 32, and Article 33 of the 1945 Constitution as an extension of the state in carrying out part of the state's functions to achieve the state's goals, namely to educate the nation's life and/or advance public welfare. Therefore, the consequence for BUMN, BUMD, BHMN, or other bodies that use state assets must continue to be supervised as a form of good and accountable state financial management.

If we follow the logic of the Constitutional Court's legal considerations above, then compare it with the legal logic of the Constitutional Court Decision No. 77/PUU-IX/2011,

[1] Prasetio, *Dilema BUMN Benturan Penerapan Business Judgment Rule (BJR) Dalam Keputusan Bisnis Direksi BUMN*, (Jakarta Timur: PT. Rayyana Komunikasindo, 2014), hlm. 41-42

then there is legal uncertainty and/or inconsistency in placing BUMN assets within the framework of state financial law. Furthermore, the Constitutional Court Decision No. 48/PUU-XI/2013 was further strengthened by the Constitutional Court Decision No. 62/PUU-XI/2013 which in substance appears consistent and explicit, where the Constitutional Court stated that BUMN assets, whether separate or inseparable, are part of state finances. However, in this decision, the Constitutional Court emphasized that the paradigm of state supervision in question must change, namely no longer based on the paradigm of state financial management in the administration of government (government judgment rules), but rather based on the business paradigm (business judgment rules). The overlap above has resulted in the creation of legal uncertainty so that BUMN managers, especially at the level of BUMN directors, experience a dilemma when making decisions in running their business. Because if a BUMN experiences losses in carrying out its business activities, then the BUMN directors can be charged with Article 2 paragraph (1) and/or Article 3 of the Corruption Crime Law where the losses experienced by the BUMN will be considered as acts that are detrimental to state finances. Therefore, the directors in carrying out the management of BUMN will prefer to play it safe.

2. Research Method

Soemitro said that normative legal research is also called library legal research, because it is mostly carried out on secondary data found in libraries.[2] An approach is a researcher's perspective in selecting a spectrum of discussion space which is expected to provide a clear description of the substance of a scientific work.[3] The data sources needed in this study were obtained from libraries and documents, through secondary data. According to Sugiyono, secondary data is a source of data that does not directly provide data to data collectors, for example through other people or through documents. In research, the sources of secondary data can be laws, books, journals, articles related to the research topic.[4]

3. Result and Discussion

According to Philipus M. Hadjon, the responsibility of officials in carrying out their functions is distinguished between job responsibility and personal responsibility. Job responsibility is concerned with the legality (legitimacy) of government actions. Personal responsibility is concerned with maladministration in the use of authority and public service. The distinction between job responsibility and personal responsibility for government actions has consequences related to criminal responsibility, civil liability and state administrative liability (TUN). Criminal responsibility is personal responsibility.[5]

[2] Ronny Hanitijo Soemitro, *Metodologi Penelitian Hukum dan Jurimetri* (Jakarta: GhaliaIndonesia, 1990), hlm. 11

[3] I Made Pasek Diantha, *Metodologi Penelitian Hukum Normatif dalam Justifikasi TeoriHukum*, Cetakan Kedua (Jakarta: Kencana, 2017), hlm. 11-12

[4] Sugiyono, *Metode Penelitian Kuantitatif* (Bandung: Alfabeta, 2018), hlm. 456

[5] Ridwan Khaerandy dan Camelia Malik, 2007, Good Corporate Governance, Yogyakarta, Total Media, hlm 16

State losses according to Law Number 1 of 2004 concerning State Treasury Article 1 number 22 are state/regional losses that include elements of lack of money, securities and goods, which are real and certain in amount as a result of unlawful acts either intentionally or negligently. According to Agus Ngadino and Iza Rumesten RS, in practice, government administrators both at the central and regional levels who commit unlawful acts and result in state/regional losses may be subject to compensation for the state losses referred to. In the field of government, the parties who can be the subject of compensation for state/regional losses. is a party that has authority related to the management of state finances, including the President, Minister of Finance, Ministers/Heads of Institutions, Regional Heads, Treasurers, Non-Treasurer Civil Servants, and other officials who are given authority in the management of state/regional finances. Based on the authority granted according to the provisions of administrative law, where according to administrative law there are three ways to obtain authority, namely attribution, delegation, and mandate.

According to the Explanation of Article 2 number 7 of Law Number 28 of 1999 concerning Clean State Administrators Free from Corruption, Collusion, and Nepotism, in number 1 it is emphasized that the Directors, Commissioners, and other structural officials in BUMN and BUMD are state administrators. This is because they are included in the group of officials who have strategic functions in relation to the administration of the state according to with the provisions of applicable laws and regulations. The officials of the BUMN are responsible for bringing the BUMN as an agent of development by using the business judgment rules paradigm and the principles of good corporate governance. The accountability of the Board of Directors can be seen from the conformity in the management of the company to laws and regulations and the principles of a healthy corporation. Based on this, if the Board of Directors in managing the BUMN causes financial losses to the BUMN due to unlawful acts, either intentionally or negligently, it can be interpreted as detrimental to state finances as long as it meets the formulation of the provisions of the laws and regulations that regulate it.

In State Administrative Law, the formulation of state financial losses is interpreted as the same as state losses. This can be seen in the provisions of Article 35 paragraph (1) and paragraph (4) of Law Number 17 of 2003 concerning State Finance; Article 1 number 22, and Articles 59 to 67 of Law Number 1 of 2004 concerning State Treasury; Article 20 paragraph (4), paragraph (5), and paragraph (6) of Law Number 30 of 2014 concerning Government Administration. These regulations regulate Treasury Claims (TP) and Compensation Claims (TGR) for non-treasurer state/regional finances. Article 67 paragraph (2) of Law Number 1 of 2004 concerning State Treasury explicitly states that: "the provisions for the settlement of state/regional losses in this law also apply to managers of state/regional companies and other bodies that manage state finances, as

long as they are not regulated in a separate law." if the administrative error occurs due to an element of abuse of authority. Based on Supreme Court Regulation Number 4 of 2015 concerning Guidelines for Proceedings in the Assessment of Elements of Abuse of Authority, the PTUN has the authority to assess before a criminal process. It is clear that the actions of BUMN directors that result in state financial losses can be subject to administrative and/or criminal sanctions. This is explicitly regulated in Article 64 paragraph (1) of Law Number 1 of 2004 concerning State Treasury. It is emphasized again in paragraph (2) that a criminal decision does not exempt from claims for compensation.

Legal certainty is a characteristic that cannot be separated from law. Law without certainty will lose its meaning. Because, it can no longer be used as a guideline for everyone's behavior. The element of certainty in law is closely related to order in society. Therefore, with order, everyone can live with certainty, because they can carry out daily activities in society.[6] In connection with the legal uncertainty above, several directors or main directors of BUMN in Indonesia have experienced legal uncertainty when they were running their business activities and it turned out to be a loss which was then considered a state financial loss. For example, a case like that experienced by Galaila Karen Agustiawan, Former President Director of PT. Pertamina (Persero) in 2009-2014. Where at that time Galaila Karen Agustiawan in running her business activities the company turned out to experience a loss. As a result of the losses suffered, Galaila Karen Agustiawan was finally named a corruption suspect by the Attorney General's Office of the Republic of Indonesia on the grounds that at that time PT. Pertamina (Persero) through its subsidiary, namely PT. Pertamina Hulu Energi (PHE) made a 10% share acquisition of the Roc Oil Company Ltd., to buy the Basker Manta Gummy (BMG) Block in Australia. The acquisition carried out by PT. Pertamina Hulu Energi (PHE) was carried out through an agreement signed on May 27, 2009 with a transaction value of US$31 million.

As a result of the acquisition, PT. Pertamina (Persero) must bear other costs arising from the Basker Manta Gummy (BMG) Block amounting to US$ 26 million. Through the funds that have been disbursed, PT. Pertamina (Persero) hopes that the Basker Manta Gummy (BMG) Block can produce up to 812 barrels of crude oil/day. However, in reality the Basker Manta Gummy (BMG) Block can only produce an average of 252 barrels of crude oil/day. Furthermore, on November 5, 2010 the Basker Manta Gummy (BMG) Block was closed, after Roc Oil Company Ltd. decided to stop crude oil production, this was done because it was considered uneconomical if production was continued. As a result of the cessation of crude oil production from the Basker Manta Gummy (BMG) Block, PT.

[6] Margono, *Asas Keadilan Kemanfaatan & Kepastian Hukum Dalam Putusan Hakim*, Ctk. Pertama, (Jakarta: Sinar Grafika, 2019), hlm. 114

Pertamina (Persero) did not receive any economic benefit from the exploration activities. As a result of the losses suffered by PT. Pertamina (Persero), then the actions of Galaila Karen Agustiawan who at that time served as President Director of PT. Pertamina (Persero) were considered to have harmed the state, where Galaila Karen Agustiawan's actions were considered to have violated Article 3 paragraph 1 of Law Number 31 of 1999 as amended by Law Number 20 of 2001 concerning the Eradication of Criminal Acts of Corruption in conjunction with Article 55 paragraph 1 point 1 of the Criminal Code. Furthermore, Karen Galaila Agustiawan was sentenced to 8 years in prison by the panel of judges in the Jakarta Corruption Court on June 10, 2019. Although in the end the panel of cassation judges of the Supreme Court handling Karen Agustiawan's case issued a verdict with the verdict including releasing the defendant from all legal charges.

In its consideration, the panel of judges stated that what Karen Galaila Agustiawan did was a business judgment rule and the act was not a criminal act. According to the panel of judges, the decision of the board of directors in a company's activities cannot be challenged by anyone. Although the decision ultimately caused losses for the company, it was a business risk. In addition, there was also a case that was almost the same in another State-Owned Enterprise, namely PT. Merpati Nusantara Airlines (Persero). Where the President Director of PT. Merpati Nusantara Airlines (Persero) who was held by Hotasi Nababan at that time was also a victim of the legal uncertainty above. In the case of PT. Merpati Nusantara Airlines (Persero) it began when in order to get out of the operational crisis, PT. Merpati Nusantara Airlines (Persero) tried to search for a B737 Classic Family type aircraft rental (series 300, 400, and 500) openly by making an announcement through the international aircraft rental community website.

After going through several changes, the shareholders of PT. Merpati Nusantara Airlines (Persero) finally accepted and approved the 2006 Company Work Budget Plan (RKAP) which is a formality of activities throughout 2006. In connection with the uncertain availability of the Classic Family type, the 2006 Company Work Budget Plan (RKAP) only lists the B737-200 type that is already owned by PT. Merpati Nusantara Airlines (Persero). However, the shareholders provide flexibility to the board of directors to change the number and type of aircraft according to market dynamics as long as it benefits the company.

4. Conclusion

The formulation of state financial losses is interpreted as the same as state losses. This can be seen in the provisions of Article 35 paragraph (1) and paragraph (4) of Law Number 17 of 2003 concerning State Finance; Article 1 number 22, and Articles 59 to 67 of Law Number 1 of 2004 concerning State Treasury; Article 20 paragraph (4), paragraph (5), and paragraph (6) of Law Number 30 of 2014 concerning Government Administration. These regulations regulate Treasury Claims (TP) and Compensation Claims (TGR) for non-

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