



THE LIABILITY PROBLEMATICS OF THE BOARD OF DIRECTORS IN THE CONTEXT OF LOSS IN THE BODY OF SOEs: A LOSS TO THE STATE'S FINANCE?

Paidi, Yuhelson, Ramlani Lina Sinaulan, Mohamad Ismed

Paidpaid619@gmail.com

ramlani_ls@jayabaya.ac.id

Master of Law, Jayabaya University

Article history:	Abstract:
Received: 6 th January 2023	State-Owned Enterprises (BUMN) are actually a form of state effort to directly seek welfare for the people. In this case, BUMN is a separate form of business entity whose wealth is obtained from state assets. The journey of BUMN as a business entity does not always run smoothly, state losses often occur due to the management of BUMN. Therefore, it becomes very significant to understand the position of wealth owned by BUMN to hold them accountable for the losses. Sumir feels that at the practical level, there is a fierce debate about the position of wealth owned by BUMN. Many postulate that BUMN are immediately separated from state assets, even though various laws and regulations and jurisprudence have stated that the wealth of BUMN is the same as state assets. So it becomes a discussion that needs to be discussed in depth regarding the position of state assets in the BUMN body. As well as investigating more deeply about the responsibility for losses suffered by BUMN, using a knife of analysis of business judgment rules.
Accepted: 6 th February 2023	
Published: 11 th March 2023	
Keywords: BUMN, State Losses, Accountable, Responsibility	

INTRODUCTION

Opening Constitution in a manner clear has give mandate to the state for realize well-being general . Indeed the ideal basis that forms pattern Indonesian government as a welfare state . Indeed the concept of the welfare state. the most ideal way to realize well-being , p This supported with experience empirical some of the country's earlier models . (Sukmana , 2016). More carry on form effort from the welfare state is distribution source Power to public , fine in a manner direct nor use effort others (Simarmata , 2008).

State Owned Enterprises are a whole business entity or part big capital owned by the state. SOEs have position central in wheel Indonesian economy , p This appear from amount BUMN assets of IDR 8,767 trillion . kindly clear BUMN position is provide internal market needs matter this is the people, more SOEs continued role central in economy. Moreover, SOEs have role key in service general , development economy , and donate state income . Position central BUMN even in a line straight with mandate constitution Article 33 of the 1945 Constitution of the Republic of Indonesia. This is reflection from the necessary countries For do mastery of power economy To use people's prosperity . because Therefore , linearly the concept of BUMN is design form from draft economy democracy initiated by Bung Hatta. In matter This economy citizenship based on mastery processes economy by the common people who aim For prosperity together . (Joseph, 2019). On context the COVID-19 pandemic , SOEs also have role central in the recovery process economics , for example in matter thawing subsidy interest , guarantee credit and distribution credit for MSMEs.

In its development mature Here , there are two mutually exclusive ideas leave behind related meaning state finances in BUMN body in also related to state losses . A number of party has argue that separated state assets For deposited on capital participation in BUMN is not Again can categorized as as part from state finances . it based on the legal entity theory that states that country's wealth that has separated become fully owned by BUMN. More further , doctrine separate legal entity that is oriented towards separation in a manner firm between treasure riches company and its management the more strengthen BUMN position as a legal entity independent . Temporary that , argument other participate confess existence separated state assets as equity participation in BUMN. However , separation riches a quo no can interpreted as well as immediately as he decided the relationship between the state and BUMN. this _ appropriate with opinion court in Verdict No. 62/PUU/XI/2013. Through perspective transaction , Court state that transaction top separation the country 's wealth No divert something rights . With thus , consequences its juridical that separated state assets in form the equity participation Still still as state wealth .

Existence Decision Court Constitution above _ apparently Not yet become milestone main judge in court in judge close thing relationship with accountability by the directors related BUMN losses which also include state finances

. As illustration case , one case state-owned losses that involve Galaila Karen Kardinah as Defendant in company PT Pertamina Hulu Energi is form concrete presence complexity enforcement law on the ground . At the appeal level , the Panel of Judges agreed with The Panel of Judges of First Instance stated Defendant has proven in a manner valid and convincing guilty do follow criminal corruption committed in a manner together . However , when has up to the level appeal , the Panel of Judges annulled decision court level first upheld in court _ previous appeal rate . Defendant stated proven do deed as charged in indictment Prosecutor General , however deed That No is something follow criminal . one interesting consideration For underlined , among others the Court argue that losses suffered by PT Pertamina Hulu Energi as child company from PT Pertamina (Persero) only is decline fluctuating value so that No become loss state finances real . this Of course raises A anomaly in context exists loss to children state-owned companies , however loss the precisely No categorized as as loss state finances .

Though , as has mandated in part explanation of the Rules Government Number 72 of 2016 concerning Changes to Regulations Government Number 44 of 2005 concerning Procedures for Participation and Administration of State Capital, though the country's wealth has transformed become riches or share in SOEs, by principle relationship Still tightly with the state because of the status of the state in matter This as holder share or capital owner . About context entity ' child state-owned companies ' which are not can equated treatment with the 'BUMN' myself , p This can scrutinized through opinion Court Disclosing constitution that throughout exploitation from entity related **covers** branch production important for the state and rule wish many people's lives or manage business whose object sourced from earth and water and wealth contained nature in it , **then** Already duly entity the looked at as something **derivation** from state domination a number of object the on part implementation from state function **and therefore** all losses incurred from child companies can categorized as as state wealth .

Indeed Good in regulation legislation nor a number of decision court has occupy in a manner firm about country 's wealth BUMN body . However _ in the practice Really No young , still many postulate that BUMN wealth is separated fully from state wealth . So arise question deep fundamentals enforcement law in Indonesia, about fate state assets in state- owned companies the .

METHOD STUDY

Study This use method analysis qualitative juridical normative as well as also supported _ method studies relevant case . Data collection obtained from studies References or library research, that is collect data based on Regulation Legislation , books , journals , articles , decisions courts , and other relevant sources . In matter This can concluded that method study This relying on an analysis of the norms law in regulation legislation and norms others growing _ growing in society .

DISCUSSION

1. The Nature of ' State Finance ' and ' Separated Wealth ' In Form Equity Participation in BUMN/BUMD According to Indonesian Positive Law

As part from administration of the state, existence management good state finances with put forward principle good governance for sure ensure achievement objective development national . For implementing it , p This strengthened in regulation Article 1 paragraph (1) of the Law Number 17 of 2003 concerning State Finance or called the " **State Finance Law** " which states :

" **State Finance** is all the rights and obligations of the state that can rated with money, as well all something Good in the form of money or form items that can made state - owned with implementation rights and obligations the ."

More further , the State Finance can covers a number of a certain kind . this _ like explained in Article 2 letter g of the State Finance Law which reads :

" The wealth of the country / wealth managed area Alone or by other parties in the form of money, letters valuable , accounts receivable , goods , as well other rights that may rated with money, **incl separated assets** in state **companies** / companies area ;"

There is Chapter aquo succeed prove that one type State Finance , among others, namely ' separated wealth ' in state companies / companies area or in matter this BUMN/BUMD. About definition on separated state wealth , more carry on will explained in section next .

As one agent development in system economy national , source BUMN capital can originate from separated state assets . Refer to the regulations legislation , definition of ' separated national wealth ' has been stated with firm through Article 1 paragraph (10) of the Law Number 19 of 2003 concerning State Owned Enterprises or referred to as the " **BUMN Law** ", which reads :

" **The wealth of the State is separated** is country 's wealth from Budget State Income and Expenditures (APBN) for made state equity participation in Persero and/ or Public Corporation as well as company limited other ."

Based on sound chapter a quo , in a way simple country's wealth that has source separated from the state budget is used as state equity participation in Persero and/ or Public Corporation as well as company limited other . Next , implications emerging juridical _ is to construction and management from country's wealth that has separated the will different . Referring to the elucidation of the BUMN Law, it is stated that status Already

No Again submit or based on the system manage Budget State Income and Expenditures or called " APBN ", however will based on conditions private and principles company corporation .

On more regulation specifically , Article 2A paragraph (3) PP Number 72 Years arrange as following :
" Deep matter state wealth share state -owned in state-owned enterprises as meant in Article 2 paragraph (2) letter d is made state capital participation in other BUMN so that part big share owned by another BUMN , then that BUMN become child state-owned company with mandatory state regulations own share with right specially arranged _ in budget basic "

With so , though the country 's wealth changed become assets of BUMN or Limited Liability Company consequence transformation such , however Still own connection with the state because of the status of the state as holder share / capital owner .

kindly philosophical , I mean shaper Constitution in enter separated state assets as part from State finances are based on presence Government in organize service public in framework reach objective patriotic as has mandated by the constitution nation . Through the above conception , at least can concluded that equity participation from source of separated state assets from the state budget in principle still will become part from state finances . Management subject to the provisions private and corporate No as well as immediately negate essence from state finances intact as has explained before .

2. Responsible party _ answer in BUMN/BUMD losses .

Not quite enough answer criminal dropped to someone to be learning for others _ For No do deed criminal . Accountability criminal dropped to those who have make reproach , p here's what then become theory geen staff zonder schuld . Basically , human or legal personification is possible subject requested responsible answer and have right as A subject law . With thus , goods Who just make _ criminal so can requested accountability . Next , the most basic question is when a BUMN/BUMD experiences loss who can requested accountability ?

BUMN Directors in operate management , own duties and powers as well as not quite enough answer . The BUMN Law does not arrange in chapter alone related How duties and powers as well as not quite enough answer directors , however as based on provision Article 11 of the BUMN Law states that against BUMN Persero applies all applicable terms and principles for company limited as arranged in Constitution Number 40 of 2007 concerning Company Limited (next called UUPT), then related provision duties and powers as well as not quite enough answer BUMN directors refer to the provisions related duties and powers as well as not quite enough answer existing directors on the provisions in UUPT.

kindly firmly , Article 1 point 5 UUPT states that directors is the responsible organ answer in management company on interest company good inside nor outside _ court . Likewise the same thing apply for BUMN directors . More continued , so that SOEs are able compete overcome competition and guarding the market, directors as one of the important organs on duty manage company , sued must can do breakthrough , innovation , and take opportunity with do taking decision must business done with full calculation and caution in face risk business . However , often decision business taken by directors resulted loss for company .

Resulting business decisions loss for company This Then can become problem for the directors of BUMN Persero because matter This means that the directors of the Persero BUMN are also detrimental state finances . this is consequence from exists decision Court Constitution Number 48/PUU-XI/2013 and the verdict Court Constitution Number 62/PUU-XI/2013 which in essence confirmed position the state assets that are separated in BUMN Persero are including in scope state finances . Thus , the directors of BUMN Persero must responsible answer on action taking decision business that is detrimental to BUMN Persero and detrimental state finances .

Although the decision he made resulted loss for company , directors in matter This No as well as immediately can asked accountability . this in line with provision in Chapter 97 paragraph (5) UUPT, who stated that member directors No can be held accountable on loss as referred to in Article 97 paragraph (3) if can prove , (a) loss the arise No Because error or negligence , (b) has do management with faith kind and careful For interest and appropriate with the aims and objectives of the Company, (c) no have clash interest Good direct nor No direct on action resulting management _ loss , and (d) has take action For prevent arise or he continued loss . In law company , Article 97 paragraph (5) said known with the Business Judgment Rule (BJR) doctrine .

In implementation of BJR, there are five elements the tree to be necessary principles applied . First , business decisions , which are meaningful that BJR only can applied to a actions taken by the directors . Second , disinterestedness , which emphasizes that every decisions taken by the directors solely only For interest company and not contain interest personal . Third , due care , namely before take decisions , directors must do business or necessary actions like , collect information related request legal opinion to expert . Fourth , honest and good faith , which means that decisions taken by the directors must based on honesty and faith Good in carry out his job as acting directors For interest company . Fifth , no abuse of discretion , namely directors in take decision in accordance with duties and powers as directors for the sake of interest company .

For categorize loss of BUMN/BUMD as state losses , required understanding related from state loss . Loss state finances is decrease the wealth of the State caused something action oppose law , abuse power / opportunity or a person 's means _ Because position or position , negligence someone and or caused by external

circumstances _ ability human . Loss the country 's finances can in the form of : 1) Expenditures something state/ regional resources / wealth (can in the form of money, goods) that should be No issued ; 2) Expenses something sources / wealth of the state/ region more big than it should according to applicable criteria ; _ 3) Disappearance national / regional resources / wealth that should be accepted (incl among them reception with counterfeit money , goods fictitious); 4) Acceptance sources / wealth of the state/ region more small / low than it should accepted (incl reception goods broken , quality No appropriate); 5) Arise something obligations of the state / region should be No there is ; 6) Arise something more state / regional obligations big than it should be ; 7) loss something rights of the state/ region should be owned / received according to applicable rules ; _ 8) State/ regional rights received more small than it should accepted .

Loss state finances that have explained Previously it also applied to BUMN/BUMD because the state owned it mastery of BUMN/BUMD in form stock . this _ supported by opinion witness expert , Bono Jatmiko SE, Ak.CA.CACP in case ex- directors Pertamina , Karen Agustiawan that loss to one of the State Owned Enterprises including category loss state finances , because **part or whole share** BUMN shares are owned by the Government or Country, so losses suffered by BUMN with Alone his influence and effect loss state finances .

However , the concept is necessary understood is that possible circumstances become condition that policy or decision business that can make directors must responsible answer in a manner criminal is in matter context follow criminal corruption meaning is form from deed oppose law . However , accountability directors in matter This needed contextualization as following : First , Policies taken by the board of directors No in accordance with Business Judgment Rule or Principles General Good Governance as well as No moment in condition force majeure . second , Policy business the own indication fraud , misdirection , violation , or actions that are not should . third , policies taken for the sake of interest company just or there is mixing interest private in it . fourth , Policy the including in deed oppose law which own objective For profitable self personal or class . Fifth , policy the become trigger something follow crime . Sixth , Policy the influence subtraction mark share implicated government _ to loss state finances . seventh , there is moral hazard from directors on taking policy the .

Based on explanation general Constitution Number 31 of 1999 as has changed with Constitution Number 20 of 2001, that is meant with state finances are whole country's wealth in form whatever , **either separated or not _ separated** , incl all State wealth and all rights and obligations that arise because :

- 1) Is at in mastery , management , and accountability official State agencies , both at the level center nor area ;
- 2) Is at in mastery , management , and accountability **State-owned enterprises** or **Regional Owned Enterprises**, Foundations, Legal Entities and Companies that **include** party **capital** third based on **agreement with the State** .

Based on explanation Article a quo is visible that BUMN capital is included in riches state property . Despite thus , some expert Still argue regarding SOE capital is separated state assets . this implicated to if happen BUMN losses , then matter the is the Company's losses solely and not is state losses . If reviewed based on Article 2 of the State Finance Law , stated :

" State finances as meant in Article 1 point 1, includes : (g) state assets / wealth managed area _ Alone or by other parties in the form of money, letters valuable , accounts receivable , goods , as well other rights that may rated with money, **incl separated assets in state companies / companies area** "

According to M. Guntur Hamzah, based on explanation chapter the so Already No doubt Again that BUMN wealth is part from state wealth . The implications , though the country 's wealth separated become a private area , BUMN assets remain is State Wealth in perspective of the State Finance Law . this confirmed also through MK Decision Number 48/PUU-XI/2013 and MK Decision Number 62/PUU-XI/2013. This is what it should be can become solution from expert discourse related debate realm state finances and their relations with loss in the body of BUMN. it at a time legitimize state losses caused by BUMN losses .

Loss state finances that have explained Previously it also applied to BUMN/BUMD because the state owned it mastery of BUMN/BUMD in form stock . Take example from Case follow Criminal Corruption committed by ex _ Main Director and Director PT Kereta Finance Deep Fire (Persero). the verdict , the Panel of Judges confirmed that has happen state loss of 100 billion rupiah. Loss of the country sourced from loss of investment funds choose PT Kereta Api (Persero) which is not can returned and accounted for by PT Optima Kharya Capital Management (PT OKCM) as Manager Investment at the moment it . In In its considerations , the panel of judges also used doctrine from R. Wiyono who said :

" That is meant with harm the country's finances Alone is The same It means with become make a loss or become reduced , so with that's what it means with **element harm state finances** is The same It means with become make a loss state finances or decrease state finances ."

Next , proof related State losses are also strengthened again by Judgment RI Supreme Court Number 813K/ Pid /1987 which states that amount resulting state losses deed somebody or corporation No need determined in a manner Certain the amount . Remote payments _ more big from accomplishments made , is _ size that deed the profitable wholesalers and detrimental to the State. If jurisprudence the contextualized to

the PT Kereta case Api (Persero), very convincing that loss of 100 billion rupiah from results investment managed by PT OKCM categorized as as loss state finances .

CONCLUSION

In principle , SOEs are form from state effort to realize people's welfare . In matter this is necessary exists firmness in classify related riches owned by BUMN. It has been explained in analysis on that position state finances in matter This segregated wealth _ in the form of BUMN capital is wealth that is not inseparable from the country 's wealth alone . More further , in matter there is case losses suffered by BUMN, then matter This needed fundamental proof , remember _ there is BJR doctrine that is not position directors in a manner as well as immediately as responsible party _ answer in matter happening BUMN losses . though the wealth the country has essence For separated and therefore implicated has enter in the area of private management , in matter This need interpreted in a manner intact that state-owned assets stay is country 's wealth perspective of the State Finance Law . This is also confirmed through MK Decision Number 48/PUU-XI/2013 and MK Decision Number 62/PUU-XI/2013. So , p This has properly become solutions and answers from expert discourse related debate realm state finances and their relations with loss in the body of BUMN.

REFERENCE

1. Afriyadi , Hadiyan , " Reconstruction Juridical Separated State Wealth in SOEs", Al'Adl Vol. IX No. 1 (January - April 2017): ISSN 1979-4940.
2. Mertokusumo , Sudikno , Get to Know One Law Introduction (Yogyakarta: Light Atma Pustaka, 2010).
3. Muhamad Hafizh , Akram and Nisriina Primadani fanaro . " Implementation Doctrine of Business Judgment Rule in Indonesia." Ganesha Law Review 1, no. 1 (2019).
4. OS Hiariej, Eddy, Principles of Criminal Law (Yogyakarta: Cahaya Atma Pustaka, 2015).
5. Rani, et al , " Consistency Confirmation position Separated State Assets in State-Owned Enterprises According to Perpetrator Power Justice In The link With Doctrine of Business Judgment Rule." ACTA DIURNAL Journal Notary Law Studies 1, no. 2 (2018).
6. Simarmata , Welfare State and Globalization : Development Policy and Comparison Experience , (Jakarta: PSIK Paramadina University , 2008).
7. Sukmana , Oman, " Concept and Design of the Welfare State " , Journal Sospol 2, no. 2 (December 2016).
8. Sulistiowati , Legal Aspects and Reality Group Company Business in Indonesia (Jakarta: Erlangga , 2010).
9. Theodoris , Falentino , et al , " Contribution of SOEs (State Owned Enterprises) in the Economic Sector in Face Covid-19 Pandemic " , Wijayakusuma Law Review 3, no. 1 (2021).
10. Yusuf, Nasrudin , et al , " Muhammad Hatta's Thoughts on Islamic Economics in Indonesia", Portrait Thinking 23, no. 1 (2019).
11. Ministry of SOEs, " Flash SOE Work Quarter 3-2021
12. Harsono , "Cooperation between State Companies, Private Companies and Cooperatives in framework Success of Economic Development in Indonesia", Speech Confirmation in Reception Profession of Professor at Brawijaya University , Malang, 1986, p . 2.
13. Hendry Julian et al, Losses State Finance in Management of State-Owned Enterprises in the form of Limited Liability Company , Perspective of Business Law and Action Criminal Corruption , Dissertation , Gadjah Mada University , (2018).