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Status of the Laws of Separated Country of Separated Countries on the Operation of State-Owned Enterprises (A Study of PT. Pelabuhan Indonesia IV (Persero) Makassar)

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Abstract: The research aims to analyze and find the legal position of the participation of state capital separated from the implementation of State-Owned Enterprises (SOEs) with the object of study at PT. Pelabuhan Indonesia IV Persero Makassar. The research method uses the juridical-sociological research method. The results of the study found that the Inclusion of State Capital included in the company was no longer a part of the country's wealth, but rather the wealth of the company itself as an independent legal entity. The Company obtained status as a legal entity when the deed of establishment was approved by the Minister of Law and Human Rights. Here there is a separation of wealth between the wealth of shareholders and the company. With these characteristics, the responsibility of the government as a shareholder for losses or corporate debt is also limited to the amount of paid-up capital (PMN).

Keywords: Equity Participation; State, State-Owned Enterprises

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I. INTRODUCTION

State-Owned Enterprises (SOEs) is the realm of private law, so state assets are only capital investments into a legal entity formed by the state with the status of the separated state assets. This implies that since the separation of a portion of state assets into SOE legal entity assets, there has been a transformation of law on public finance into private finance that is fully subject to civil law (Ibrahim, 1997). Likewise, the legal position of a state official sitting as a shareholder or board of commissioners is equal or equal to the legal position of ordinary citizens or other private shareholders. That is, public immunity as a ruler no longer applies and to him fully subject to and apply private law, even though the company is 100% (one hundred per cent) state-owned (Sagala, 2009). Therefore, the participation of state capital in a company is ordinary participation with the same legal status as participation by other private parties. This view is reinforced by the UUBUMN, among others, Persero has the main objective of pursuing profits and Public Corporation aims at public benefits in the form of providing high-quality goods and/or services and at the same time pursuing profits based on the principles of company management. Therefore, the objectives of BUMN are similar or relatively the same as the objectives of other private limited liability companies, including management based on Company Law. Therefore, if a loss occurs at a state-owned corporation, the loss is not a loss of state finances but a loss referred to as a business risk of a private legal entity.

In reality, SOE business actions are seen as acts of state financial loss (*das sein*). This is evident in the case experienced by state-owned PT Pos Indonesia employees as stated in the veranda of the Supreme Court of the Republic of Indonesia (www.kejaksaan.go.id dated May 3, 2009) with the case of the position as follows:
"Defendant RAP (abbreviated writer) as Head of the Jakarta Post Office Mampang, which was conducted from April 2005 to March 2007 at the Jakarta Mampang Post Office (UPT), Jalan KaptenTendean No. 43 South Jakarta, which has issued commission money to external parties, namely customers of PT. Pos Indonesia for each postal service paid on the pretext as a policy of the directors in accordance with the Directors' Circular Letter of PT. Pos Indonesia SE-No. 41 / Dirop / 0303 dated March 20, 2003 which aims to maintain customer loyalty to improve performance and productivity by basing the approval of HANA SURYANA, Pos IV Jakarta Regional Office by helping to agree on receipts made by marketing staff, then the commission money is issued from the budget line of the marketing costs of the Post Office of the Jakarta UPT Mampang, however the granting of commissions to external parties is contrary to Article 89 of Law No. 19 of 2003 concerning SOEs which basically prohibit giving anything to customers for what they have determined. With the issuance of the

commission money on the pretext of external coaching seems to be handed over to the customer even though it has been used for other purposes outside of its designation so that there has been a loss of state finance Cq. PT Pos Indonesia (Persero) in the amount of Rp. 661,473,287, - (six hundred sixty-one million four hundred seventy-three thousand two hundred eighty-seven rupiah). "

For this action, the verdict requested by the public prosecutor is:

1. Stating that the accused RAP was found guilty of committing a Corruption Act as regulated in Article 3 Jo. Article 18 paragraph (1) letter b of Law Number 31 of 1999 as amended by Law Number 20 of 2001 concerning Amendment to Law Number 31 of 1999 concerning Eradication of Corruption Jo. Article 55 paragraph (1) of the Criminal Code Jo. Article 64 paragraph (1) of the Criminal Code by Subsidiary charges;
2 RAP defendants are sentenced to prison for 2 (two) years, reduced as long as the defendant is in custody, with the defendant's order being held by detention centres;
3 Pay a fine of Rp. 100,000,000 (one hundred million rupiahs) subsidiary 3 (three) months of confinement;
4 Paying a Replacement of Rp. 1,353,973,812, - (one billion three hundred fifty three million nine hundred seventy three thousand eight hundred twelve rupiah), if the replacement money is not paid within 1 (one) month after the court's decision which has obtained permanent legal force, then the property belonging to the convicted person will be confiscated and auctioned off to cover the replacement money. If the convict does not have sufficient assets to pay the replacement money, then it will be replaced with a prison sentence of 1 (one) year;
5 Stating evidence in the form of documents and documents used in other cases.
6 Assign the defendant to be burdened with paying the court fee of Rp. 5,000, - (five thousand rupiah).

Based on the case and the prosecutor's claim above, it is clear that the conduct of the employees of PT Pos Indonesia BUMN in the framework of increasing the sales of the PT Pos Indonesia BUMN business is considered a criminal act because it is detrimental to the State's finances. These criminal complaints against BUMN employees are contrary to the business principles adopted by PT Pos Indonesia as a Limited Liability Company which is subject to the private law of the Company Law and the Law. In the provisions of Article 11 of the UUBUMN as stated above, that the Persero applies to all provisions and principles that apply to limited liability companies as stipulated in Act Number 1 of 1995 concerning Limited Liability Companies ("Company Law") jo. Law Number 40 of 2007 concerning Limited Liability Companies. Moreover, Article 97 paragraph (5) of the Company Law states, "Members of the Board of Directors cannot be held responsible for the Company's losses if they can be proven: (a) The loss is not due to an error or negligence; (b) Has made arrangements in good faith and prudence for the interests and in accordance with the aims and objectives of the Company; (c) Does not have a conflict of interest, directly or indirectly, of the management actions that result in losses; and (d) Have taken actions to prevent such losses arising or continuing. Therefore, RAP's actions as employees who carry out the business activities of PT Pos Indonesia BUMN are not subject to criminal sanctions, other than because the Company's management cannot be held responsible for the Company's losses because he as an employee carries out the Company's management (Board of Directors) orders, also because the acts concerned are not related to and not subject to public law, but subject to private law because the participation of state capital in SOEs is participation that comes from separate assets that are not subject to the APBN mechanism as has been affirmed in the explanation of Article 4 of the UU BUMN.

In addition to the PT Pos Indonesia BUMN case, there are still many other cases that "ensnare" SOE employees because it is seen that their actions qualify as public acts (which are seen as detrimental to state finances), and not as private law. The disharmony of the laws and regulations creates legal uncertainty and risk for the Directors of the state to make business decisions, because the management of BUMN may be accused at any time of harming the state even though the decision taken is based on rational business principles and rests on good governance (*good corporate governance*) as mandated by the Company Law (Tjager, 1999). This hurts the effort to build a strong, competitive and value-added BUMN. When SOEs are faced with global challenges, there should be a certainty that SOE management has the opportunity to make decisions with global standards so that they can compete in a game arena that is equivalent to the management of non-SOE companies.

This condition must be stopped. If it is deemed that business conduct which is detrimental to SOEs is also a loss of state finances, this needs to be affirmed in the UUBUMN and the laws and regulations governing state financial losses (Rajagukguk, 2006). If the deeds of SOEs' business losses are not seen as a loss to the state, then this matter also needs to be affirmed in the legislation. It must be clear the boundaries of the status and legal status of the state capital separated in the operation of SOEs, particularly at PT Pelabuhan Indonesia IV (Persero). The legal status and legal status limit of the separated state is also needed to simultaneously differentiate with the assets and assets of SOE companies as a company that is managed based on the principles of a limited liability company as mandated by the Company Law. This is what interests the author to analyze the nature of the legal position of the participation of state capital separated from the implementation of SOEs.

II. RESEARCH METHOD

The method used in writing this research is the normative legal writing method (Sunaryati Hartono, 2006: 139), which is a method of writing that is based on an analysis of several legal principles and legal theories and laws and regulations that are relevant and related to problems in research this. This normative legal research is a procedure and a way of scientific research to find the truth based on the scientific logic of law in terms of normative (UK Satyawacana, 2000: 20-22).

Problem approach used in writing this study: the statutory approach; conceptual approach. (UK Satyawacana, 2000: 20-22), and a comparative approach. (Sri Mamuji, 2001: 14);

III. DISCUSSION

The important role of the state in the implementation of the country's economy is that the state can form a State-Owned Enterprise (BUMN), as a form of the state to help implement welfare for the community. Mubyarto argued that state control as mandated by the 1945 Constitution of the Republic of Indonesia to control certain production branches that control the lives of many people is aimed at increasing people's prosperity maximally (Arifin P. Soeriatmadja, 2009: 57). This is in line with Soepomo's view that states that state control can be interpreted as regulating and/or organizing primarily to improve and enhance production. (Arifin P. Soeriatmadja, 2009: 57)

Persero is an independent legal entity and has its own rights and obligations, including those related to assets owned by the state, regardless of the assets of its founders and their management. The concept of segregation of assets in Persero also applies to the state as a public legal entity, with the state participating in capital participation in a pesero, so the state is automatically deemed subject to the domain of private law.

In Article 3 paragraph (1) of Law Number 40 the Year 2007 concerning Limited Liability Companies, it is stated: "The Shareholders of the Company are not personally responsible for the agreements made on behalf of the Company and are not responsible for losses of the Company exceeding the shares owned." Material Article 3 paragraph (1) of Law Number 40 Year 2007 concerning Limited Liability Companies by the concept of the company, namely the principle of separate entitiesand limited liability. But this principle is ignored by the inclusion of state capital in the company. For this reason, confusion arose concerning state assets and company assets and related to state checks and losses. Differences in the understanding of state finances are also due to differences in the definition of state losses. The definition of state losses according to Article 1 number 22 of Law Number 1 of 2004 concerning State Treasury, "State / Regional Losses are shortages of real, certain amounts of money, securities, and goods, as a result of intentional or negligent unlawful acts."

The status of company assets viewed from two different domains has different implications, because in the domain of public law in the presence of state assets in state assets, the state can immediately conduct an examination of the management of state finances within the company. But even so in the domain of private law, the state is considered like ordinary shareholders and regardless of its immunity as a public legal entity because by engaging in the capital, the state is considered to have submitted to the domain of private law and the state cannot inspect state assets.

The difference in interpretation gives fear and doubt in making business decisions, then all business decisions will always take a long time and cause high costs because directors must coordinate and solicit opinions from various parties such as the Prosecutors' Office, Development Finance Supervisory Agency, consultants finance, and legal consultant.

Whereas in the business world directors need to act quickly and appropriately in making business decisions. In-Law Number 17 of 2003 concerning State Finances (Tumbuan, 2002), it is formulated that state finances include state assets separated by capital participation in state-owned companies, such as Article 2 letter g whose formulation is “state assets / regional assets that are managed alone or by other parties in the form of money, securities, receivables, goods, and other rights that can be valued with money, including assets that are separated in state / regional companies. "If you read Article 2 letter g of Law Number 17 the Year 2003 concerning Finance This country clearly understands state finances, including assets that are separated in-state companies, so that separated state assets which are included as state capital participation in state-owned companies are still state assets.

Whereas in Law Number 19 of 2003 concerning State-Owned Enterprises (SOEs) in *a contrary* determine different things concerning the separated state assets. The definition of state assets is listed in Article 1 number (10) of Law Number 19 of 2003 concerning State-Owned Enterprises, State Assets separated according to Article 1 number 10 of Act Number 19 of 2003 concerning State-Owned Enterprises is state assets originating from the State Revenue and Expenditure Budget (APBN) to be used as state capital participation in Persero and/or Public Companies and other limited liability companies. Furthermore, in the elucidation of Article 4 paragraph (1) of Law Number 19 of 2003 concerning SOEs, which means the separated state assets are state assets sourced from the State Revenue and Expenditure Budget to be used as capital participation in the

State-Owned Enterprises. In Act Number 19 of 2003 concerning State-Owned Enterprises a difference in the meaning of the separated state assets.

In Article 1 number 1 of Law Number 1 of 2004 concerning the State Treasury formulates, "State Treasury is the management and accountability of state finances, including investments and assets that are separated set out in the APBN and APBD". With the understanding of state treasury involving investment and wealth separated from the state budget and the regional budget becomes the responsibility and management of the state treasury automatically, it puts investment in the company in the domain of public law.

In Article 33 paragraph (2) of the 1945 Constitution of the Republic of Indonesia, it is regulated that the branches of production which are important to the state and control the livelihoods of the public are controlled by the state. Based on Article 33 paragraph (2) of the 1945 Constitution of the Republic of Indonesia, the capital participation made by the state in the company is one form of its implementation. Equity participation carried out by the state originates from separated state assets.

The problem of separated state assets related to state finances is increasingly complicated. Two views are equally strong, namely those who view the state assets that are separated remain as part of state finances, and those who view that with the existence of assets separated by capital participation in the company, the assets that are separated have become part of the assets of the state.

Separated State Assets which then become capital participation in the company is one form of the embodiment of the state to implement the concept of the welfare state. This is by Article 33 paragraph (2) of the 1945 Constitution of the Republic of Indonesia, that the branches of production which are important for the state and which control the livelihoods of the public are controlled by the state. The form of separated state assets is one of the elements of state finance that is managed as well as possible.

This separation of state assets contains meaning and consequence, namely the government set aside state assets to be used as investment capital to be used as capital for the establishment of public companies or companies or to increase and strengthen the capital structure of public companies or limited liability companies in increasing their business activities. (Arifin P. Soeriatmadja, 2009: 115) The

definition of state assets separated according to Article 1 number 10 of Law Number 19 of 2003 concerning State-Owned Enterprises, the separated State Property is stated assets originating from the State Budget (APBN)) to be used as state capital participation in Persero and/or Public Companies and other limited liability companies. Furthermore, in the elucidation of Article 4 paragraph (1) of Law Number 19 of 2003 concerning State-Owned Enterprises, the separated state assets constitute state assets sourced from the State Revenue and Expenditure Budget to be used as capital participation to the state-owned companies.

In managing separated state assets various obstacles arise, among others related to the state financial status that has been separated and become capital in the state company. Persero, which is supposed to be a private legal entity with the definition of Article 1 number 1 of Law Number 1 of 2004 concerning the State Treasury, "State Treasury is the management and accountability of state finances, including investments and separated assets set out in the State Budget and Regional Budget", making the company may be examined by a public legal entity that has the authority to examine state finances. Thus the company is placed in the public legal domain.

In addition, the Principle of State Assets Separated in the form of Equity Participation in Persero is also supported by the existence of a Fatwa from the Supreme Court Number WKMA / Yud / 20 / VIII / 2006 concerning the Separation of BUMN assets from state assets. The contents of the fatwa are related to Article 1 number 1 of Law Number 19 of 2003 concerning State-Owned Enterprises and Article 4 paragraph (1) of the same law which, according to the Supreme Court, is a more specific law concerning Business Entities State-owned, it is clearly said that state capital originating from wealth that has been separated from the State Revenue and Expenditure Budget so that its management should not be based on the State Revenue and Expenditure System system but should be based on sound corporate principles, according to the Supreme Court. State-owned Enterprises are not part of the receivables from the state (Nasution, 2003). This is also in accordance with the Decision of the Constitutional Court Number 77 / PUUIX / 2011, according to the Supreme Court that Law Number 19 of 2003 concerning State-Owned Enterprises is more specifically positioned than Law Number 17 of 2003 concerning State Finance (*lexspecialisderogatlegigenerali*) therefore Article 2 letter g of Law Number 17 Year 2003 is deemed not legally binding.

Capital participation by the state sourced from separated state assets is a form of regime shift that was originally part of the state finances which is a public legal regime after becoming capital participation in the state, then it is shifted to a valid private legal regime.

In the implementation of its management of the state, the state cannot completely release control over the management of the separated state assets. But in fact that in the management of the company's finances it is entirely the authority of the company itself, but in this case the country as shareholders can carry out the supervision process, and in the same position as other individual shareholders. Associated with the supervision referred to in the Constitutional Court Decision Number 62 / PUU-XI / 2013, supervision of public institutions

should only stop at the representative of the state in the company as the stakeholder, so that the examination conducted by public institutions does not include the assets of the company.

Confirmation of the limited liability held by shareholders in accordance with the provisions of Article 3 paragraph (1) of Law Number 40 Year 2007 concerning Limited Liability Companies, "Shareholders of the Company are not personally responsible for agreements made on behalf of the Company and are not responsible for losses The company exceeds the shares owned ". Therefore, it is clear that state assets are separate from state assets. If the assets of the state are the same as the assets of the state, then the debt of the company is the same as the state debt, which is contrary to limited liability.

Persero as a legal entity should be constructed as a human being, namely by having rights and obligations so that the company can do legal actions through organs owned by the company. Persero as a legal entity is seen as separate from the individuals who manage the company so that all profits obtained in the activities of the company will become the profits of the company. If the company suffers a loss, the burden of the loss cannot be borne by the individual who manages the company.

The principle that is very important in the company which hereinafter is *a limited liability,* the *limited liability* means that shareholders are responsible only for the amount of capital included in the company which means only the amount of shares owned. Shareholders cannot be held responsible until their assets.

However, this does not reduce the possibility of the Shareholders being responsible to cover their assets if it is known that the shareholders have bad intentions by using the company for personal interest or the shareholders acting as a guarantor for creditors for the company's debts. This concept is commonly referred to as *corporate veil piercing*, and in Law Number 40 of 2007 concerning Limited Liability Companies has also been regulated especially in Article 3 paragraph (2).

The risks of the state due to participating in carrying out capital participation in the company include the state must comply with the scope of private law because of the company as a private legal entity. The nature of the separation of the separated state assets to be used as capital participation in the company as a private legal entity, such as the company is the release at all from its parent, namely state wealth or state finances. The legal consequence of the investment is that the state will be a shareholder in the state-owned companies and capital owners in public companies, which in this case will be represented by the State Minister of SOEs.

The separated state assets will become the assets of the state and public company. In Dutch, it is known as *split'sen*or *splits* which means division or division into two. Divided or divided it implies a juridical meaning that between one and the other it is indeed not a single entity. (Decision of the Constitutional Court Number 62 / PUU-XI / 2013: 78)

According to state law, a state as a shareholder is not a public institution, so the Directors and the Board of Commissioners of the state do not state administrators, they are state-owned organs subject to the legal domain private. In the opinion of Arifin P. SoeriaAtmadja, that in accordance with Article 4 paragraph (3) of Law Number 19 of 2003 concerning State-Owned Enterprises, the state when separating its assets in the context of establishing a BUMN / Persero whose funds originate from the State Budget must be carried out by Regulation The government and this are still acting in the domain of the public/state financial attorneys. However, when expressing his desire to establish BUMN / Persero before a notary public, the state immediately submits itself voluntarily and quietly to Civil Law, and the state's juridical position is as a subject of ordinary civil law and loss of public immunity. The state as a shareholder is the same as other ordinary members of the community (shareholders). (Arifin P. Soeriatmadja, 2009: 399)

By depositing part of the company's operating income or state tax, the money that was originally private money, simultaneously the money goes into the state treasury, so that private money becomes public money and is automatically subject to the provisions of the Law Act Number 17 of 2003 concerning State Finances and Act Number 1 of 2004 concerning State Treasury.

If the state finances are not state finances, the state as shareholders if the company suffers losses due to the small dividends obtained, the state can make a claim for compensation, as stated in Article 61 paragraph (1) and Article 97 paragraph (6) of Law Number 40 Year 2007 concerning Limited Liability Companies. Article 61 Paragraph (1) of Law Number 40 Year 2007 concerning Limited Liability Companies stipulates that, "Every shareholder has the right to bring a lawsuit against the Company to the district court if it is harmed because of the Company's actions which are considered unfair and without reasonable reason as a result of the GMS decision, Directors and/or Board of Commissioners ".

Article 97 paragraph (6) of Law Number 40 Year 2007 concerning Limited Liability Companies regulates that, "On behalf of the company, shareholders who represent at least 10% (ten percent) of their shares with voting rights can file a lawsuit through a district court against members directors who caused errors or negligence caused losses to the company ". With these two articles, the state has a claim for compensation if the state suffers losses due to the negligence of the state-owned company.

The view that separated state assets are completely separate from state finances implies that by repositioning the audit and state finance orientation, audits of State-Owned Enterprises, especially those in the form of Persero, certainly do not become the authority of the Supreme Audit Agency.

As a state institution, ideally, the Supreme Audit Board should focus its audit orientation on strategic state financial policies. Thus, the examination of the State-Owned Enterprises and Regional-Owned Enterprises in the form of state-owned companies is submitted to the public accountant, whose reports are then submitted to the General Meeting of Shareholders (GMS). The Supreme Audit Board can only conduct audits of BUMN / BUMD if a General Meeting of Shareholders is desired. This is the basic essence of the independence of BUMN / BUMD as a legal entity. (Adrian Sutedi, 2012: 20) The

Supreme Audit Board can still inspect the public company, but based on Article 71 of Law Number 19 Year 2003 concerning State-Owned Enterprises. So that the Supreme Audit Board can still inspect the provisions of the General Meeting of Shareholders. Based on the principle of separation of legal entity wealth, it will be expressly seen as a form of independence from the company in the implementation of the management of state assets. By adhering to this principle, the board of directors and the board of commissioners will feel safe and unconcerned in carrying out *business judgment rules*, and not afraid to be charged and accused of corruption if the company suffers a loss.

IV. CONCLUSION

Theconception of state assets separated in the State Capital Inclusion (PMN) in BUMN Persero is the separation of state assets from the State Budget (APBN) to be subsequently used as State Capital Inclusion in BUMN BUMN and further development and management are no longer based on the APBN system, but their coaching and management is based on principles in corporate law. Legally, the State Capital Participation included in the company is no longer a part of the country's wealth but becomes the company's wealth itself as an independent legal entity *(persona stand in judicial)*. The Company obtained status as a legal entity when the deed of establishment was approved by the Minister of Justice and Human Rights. Here there is a separation of wealth between the wealth of shareholders and the company. With these characteristics, the responsibility of the government as a shareholder for losses or corporate debt is also limited to the amount of paid up capital (PMN).

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