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LOSSES IN THE MANAGEMENT OF SUBSIDIARIES OF STATE-OWNED ENTERPRISES IN THE FORM OF LIMITED LIABILITY COMPANIES BASED ON THE DOCTRINE OF BUSINESS JUDGMENT RULE AND CIVIL LAW

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Abstract

Losses experienced in managing state-owned subsidiaries are not considered state losses but losses of the State-Owned Enterprises, as SOE subsidiaries are considered civil legal entities. Thus, there is a need to understand the legal responsibilities and principles governing management decision-making in SOE subsidiaries and the implications for state finances. This research is a normative legal research that uses legislative, conceptual, and comparative approaches. The object of research is legal norms relating to state financial losses in the management of BUMN subsidiaries in the form of PT, based on the doctrine of the Business Judgment Rule and civil law. Secondary data is obtained from literature studies. Data analysis is carried out qualitatively by describing the opinions of respondents and the results of literature studies descriptively and universally, using the inductive method to conclude from particulars to generalities by considering theoretical perspectives. The results show that losses in the management of BUMN subsidiaries in the form of PT require a cautious approach, with the doctrine of the Business Judgment Rule as a guideline for evaluating management decisions. Responsibility to shareholders, including the state, requires careful consideration of the interests of all parties. The principles of good corporate governance, transparency, accountability, and effective risk management are crucial to preventing undue losses.

Keywords: SOEs, Business Judgement Rule Doctrine, Civil Law.

INTRODUCTION

Losses experienced in managing state-owned subsidiaries are not categorized as State losses. Losses of State-Owned Enterprises become losses from State-Owned Enterprises themselves, caused by SOE subsidiaries as civil law entities. In this case, the Government established a subsidiary of a State-Owned Enterprise (AP BUMN), whose entire capital is owned by the state and not divided into shares, which aims to benefit and increase profits for the subsidiary. Therefore, there should be no financial losses to the country. State-owned enterprises are legal entities consisting of companies and public companies. The wealth of a Legal Entity and the state's wealth are separate things. (Juliani, 2016).

The limits of state finances became clearer with the presence of Law Number 17 of 2003 concerning State Finance. Based on Article 1 paragraph (1), what is meant by state finance is all state rights and obligations that can be assessed with money, as well as everything both in the form of money and in the form of goods that can be made state property in connection with

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the implementation of these rights and obligations. State financial reform began with a package of laws in the financial sector: Law Number 17 of 2003 concerning State Finance, Law Number 1 of 2004 concerning State Treasury, and Law Number 15 2004 concerning Examination of State Financial Management and Responsibility. Before 2003, Indonesian state finances used the provisions of the Dutch colonial legacy legislation, which was still valid according to the transitional rules of the 1945 Constitution. The Dutch heritage regulations include *Indische Comptabiliteitswet* (ICW) Stbl. 1925 Number 448, *Indische Bedrijvenwet* (IBW) Stbl. 1927 Number 419, *Regleme Voorhet Administratief Beheer* (RAB) Stbl. 1933 Number 381 and *Instructie En Verdere Bepalingen Voor De Algemeene Rekenkamer* (IAR) Stbl. 1933 Number 320. The first three regulations were used as guidelines for state financial management at that time, while the examination of state financial responsibility was done using IAR Stbl. 1933 Number 320 (explanation of Law Number 17 of 2003). (Chang, H. J, 2007).

Economic improvement is one of the goals of national development in Indonesia. Various efforts were made to improve the welfare and economy of the Indonesian people. The meaning of the realization of the will of the Constitution for welfare is realized by the establishment of State-Owned Enterprises, otherwise known as SOEs. The form of involvement of the Indonesian state to realize the fulfillment of the citizens' basic needs is manifested by establishing a State-Owned Enterprise, from now on abbreviated as BUMN, which in its journey also produces goods and/or services for the community. The General Explanation Number 1 of Law Number 19 of 2003 concerning State-Owned Enterprises, from now on referred to as the SOE Law, explains that SOEs are one of the economic actors in the national economic system, in addition to private businesses or cooperatives. (Indonesia, P. R. 2006).

State-owned enterprises, from now on referred to as SOEs, are business entities whose entire or majority of capital is owned by the state through direct participation derived from separated state assets. (Law Number 19 of 2003 concerning State-Owned Enterprises, Article 1, Paragraph (1)). SOEs are one of the actors of economic activity in the national economy based on economic democracy and have an essential role in implementing the national economy to realize public welfare. (Indonesia, P. R. 2006), (Muchayat, 2010)

SOE Minister Erick Thohir told the media that as many as 74 SOE children and grandchildren had been closed. The closure was carried out for efficiency and at most of Pertamina's children and grandchildren, PTPN and Telkom. Efficiency in SOE-owned companies is carried out to create substantial SOE holdings in the face of market competition. As a holding company, SOEs certainly play an active role in regulating and controlling their subsidiaries' business activities and operations. However, SOE subsidiaries continue to carry out business activities despite experiencing losses because they involve services and energy supply for the community, such as subsidiaries of PT. Pertamina (Persero), namely PT. Pertamina Patra Niaga with non-subsidized LPG distribution activities. Against this, the Director of the Center for Public Policy Studies (Puskepi), Sofyano Zakaria, said regarding the problem of companies that are not included in State-Owned Enterprises (SOEs), such as PT Pertamina Patra Niaga are not obliged to continue non-subsidized businesses that continue to experience losses. (Juliani, 2016)

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Since the issuance of Law Number 19 of 2003 concerning SOEs, the issue of managing the business activities of SOE subsidiaries and the legal status of SOE subsidiaries, whether including SOEs or not, has often become polemical and interesting to discuss. This is due to the parent SOE that invests capital in its subsidiary, using part of its assets derived from state wealth to establish its subsidiary.

Currently, many of the central business activities of SOEs are carried out by SOE subsidiaries rather than directly handled by their parent companies. There is an impression that this is a step toward anticipating the occurrence of criminal law entanglement of corruption for parties interested in SOEs. The logic built by the many involvement of SOE subsidiaries to manage business activities that were initially handled by SOEs is that SOE subsidiaries must not be touched by the hands of the state, including in the event of state losses due to the business activities they run, because the legal relationship between SOEs and SOE subsidiaries is a contractual relationship commonly used in private law.

Based on the description of the findings of previous dissertation research results, both in searching for research titles, literature searches, and although some studies are similar to financial loss research of 44 countries in the management of SOE subsidiaries. There is an element of Novelty or state-of the Art in this study that lies in "Company Losses, not in State financial losses."

METHODS

The type of research used in this dissertation is normative legal research (juridical normative). Normative or Doctrinal Legal Research is obtaining the rule of law, legal principles, and legal teachings to address legal issues/problems (Marzuki, 2010). Research-based on regulations, norms, principles, rules, and other laws relating to state financial losses in managing subsidiaries of State-Owned Enterprises in the form of limited liability companies based on the doctrine of business judgment rule and civil law. This study's research object is legal norms in other related laws and regulations (Amiruddin, H, 2012). The approaches used in this study are the statute, conceptual, and comparative approaches. This research was conducted at the Pertamina Office in DKI Jakarta by taking data at several strategic points in Indonesia.

The type of data source used in this study is secondary data obtained from library materials, literature studies, or second parties. Secondary data is obtained from library materials or through a source that is already available or has been collected by others. Data collection is carried out through literature research. Data analysis in this study uses a qualitative approach method that emphasizes the formulation of problems that will be described descriptively in analysis, namely the opinions and responses of selected respondents, and the results of literature studies are studied and studied universally. Then, the results of this data analysis are described in detail from certain aspects, studied using the inductive method, and, in this case, conclusions produced from the specific to the general and using the perspective of theoretical thinking of scholars.

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RESULT AND DISCUSSION

In the business world, the company's leadership must make a decision to achieve company goals. Decisions are also made by policymakers in the company when carrying out business strategies to face highly competitive competition. Business decision-making is a strategic and crucial action that can impact individuals or companies because today's business competition changes very quickly and is influenced by many factors, so fast and appropriate decision-making is needed to maintain business continuity.

Decision-making occurs through four stages: Intelligence, Design, Choice, and Implementation. Intelligence is the process of collecting information aimed at identifying problems (Fahmi, 2013). To make the right and consistent decisions, SOE subsidiaries must conduct an analysis that considers various factors and compares the advantages and disadvantages of the decisions taken. The birth of a decision does not necessarily occur simply like that because a decision is always born based on a process that takes time, energy, and thought until, finally, crystallization occurs and the decision is born. (Prastyawan & Lestari, 2020), (Irham Fahmi, M. P. K, 2013).

Company losses are one aspect that cannot be avoided throughout the life of a company. Loss is one of the potential occurrences of business decisions taken. A decision taken has the potential not to be able to meet the expectations of the company and various interested parties; for that, it needs to be carefully considered by the company, mainly SOE subsidiaries, so as not to cause company losses. A business decision must have profit and loss consequences, which, if left continuously, will potentially cause the existence of/the company. For this reason, business decision-making is carried out in an agreement and agreement when the decision is made, and the decision must be agreed upon jointly by all parties. In addition, it is necessary to conduct a joint evaluation of the decisions that have been agreed upon and implemented to maintain the company's sustainability.

Normatively, corporate actions carried out by the Board of Directors of SOE subsidiaries are in the realm of corporate law that has been available and applies a set of supervisory and law enforcement instruments to it by referring to Law No. 40 of 2007 concerning Limited Liability Companies. The loss of a state-owned subsidiary is predicted by managing the company and making policies or business decisions expected to provide financial benefits for the company. However, risk is inevitable in the management of the company in question and is a natural thing in addition to the issue of pursuing profits, which is its true goal. (Zulmawan, 2019)

Calculating state financial losses must be real and certain. It cannot be done arbitrarily but must undergo an investigative audit organized by authorized agencies under the law, namely BPK and BPKP, or by a Public Accountant who has special certification for it. (Atmadja et al., 2013).

State-owned company managers must implement good corporate governance to compete between domestic market dynamics and global geopolitics. In realizing this, SOEs, through their companies, must provide guarantees and comfort for investors in the form of a statement of corporate intent (SCI), which is realized by the involvement of directors to be responsible for carrying out their duties and responsibilities through appointment agreements (AA) that can

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be assessed through the results of the reward and punishment system which is the result of ratification of Law No. 19 of 2003 concerning SOEs. The Government, through the State Minister of SOEs, already has a policy, namely the Regulation of the State Minister of SOEs Number PER-02/MBU/03/2023 concerning Guidelines for Governance and Significant Corporate Activities of State-Owned Enterprises, which proves that the Government seriously views that Good Corporate Governance (GCG) must be the basis for SOE management. (Tunggal, 2002)

The objectives of implementing GCG principles in SOEs can be seen in Article 4 of the Decree of the State Minister of SOEs Number: PER-01/MBU/2011 concerning the Implementation of *Good Corporate Governance* in SOEs, namely to:

1. Optimize the value of SOEs so that companies have strong competitiveness, both nationally and internationally, so that they can maintain their existence and live sustainably to achieve the goals and objectives of SOEs;
2. Encourage the management of SOEs in a professional, efficient, and effective manner, as well as empower the function and increase the independence of the Company's Organs/Public Organs;
3. Encourage the Company/Perum Organ in making decisions and carrying out actions based on high moral values and compliance with laws and regulations, as well as awareness of the social responsibility of SOEs towards Stakeholders and environmental sustainability around SOEs;
4. Increase the contribution of SOEs to the national economy;
5. Improving a conducive climate for the development of national investment

When SOEs form subsidiaries, the capital of SOE subsidiaries is sourced from private finance, not the state budget. The capital of SOE subsidiaries has absolutely no element of the state budget. Referring to the doctrine of a separate legal entity, the position of BUMN companies is that they are separate legal entities from SOEs, so state capital participation in SOEs will change into share value. It has implications for the principle of separation between ownership and control, which provides free space for managers to carry out business activities professionally without state intervention as shareholders.

The position of a subsidiary of a BUMN is a private company controlled corporately by a BUMN as the parent company. Thus, SOE subsidiaries do not have liability obligations to the state but to the parent company, namely SOEs. The legal consequences of the separation of fund entities, which are state assets, are that if there is a loss to a subsidiary, it will not impact state losses.

SOEs are business entities who is entire or most capital is owned by the state through direct participation derived from separated state wealth. Capital in the form of assets owned by SOEs comes from the participation of state capital derived from the State Budget and is state wealth. The assets of these SOEs come from long-term government investments to obtain economic, social, and/or other benefits. Government investment can be in stocks, debt securities, and

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direct investment (providing movable or immovable objects). The wealth of SOEs or BUMDs cannot be confiscated because the wealth belongs to the state. This is due to the state investing (derived from the APBN or APBD) to SOEs or BUMDs by the provisions of Article 50 of the State Treasury Law and also refers to Article 1 numbers 10 and 11 of the State Treasury Law, which reads "State/regional property is all goods purchased or obtained at the expense of the APBN/APBD or derived from other legitimate acquisitions."

The management of SOEs, in this case, the Board of Directors, in carrying out their duties to manage SOEs, must comply with the articles of association of SOEs and laws and regulations and must implement the principles of professionalism, efficiency, transparency, independence, accountability, accountability, and fairness, or in other words principles related to good corporate governance). The provisions of laws, regulations, and principles must be applied and obeyed by their implementation, considering that SOEs in Indonesia manage substantial assets, which total up to 3,500 trillion rupiah. SOE capital is and comes from segregated state wealth. This is regulated in Article 4, paragraph (1) of Law Number 19 of 2003. State wealth, separated according to Article 1, number 10, is state wealth derived from the State Budget (APBN), used as state capital participation in the company and/or Perum and other limited liability companies. (Tunggal, 2002)

SOE officials are responsible for bringing SOEs as development agents by using the paradigm of business judgment rules and the principles of good corporate governance. The responsibility of the Board of Directors can be seen from the conformity in the management of the company to the laws and regulations and sound corporate principles. Based on this, if the Board of Directors in managing SOEs incurs financial losses of SOEs 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 governing it.

In state administration law, state financial losses are formulated 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 Article 67 of Law Number 1 of 2004 concerning the State Treasury; Article 20 paragraph (4), paragraph (5), and paragraph (6) of Law Number 30 of 2014 concerning Government Administration. The regulation regulates Treasury Claims (TP) and Non-Treasury Financial Compensation Claims (TGR).

According to Article 20, paragraph (2), and paragraph (6) of Law Number 30 of 2014 concerning Government Administration, government officials who commit administrative errors that cause state financial losses must return the state losses if the administrative errors occur due to elements of abuse of authority. Based on Supreme Court Regulation Number 4 of 2015 concerning Procedural Guidelines in the Assessment of Elements of Abuse of Authority, PTUN is authorized to assess before criminal proceedings. The actions of SOE directors that result in state financial losses may be subject to administrative and/or criminal sanctions. This is explicitly regulated in Article 64 paragraph (1) of Law Number 1 of 2004 concerning the State Treasury. It is reiterated in paragraph (2) that the criminal judgment does not exempt from compensation claims.

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In its position as a civil law entity, the government can carry out civil law actions in the form of agreements and so on. In this context, there is a transformation of law from state finance to private finance. As the government's position as a shareholder of SOEs, the government cannot act to use its public power to regulate and manage SOEs. This is due to the government's participation in SOEs acting as private law subjects so that responsibility for its management cannot be imposed on the government as a public law entity.

State financial regulation in managing subsidiaries of State-Owned Enterprises (SOEs) is crucial to support the settlement of civil state financial losses, especially in reforming SOE law and state finance. One model or form of financial regulation that can be applied is through an approach to strengthening transparent and accountable financial governance.

First, there needs to be a strict supervision and control mechanism for the financial management of SOE subsidiaries. This can be done by establishing clear standards and procedures for using and managing funds, as well as implementing regular internal and external audits to ensure compliance with applicable policies and regulations. Second is the need to establish an independent institution or supervisory body that has the authority to supervise and evaluate the financial performance of SOE subsidiaries. This agency can ensure that financial management is carried out transparently, efficiently, and by the principles of good governance.

In addition, applying risk management principles in the financial management of SOE subsidiaries is essential. This includes identifying financial risks that may arise, developing risk mitigation strategies, and regularly evaluating the effectiveness of those strategies. Civil settlement of state financial losses and strong and well-managed financial arrangements will help minimize the risk of losses. In addition, transparency and accountability in financial management will facilitate investigating and resolving civil losses in case of law violations or policies resulting in state losses. (Zulmawan, 2019)

Thus, through strengthening financial governance, strict supervision, effective risk management, and transparency in the financial management of SOE subsidiaries, a model of state financial regulation can be created that can support the settlement of civil state financial losses while strengthening the reform of SOE law and state finances as a whole.

Loss in the management of SOE subsidiaries in the form of PT refers to the responsibility of the company's directors and management for business decisions. The Business Judgment Rule (BJR) doctrine and civil law principles serve as guidelines in evaluating management actions related to company losses.

The business judgment rule is one of the doctrines in company law that protects company directors from being responsible for losses arising from a consequence if their actions are based on good faith and prudence.

BJR doctrine states that the court will not interfere with business decisions taken by directors unless negligence, abuse of authority, or conflict of interest is proven. It protects directors in making decisions that are considered suitable for the company, provided that the decisions are made in good faith, are based on adequate information, and are within the limits of the authority

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granted. However, SOE subsidiaries in the form of PT have additional responsibilities to shareholders, including the state as the majority shareholder. The Board of Directors must consider the interests of the company and shareholders, particularly the state, as the principal shareholders. They must act carefully and ensure that the decisions taken do not cause undue harm to the company or the country.

Civil law provides a framework for assessing management actions related to company losses. It includes directors' contractual responsibilities towards the company and shareholders and their obligation to act with reasonable care and safeguard the company's interests. Violating this obligation may result in legal liability to directors and management, including compensation for losses incurred.

Overall, the concept of loss in managing state-owned subsidiaries in the form of a PT involves applying the BJR doctrine to protect legitimate business decisions while paying attention to contractual and civil law responsibilities towards the company and shareholders. It emphasizes the importance of transparency, accountability, and prudence in management decision-making to avoid undue losses.

CONCLUSION

Losses in the management of state-owned subsidiaries in the form of PT are complex issues and require a careful approach to their assessment. The Business Judgment Rule (BJR) doctrine is essential in evaluating management decisions. It protects directors for business decisions taken in good faith and caution, as long as they do not violate contractual or civil law obligations towards the company and shareholders. However, the additional responsibility towards shareholders, including the state as the majority shareholder, demands that the decisions taken must consider the interests of the company and shareholders, including the state as the main shareholder. Thus, it is essential to apply the principles of good corporate governance, transparency, accountability, and prudence in management decision-making to avoid undue losses to the company or state. In addition, strict supervisory mechanisms, effective risk management, and transparent financial arrangements are also needed to support the settlement of civil state financial losses and strengthen the reform of SOE law and state finances as a whole.

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