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The Responsibility of Parent Company towards Subsidiary on the State-Owned Holding Companies in Indonesia

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Abstract: The establishment of State Owned Enterprises Holding in Indonesia is one way to increase profits, but the regulatory framework for companies belonging to group companies in Indonesia still uses a single corporate approach. As a result, the company's law only regulates the relationship between the parent company and subsidiary as the special relationship between two independent legal entities in a Group Company construction. Based on the topic, the writer is interested in writing how is the legal responsibility of the parent company to its subsidiary in the Stated-Owned Holding Companies. This research is conducted using normative legal research. Types of data used in this research are secondary data with primary and secondary legal material. Based on the research, it can be concluded that the responsibility of the parent company to its subsidiary in Stated-Owned Holding Company can be divided into some responsibilities, they are; responsibility through voice rights agreement due to privilege shares ownership, responsibility through material contract, responsibility as debt warrantor for subsidiary, and whole of responsibilities due to subsidiary management. The quality of education and research can increase profits in the business world.

Keyword: Responsibility, Indonesia SOE's, Subsidiary.

INTRODUCTION

BUMN or State-Owned Enterprises is one of the business players in the Indonesian economy, along with private and cooperative sector. State-Owned Enterprises (BUMN) is a business entity which the state owns all or most of its capital through direct participation which comes from separated state assets (Article 1, Paragraph (1) Act of State-Owned Enterprises). As time goes by, State-Owned Enterprises (BUMN) is required to change in order to make the companies have high competitiveness and creativity in the global competition. There are three references which are usually used in changing the company's activity; they are restructuring, profitability and privatization. The key to success in restructuring the State-Owned Enterprises (BUMN) lies on the choice of restructuring method. For example, in Singapore and Malaysia, there are several choices of restructuring method, one of which is the establishment of a holding company [1].

Holding company or Parent Company is a central company which has a purpose of owning most of the shares of other companies and regulate those companies. Usually, a holding company has many companies which are engaged in different business fields. The establishment process of the parent company can be conducted by three procedures; they are; residual procedure, full procedure, and programmed procedure [2]. It is different from holding company on the private company; the establishment of state-owned holding companies is focused on creating maximum synergy from State-Owned Enterprises (BUMN) which has the similar business yet different target market [3].

The establishment of the state-owned holding company in Indonesia is based on the government regulation No. 72 of 2016 concerning of Amendment of Government Regulation No. 44 of 2005 about Participation and Administration Procedure of State Capital on State-Owned Enterprises and Limited Liability Company (PT). There is an amendment on Article 2, Paragraph (2) Letter d in the Government Regulation No. 72 of 2016, which states that State-owned shares in State-Owned Enterprises (BUMN) or Limited Liability Companies (PT) are also included in state capital participation and the existence of new provisions, it is Article 2A which states that in the framework of establishing a State-Owned Holding Company does not require the approval of the House of Representatives (DPR) because it held without going through State Expenditure Budget (APBN) mechanism. The reason why the government issues the regulation is that the State Expenditure Budget (APBN) mechanism

has been conducted when the Stated-Owned Enterprises was established. Besides, even though the Stated-Owned Enterprises' shares are changed into a subsidiary of the holding company, the Government still has the privileges regulated in the articles of Association.

Strategic Plan of Ministry of Stated-Owned Enterprises of 2015-2019 mentions that Stated-Owned Holding Company in Indonesia which has been run is holding of Cement Company (with the Parent Company PT. Semen Indonesia (Persero) Tbk), and holding of Fertilizer Company (with the Parent Company PT. Pupuk Indonesia (Persero)). Then, on October 2nd, 2014 the government, through Ministry of Stated-Owned Enterprises Dahlan Iskan, had officially launched the establishment of Stated-Owned Holding Companies of Plantation and Forestry. PTPN III became Parent Company of Plantation holding, while State Forestry Corporation (Perum Perhutani) became Parent Company of Forestry holding. In 2017, Ministry of Stated-Owned Enterprise continues to complete the establishment of Stated-Owned Enterprise holding in 6 sectors. The six sectors which will be established as holding company is; oil and gas holding, mining holding, financial services holding, housing holding, construction and toll road holding, and food holding. However, in November 2017 a mining holding was established with Inalum became its parent Company. Then, PT Aneka Tambang (Antam) Tbk, PT Bukit Asam Tbk, and PT Timah Tbk became subsidiary companies.

Stated-Owned Enterprises are formed as Public Companies and Persero (Individual Company) Companies, which only Persero Companies can be established as state-owned holding companies. Article 11 in the act of Stated-Owned Enterprises stated that all provisions and principles applicable to Limited Liability Companies are also applicable to Persero Companies. The regulatory framework for companies joined to group companies in Indonesia still uses the Limited Liability Company Law so that they can be known as single group companies. It is regulated in Article 3, Paragraph (1) Act No. 40 of 2007 concerning of Limited Liability Companies. The Article states "The shareholders of the Company are not personally responsible for the agreements made in the name of the Company and are not responsible for the loss of the Company exceed of the shares held."

As the regulatory framework for the single company, company's law only regulates the relationship between Parent Company and Subsidiaries Company as the special relationship between two independent legal entities in the construction of Group Company [4]. Based on the topic, the writer is interested in writing how is the legal responsibility of the parent company to its subsidiary company in Stated-Owned Holding Companies.

RESEARCH METHODS

This research is conducted using normative legal research. This research is legal research which is conducted by examine library materials or secondary data. This research is also called library legal research [5]. The nature of this research is prescriptive. Through the nature of prescriptive research, the author can evaluate the rightness or wrongness or what should be judged according to law towards the facts or legal events as the results of the study [6]. The type of data used is secondary data with primary legal material, which is Act No. 19 of 2003 Concerning Stated-Owned Enterprises, Act No. 40 of 2007 Concerning Limited Liability Companies, and Government Regulation No. 72 of 2016 concerning Amendment of Government Regulation No. 44 of 2005 concerning Participation and Administration Procedure of State Capital on State-Owned Enterprises and Limited Liability Company. Meanwhile, secondary legal materials consist of book, journal, and scientific articles. Secondary data is the data gained from library material which is consisted of information indirectly obtained from literature studies.

DISCUSSION

As explained above, the regulatory framework to companies joined in group companies still uses the Limited Liability Company Act so that they can be known as single group companies. The legalization of the status of a subsidiary's legal entity as an independent legal entity does not abolish the legal entity status of the related subsidiary company, so the subsidiary company is still known as an independent legal subject. Juridical recognition of the subsidiary's legal entity causes the legal principle of the company as a legal person and limited liability legal doctrine. As the legal person or independent legal subject, the subsidiary company has the juridical independence to conduct their legal actions, so the parent company will not be responsible for the legal actions of the subsidiary company [7].

Parent Company as shareholders of its subsidiaries owns protection due to the application of limited liability principle. The implementation of this principle causes the parent company only has the responsibility to its shares value in its subsidiary for its inability in settling legal responsibilities to third parties [8]. However, the responsibility of the parent company as shareholders of its subsidiaries is not limited. In Article 3, Paragraph (2) of Limited Liability Act No. 40 of 2007 regulated that abolishing limited responsibility from shareholders toward a company's legal responsibility which caused by;

- The requirements of the Company as a legal entity have not been or are not fulfilled;

- The related shareholders, whether it is directly or indirectly, has lousy intention to use the company for personal interests;
- The related shareholders are involved in legal violation action conducted by the company; or
- The related shareholders, whether it is directly or indirectly, against the law using the company's property causing the Company's properties are not insufficient to pay off the Company's debt.

Responsibility through Voice Rights Agreement

The relationship between the parent company and subsidiary can be occurred due to the voice rights agreement made between the founding shareholders, who agreed that one of the founding shareholders determined the directors and commissioners board appointment. This kind of agreement can occur on Group Company includes state-owned Enterprises which is often called as red-white shares and usually called as series A shares [9]. Series A Shares regulation on Stated-Owned Holding Companies is served in Article 2A, paragraph (2) Government regulation No. 72 of 2016 stating that the country should have shares within the subsidiary of Stated-Owned Enterprises with privilege regulated in articles of Association. The privilege regulated in the articles of Association consists of rights to approve;

- Appointment of the director's board and Commissioners Board members;
- Amendment to the articles of association;
- Change of the share ownership structure;
- Merger, consolidation, separation, dissolution, and companies' takeover by other companies.

Many parliamentarians have since argued that PP 72/2016 weakens the House power over SOE affairs and erodes the quality of governance. Some critics have even argued that article 2A could provide an opportunity for the government to hand over SOE (BUMN) shares to private entities. Critics were suspicious that the government, albeit not necessarily the current one, may seize the opportunity to carry out murky privatization without knowledge of the House [10]. Based on these arguments, PP 72/2016 was accused of contradicting a long list of legislation with higher hierarchy, including Articles 23 and 33 of the Constitution, Article4(2) of the State-Owned Enterprises Act (UU 19/2003), and Article 24 of the State Finance Act (UU 17/2003). This check-and-balance argument has often involved nationalistic rhetoric. Some lawmakers have suggested the possibility of Pertamina assets being transferred to multinational company Chevron and the National Monument (Monas) being sold to foreigners [11].

Based on the Supreme Court Decision of the Republic of Indonesia Number 21 P/HUM/2017 the participation of state capital in other SOEs can be justified on the grounds that state shares are state assets that are separated so that they are in the land of private law which is managed in good corporate governance and from the beginning has been through the APBN mechanism and get approval from the DPR. Transformation into state assets that are separated in the form of shares results in the transfer to SOEs to other Limited Companies in the form of state capital participation in the private sector, so that the approval of the DPR is no longer needed, but enough with the decision of the General meeting of shareholders/Minister.

Responsibility through Material Contract

Holding company may conduct material contracts about the subsidiary's activities, so the juridical responsibility of actions carried out by subsidiaries to certain limits can be charged to holding companies. It can occur to assets belong to holding company which becomes collateral for the debts made by a subsidiary. Material contract bond conducted by holding company on its subsidiary's business can be carried out in the following forms:

- Subsidiary shares held by a holding company are mortgaged or delegated to the authorized party to guarantee the debts made by a subsidiary to the third party.
- The shares of other companies yet still in the same group company, which a holding company owns the shares, then it is mortgaged or delegated to the authorized party to guarantee the subsidiaries' debt.

The subsidiary takes the assets of holding company guaranteed to creditor due to the debts are in the form of debt guarantees, such as a mortgage or fiduciary [12].

Responsibility as Debt Warrantor for Subsidiary

The legal relationship between the parent company and a subsidiary in holding company is a separate legal entity, but both of them remain as an economic entity of Group Company. In the group company, the parent company may give capital loans or credit and become a guarantor for the subsidiary to restore its performance. The guarantee is an engagement which is carried out by the parent company and the subsidiary. If there is a loss in the future caused by the subsidiary for its inability in fulfilling good performance to a third party, then the contractual responsibility of the parent company occurs, as stated in Article 1820 of Civil Code, the Article stated that "Coverage is an agreement which is a third party, for the sake of the debtor interest, engage himself to fulfill the debtor's engagement, if the debtor does not fulfill its engagement." The contractual responsibility of the parent company as the guarantor does not provide specific material to be engaged as collateral to the creditor due to subsidiary's debts which have run out of time, yet the parent company engages itself to guarantee the debts.

The consequence is that if the debtor breaches the contract, the assets/properties owned by the parent company becoming repayment of the subsidiary's debt. It is following Article 1831 of the Civil Code which stated: "The Guarantor is not obliged to pay the creditor unless the debtor fails in paying his debts, in that case, the items belonging to the debtor must be confiscated and sold separately to pay off the debt." The debt guarantee carried out by the parent company can be conducted by a corporate guarantee, personal guarantee, or limited warranty. Corporate guarantee, holding company has purposed to guarantee subsidiary's debt to the third party. The personal guarantee, the owner of the group is the shareholder in holding company, yet this Personal guarantee has purposed to guarantee the subsidiary's debt to the third party [13]. In practice, the holding company does not want to take risks by risking all of its assets both the assets owned by the Group Company and the personal property [14].

Whole of Responsibilities due to Subsidiary Management

Agency theory views on how the formal and informal contract between one people or more called as principal (in this case, it is parent company) which has responded to other people called agent (subsidiary), they defend their interests by delegating some strengths in making the decision [15]. This case does not make the parent company neglect the responsible for subsidiaries' actions. The parent company can be asked for the response if it can be proven:

- The participation of the parent company in determining company management, finance, business decisions which cause losses for the company. For example, the company participates in determining amount, designation and use in taking credit. Due to those interventions, the company suffered some losses.
- The activities conducted by the subsidiary is used to parent company interests.
- The parent company, improperly, neglects financial adequacy problems of subsidiary [16].

The civil claim can be filed to the parent company as the shareholder; if the parent company interferes the subsidiary's management, finance, and business, the parent company can be prosecuted [17]. The sample case: the case of Golden Key Group in 1994 which was accused of corruption of 1.3 trillion rupiahs. The corruption accusation, which became the case of the year in 1994, was the accusations results of lousy credit taken by subsidiaries of the Golden Key of Bapindo or Bank Pembangunan Indonesia (Indonesian Development Bank). Bapindo provided credit with improper procedures to the Golden Key Group, and finally, the credit was jammed or misused by shareholders (owners), then the owner of the Golden Key companies are asked for their responsible [18].

CONCLUSION

The responsibility of parent company to its subsidiary on Stated-Owned Holding Company can be divided into some responsibilities; they are responsible through voice rights agreement due to privilege shares ownership, responsibility through material contract, responsibility as debt warrantor for the subsidiary, and the whole of responsibilities due to subsidiary management.

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