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Indonesian Regulations Related to State Losses in Persero State-Owned Enterprises Partly Owned by the State

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ABSTRACT: Indonesian Regulations Related to State Losses in Persero State-Owned Enterprises Partly Owned by the State. Persero SOE as a form of SOE has capital in the form of share ownership which is wholly or at least 51% (fifty-one percent) of its shares owned by the Republic of Indonesia. The main objective is to pursue profit. Thus, it is possible that in an SOE Persero, the shares are not only owned by the state but also partially owned by other parties. Therefore, the capital of the SOE is partly or wholly derived from state finances. The type of research used was qualitative research, especially doctrinal legal research. It used a statute approach, collecting data and legal materials through library research and analyzing using qualitative analysis. The research results obtained were state assets that have been transformed into SOE capital whose management was subject to the business paradigm (business judgment rules). However, the separation of state assets does not turn them into SOEs assets which are independent of state assets. Therefore, the operationalization of SOEs is based on both private law and public law.

KEYWORDS: Regulation; state loss; State Owned Enterprises; share.

A. INTRODUCTION

Indonesia is a constitutional state with the concept of a welfare state. It means that a welfare state or welvarestaat concept or commonly known as a material rule of law state (Thamrin, 2013). Kadek Wibawa stated that this is in line with the objectives of the state as stated in the Preamble to the 1945 Constitution of the Republic of Indonesia (1945 Constitution of the Republic of Indonesia) paragraph IV, which is further formulated: " government of Indonesia protects all the people of Indonesia and all the independence and the land that has been struggled for, and to improve public welfare, to educate the life of the nation and to participate toward the establishment of a world order based on freedom, perpetual peace, and social justice" (Susila Wibawa, 2019). This national goal is implemented through the administration of the state by the government as the bearer of people's sovereignty in the form of implementing general administration and development activities in all aspects of national life.

Indonesia as the state according to the law, the state financial management system must also be based on the main rules stipulated in the 1945 Constitution of the Republic of Indonesia Chapter VIII regarding Financial Matters. In Article 23 paragraph (1), it is stated “The state revenue and expenditure budget as a form of state financial management is determined annually by law and implemented openly and responsibly for the greatest prosperity of the people." Furthermore, Article 23C of the 1945 Constitution of the Republic of Indonesia states, "Other matters regarding state finances are regulated by law.”

Article 23 C of the 1945 Constitution of the Republic of Indonesia was then implemented with 3 (three) packages of laws, namely Law Number 17 of 2003 concerning State Finance (State Finance Law), Law Number 1 of 2004 concerning the State Treasury (State Treasury Law), and Law Number 15 of 2004 concerning Examination of State Financial Management and Responsibility. Article 6 paragraph (1) of the Law on State Finance states that: "The President as the head of government holds the power to manage state finances as part of government power." This power includes general authority and special authority. Due to the widening and complexity of state financial management activities, the State Finance Law also regulates financial relations between the government and state companies, regional companies, private companies, and public fund management bodies.

Based on Article 24 paragraphs (1) and (2) of the State Finance Law and Article 1 point 1 of the State Treasury Law, State-Owned Enterprises (hereinafter referred to as SOEs) are also included in the scope of state finance and treasury. Article 3 paragraph (1) of the Law on State Financial Management and Accountability Examination confirms that the audit of state financial management and responsibility carried out by BPK covers all elements of state finance as referred to in Article 2 of the State Finance Law. Therefore, based on these provisions, BPK has the authority to conduct audits of SOEs.

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In its development, the number of SOEs from year to year has decreased. The number of SOEs continues to decrease every year. In fact, the number of SOEs in 2020 reached its lowest point in the last seven years. Based on data from the Central Statistics Agency (BPS), only 107 SOEs are remaining in 2020. This number is six fewer companies compared to the previous year's 113 SOEs. The Minister of SOEs, Erick Thohir stated, "The reduction in SOEs occurred due to the restructuring of SOEs through the formation of consolidation in the pharmaceutical and insurance sectors. This is one of the government's efforts to increase the efficiency, productivity, and competitiveness of SOEs" (M Ivan Mahdi, 2021).

The implementation of good corporate governance in SOEs is a necessity. According to Ilya Avianti, the issue of corporate governance occurred when the economic crisis hit Asian countries, especially Southeast Asia, including Indonesia (Avianti, 2017). Furthermore, Tricker stated, "Good corporate governance is a term that arises from interactions between management, shareholders, the board of directors and other related parties, due to inconsistencies between "what" and what should be" (Tricker, 1994).

Edward UP Nainggolan explained that by seeing the enormous potential of SOEs, the Government needs to improve the performance of SOEs, namely by increasing the value of SOEs and returns for the Government (Nainggolan, 2020). Persero SOEs as a form of SOEs have capital in the form of share ownership which is wholly or at least 51% (fifty-one percent) of its shares owned by the Republic of Indonesia whose main objective is to pursue profit. Hence, it is possible that in Persero SOEs, the shares are not only owned by the state but also partly owned by other parties, so, the capital of the SOEs is partly or wholly derived from state finances.

From the perspective and function, the Persero SOEs cannot be fully considered a private legal entity. Several previous studies have been recorded regarding SOEs and state losses, including Tiyas Asri Putri and Tundjung Herning Sitabuana (Asri Putri & Herning Sitabuana, 2022) 2022 wrote about the Supervision of State Financial Management of State-Owned Enterprises (SOEs); Nelvia Rosa (Roza, 2022) in 2022 also wrote regarding the Problems of Determining State Financial Status in Persero State-Owned Enterprises; in 2016, Henny Juliani (Juliani, 2016) in the Journal of Legal Issues also wrote regarding the Responsibility of the Board of Directors of SOEs for Actions Causing Loss of State Finances; and in 2014, Dian Ety Mayasari (Dian Ety Mayasari, 2014) wrote about the Position of State-Owned Enterprises as State Assets concerning State Financial Losses. However, the research that the author wrote about state loss regulations on Persero SOEs where the state has a majority stake in the company.

Based on this description, this research is entitled: " Indonesian Regulations Related to State Losses in Persero State Owned Enterprises Partly Owned by the State"; with the formulation of the problem, namely: what is the scope of state losses in the context of SOEs and state finances? And what about the management and accountability of Persero SOEs, whose shares are partly owned by the state, in the event of a risk that results in state losses? The research aims to explain and analyze the scope of state losses in the context of SOEs and state finances as well as the management and accountability of Persero SOEs whose shares are partly owned by the state in the event of a risk resulting in state losses.

B. RESEARCH METHOD

This type of research was qualitative research, especially doctrinal legal research. Doctrinal legal research focuses on the law as an independent rule, which can be traced through legal texts and statutes, with little (even 'no') references to other disciplines (Hakim, 2016).

Pendekatan dalam penelitian ini merupakan statute approach. Statute approach merupakan penelitian yang mengutamakan bahan hukum yang berupa peraturan perundang-undangan sebagai bahan acuan dasar dalam melakukan penelitian.(Peter Mahmud Marzuki, 2006) Kadek Wibawa dan Sri Nurhari lebih lanjut menyatakan bahwa: "Doctrinal law research is carried out by searching and analyzing legal materials, both primary legal materials, secondary legal materials, and tertiary legal materials".(Wibawa & Susanto, 2020) Mendasarkan pada hal tersebut, maka penelitian ini berada di bawah payung paradigma positivisme, dimana ontologi dalam paradigma ini adalah "Naive realism: "real" reality but apprehendible (Indarti, 2016).

Data collection and legal materials were conducted through literature studies or document studies. The analysis in this research used qualitative analysis. This is because the research process is inductive and the final results are descriptive (Merriam, 2014; Rumata, 2017).

C. RESULT AND DISCUSSION

1. Measuring State Losses by SOEs in the Context of State Finances

In achieving state goals and being able to realize people's welfare and Article 33 of the 1945 Constitution of the Republic of Indonesia, the government has the authority to manage state finances so that these state tasks can be realized immediately. The government obtains authority based on Article 23 of the 1945 Constitution of the Republic of Indonesia which is then implemented in Law Number 17 of 2003 concerning State Finance, in Article 1 point 1 formulates that state finances are all rights and obligations

of the state that can be valued in money. In addition, everything either in the form of money or in the form of goods can be owned by the state in connection with the implementation of these rights and obligations.

Article 2 letter g of the Law on State Finance further stipulates that "state assets/regional assets that are self-managed or by other parties in the form of money, securities, receivables, goods, and other rights that can be valued in money, including assets that are separated in state companies/regional companies. These provisions indicate that SOEs assets as separated state assets are also included in the category of state finances. Law Number 19 of 2003 concerning State-Owned Enterprises (hereinafter referred to as Law No. 19 of 2003 concerning SOEs), in its elucidation, states that an SOE whose entire or majority of the capital comes from separated state assets is one of the economic actors in the economic system. nationally in addition to private enterprises and cooperatives. SOEs also play a role in producing goods and/or services needed to realize the greatest prosperity of the people.

As one of the executives of national economic activity, SOEs have an important role in realizing people's welfare. The role of SOEs is important in the provision of goods and services for the people of Indonesia, being able to compete in global competition and on the other hand also playing an important role in contributing to state revenues cannot be separated from the function of SOEs as an agent of development, even though on the other hand Others are profit-oriented (Nugroho & Wrihatnolo, 2008). As an agent of development, the management of SOEs must be carried out using the paradigm of business judgment rules and the principles of good corporate governance to improve people's welfare.

Article 23C of the 1945 Constitution of the Republic of Indonesia states, "Other matters concerning state finances are regulated by law". The provisions of Article 23C are then implemented through 3 (three) packages of laws. There are Law Number 17 of 2003 concerning State Finance, Law Number 1 of 2004 concerning the State Treasury, and Law Number 15 of 2004 concerning the Examination of Management and Accountability Responsible for State Finances. Terminology of state finance according to Law no. 17 of 2003 concerning State Finances can be seen in the formulation of Article 1 point 1. Thus, state finances are all state rights and obligations that can be valued in money, as well as everything both in the form of money and in the form of goods that can be owned by the state in connection with the implementation rights and obligations.

In the formulation of laws and regulations, there is the formulation of "state financial losses" which is interpreted or analogous to "state losses", this can be seen in the formulation of Criminal Provisions, Administrative Sanctions, and Compensation according to Article 35 of Law no. 17 of 2003, as follows:

(1) Every state official and non-treasurer civil servant who violates the law or neglects his/her obligations either directly or indirectly causing losses to state finances is required to compensate for said losses.
(2) Everyone who is given the task of receiving, keeping, paying, and/or handing over money or securities or state goods is a treasurer who is obliged to submit an accountability report to the Audit Board.
(3) Each treasurer as referred to in paragraph (2) is personally responsible for losses in state finances under his management.
(4) Provisions regarding the settlement of state losses are regulated in the law regarding the state treasury.

The term "state loss" used is based on the formulation of Law no. 1 of 2004 concerning the State Treasury Article 1 point 22 which states, "state/regional losses are shortages of money, securities, and goods, the real and definite amount as a result of unlawful acts, whether intentional or negligent". In the general elucidation of point 6 concerning the Settlement of State Losses, it is emphasized that any state/regional loss caused by an unlawful act or a person's negligence must be reimbursed by the guilty party. With the settlement of these losses, the state/region can be recovered from the losses that have occurred. In this regard, each head of the ministry/institution/head of the work unit of the regional apparatus is obliged to immediately file a claim for compensation after knowing that the state ministry/institution/work unit of the regional apparatus in question has suffered a loss. The imposition of state/regional compensation for treasurers is stipulated by the Supreme Audit Agency, while the imposition of state/regional compensation for non-treasurer civil servants and other officials who have been assigned to compensate state/regional losses may be subject to administrative sanctions and/or criminal sanctions if they are proven commit administrative and/or criminal violations.

According to Hernold Ferry Makawimbang, in practice (in concreto) at the corruption court, the use of the term "state loss" is interpreted or analogous to "state financial loss" as referred to in Article 2 and Article 3 of Law no. 1 of 1999 (Makawimbang, 2014). Even though the area for the regulation of "state losses" contained in Article 1 number 22 of Law no. 1 of 2004 is the realm of administrative law, it is different from the regulation of "state financial losses" as the realm of criminal law.

From the aspect of the normative and practical approach, the regulation of the area of "state financial losses" in the realm of criminal acts of corruption is:

a) The word "can" before the phrase "harm the country's finances or economy" indicates that the criminal act of corruption is a formal offense. Thus, a criminal act of corruption is sufficient by fulfilling the elements of the (criminal) act that have been formulated not by the emergence of consequences (Explanation of Article 2 b of Law Number 31 of 1999) and other meanings

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according to the opinion of the Constitutional Court in the Decision of the Constitutional Court Number 003/PUU-IV/2006 dated 24 July 2006. The legal considerations state that the word "can" before the phrase "financial loss state and the economy must be proven and can be calculated" first, then stated, "such matter is interpreted that the element of state loss must be proven and must be calculated, even though it is an estimate or even though it has not occurred. Such a conclusion must be determined by an expert in the field."

b) Even the slightest reduction in "state finance" if it is the result of an unlawful act, is considered a "criminal act" (the criminal act of corruption).).

c) Returning state financial losses or the country's economy does not abolish punishment against the perpetrators of these crimes. Recovery of state financial losses or the country's economy is only one of the factors considered by the judge (meaning still being punished, not acquitting).

d) Losses to state finances (material offenses) as a result of "formal offenses" (formal offenses) are not the result of negligence or force majeure, or because of the authority of a position order that is misused in carrying out a government policy ("beleid", "vrisjsbestuur" or " discretionary power"), but due to acts of "deliberately breaking the law or abusing authority", (detournement de povoir or abus de droit).

e) State financial losses are equated with the element of a criminal act, "unlawful act of enriching oneself, another person or corporation" or equated with the element of delict (criminal act), "benefiting oneself, another person or corporation by abusing authority and opportunity."

f) There are no administrative sanctions, only criminal penalties: prison, confinement, and fines (KUHP/Criminal Code Article 10) and/or additional criminal penalties (reimbursement of money or recovery of state financial losses) by returning "results of corruption" or substitute prison sentences.

There are different perceptions about state losses and SOEs losses. Some argue that the losses suffered by SOEs must be the result of acts of corruption because SOEs assets are stated (financial) assets and something that causes state losses to be declared as corruption. On the other hand, some argue that SOE losses can occur due to several things, namely mismanagement, increased operational costs, tighter business competition and other causes of state losses that can occur in business entities. The Supreme Court mediated this difference in perception through letter number: WKMA/yud/20/VIII/2006 dated August 16, 2006, which decided that the management of separated state assets (SOEs) was based on the principle of a healthy company (not the State Budget system). Therefore, SOEs receivables are declared not as state receivables. Provisions in the Law on State Finances which include separated state assets as elements of state finances are declared to have no legal force.

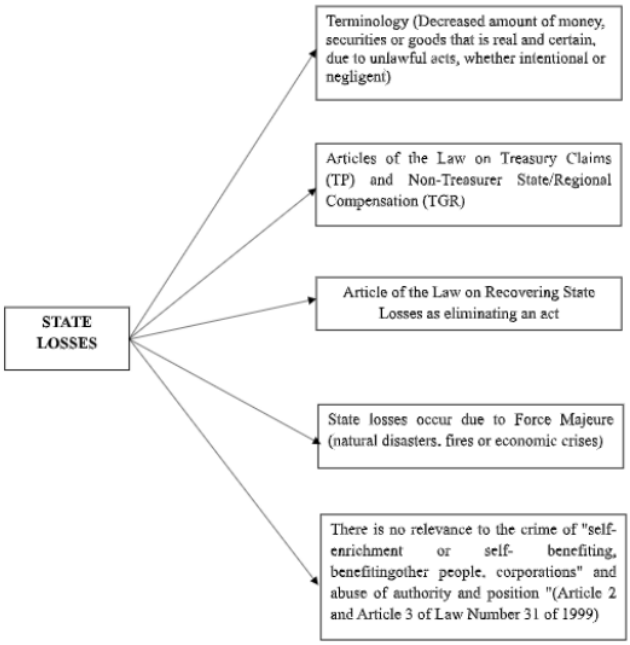

Figure 1. The Scheme of State Loss as Regulatory Realm State Administrative Law (Article 1 point 22 of Law No. 1 of 2004)

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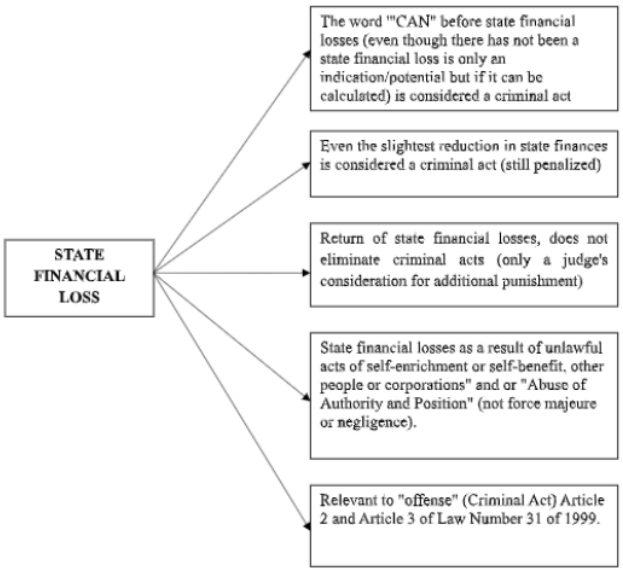

Figure 2. Scheme of State Financial Losses as a Domain of Criminal Law Regulations

2. Management and Accountability for State Losses by State-Owned Enterprises Partially Owned by the State

According to Law no. 19 of 2003 concerning SOEs, SOEs consist of 2 (two) types of companies, namely Limited Liability Companies (Persero) and Public Companies (Perum). Article 1 number 2 No.19 of 2003 states that a Persero is a SOEs in the form of a Limited Liability Company whose capital is divided into shares of which all or at least 51% (fifty-one percent) of the shares are owned by the Republic of Indonesia whose main objective is to pursue profits.

BUMN capital comes from separated state assets. This is regulated in Article 4 paragraph (1) of Law No. 19 of 2003. In the elucidation of Article 4 paragraph (1) what is meant by being separated is the separation of state assets from the State Budget to be used as state capital participation in SOEs for further development and management which is no longer based on the principles of a healthy company. State assets mean originating from the State Budget to be used as the state capital in Persero and/or Perum and other limited liability companies. According to the Rulings of the Constitutional Court Number 48/PUU-XI/2-13 and Number 62/PUU-XI/2013, in essence, SOEs whose entire or most of the shares owned by the state are an extension of the state in carrying out some of the state's functions to achieve state goals. The country's wealth has indeed been transformed into SOEs capital whose management system is subject to the business paradigm (business judgment rules), but the country's wealth does not turn into SOEs wealth which is independent of state wealth. As a result, there is no transformation of public law into private law.

Directors of SOEs must always remember that SOEs assets are state assets. Thus, in carrying out the management and accountability for SOEs management, they must be based on laws and regulations even though their management is also subject to the business paradigm (business judgment rules) and the principles of good corporate governance. This is based on statutory provisions and decisions of the Constitutional Court. Thus, in leading and managing SOEs, the Board of Directors must understand that the Board of Directors plays a very important role in bringing SOEs as an extension of the state in carrying out some of the state's functions to achieve state goals based on the 1945 Constitution of the Republic of Indonesia, for people's welfare.

Based on the formulation of laws and regulations that separate state assets that have been transformed into SOEs capital, it does not make the separation of state assets turn into SOEs assets that are separated from state assets. As a result, there is no transformation of public law to private law (Fitriyanti; 2022). Thus, if the Board of Directors in managing SOEs results in financial losses, SOEs can be interpreted as detrimental to the state as long as its management is not based on the principles of business judgment rule and good corporate governance and violates the provisions of the applicable laws and regulations.

The Supreme Court through Letter Number WKMA/Yud/20/VIII/2006 provided the basis for the government to revise Government Regulation Number 14 of 2005. Based on the Supreme Court's fatwa, the Government issued Government Regulation Number 14 of 2005 concerning Procedures for Writing Off State Receivables. Initially, SOEs receivables were considered state receivables which were settled according to Law Number 49 of 1960 concerning the Committee for State Receivable Affairs (PUPN), then with the issuance of Government Regulation Number 33 of 2006, the legal status of SOEs /BUMD (Persero)

receivables no longer had the status of state receivables. however, these receivables have legal status as receivables or receivables from the relevant BUMN/ Regional owned enterprises (Persero) legal entity (Wibowo; et al., 2021).

According to Article 20 paragraph (2) and paragraph (6) of Law Number 30 of 2014 concerning Government Administration, government officials who commit administrative errors causing state financial losses must return the state losses if the administrative error occurs due to an element of abuse of authority (Wibowo; et al., 2021). Based on Supreme Court Regulation Number 4 of 2015 concerning Procedural Guidelines in Assessing Elements of Abuse of Authority, the Administrative Court has the authority to assess before criminal proceedings (Nugroho & Wrihatnolo, 2008). Thus, it is clear that the actions of the directors of SOEs that result in losses to state finances can be subject to administrative sanctions and/or criminal sanctions. This is explicitly regulated in Article 64 paragraph (1) of Law Number 1 of 2004 concerning the State Treasury. Paragraph (2) emphasizes again that a criminal decision does not absolve from claims for compensation.

In Article 2 and Article 3 of Law Number 31 of 1999 concerning the Eradication of Corruption along with the General Explanation of the fourth paragraph, Hernol Ferry Makawimbang provides the formulation that states financial losses (material offenses) as a result of "actions against the law" (formal offenses) occur not due to negligence or force majeru, or due to an official order that was misused in carrying out a government policy ("beleid", "vjisjsbestuur", or "discretionary"), but due to an act of "deliberately against the law" or "abuse of authority", (detournement de pouvoir or abus de droit) (Makawimbang, 2014). Even the slightest decrease in "state finances" if it is the result of an unlawful act, is considered a criminal act (criminal act of corruption). Returning losses to the state or the state's economy does not abolish the crime against the perpetrators of these crimes and returning state financial losses or the state's economy is only one of the factors considered by the judge. It means that the perpetrators of criminal acts are still punished, not set free.

D. CONCLUSION

According to the description above, it can be concluded that in order to carry out duties, the directors of SOEs must always comply with the articles of association of the SOEs concerned, laws and regulations, and the principles of good corporate governance. Hence, in carrying out their duties, they do not conflict with the law. In essence, Persero SOEs, whose shares are partly owned by the state, is an extension of the state in carrying out some of the functions of the state to achieve state goals as stipulated in Law Number 19 of 2003 concerning SOEs. Furthermore, the provisions in Article 2 letter g of Law Number 17 of 2003 specifically Regarding assets that are separated into state companies/regional companies also do not have legally binding force. The country's wealth has been transformed into SOE capital whose management is subject to the business paradigm (business judgment rules). However, the separation of state wealth does not turn it into SOEs wealth which is independent of state wealth. Therefore, the operationalization of SOEs is based on both private law and public law.

The advice given is that SOEs directors in conducting their duties must always be in good faith and full of responsibility and comply with the articles of association of the SOEs concerned, laws and regulations, as well as the principles of good corporate governance and business judgment rules. Thus, they did not conflict with good law, state administrative law, civil law, and criminal law.

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