

The Essence Of Government Shares Subscription: A Review The Implementation Of State-Owned Enterprises

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Abstract: The purpose of this study was to determine and explain the mechanisms and the implementation of government share subscription in the implementation of SOEs; legal standing of the government shares subscription in the implementation of the state budget that separated in the implementation of SOEs and its legal implications of state loss or not; and also, legal accountability for losses arising out of shares subscription of SOE. In this study, the authors use normative legal research. The data obtained in this study will be analyzed using qualitative normative method with inductive logic. Results from the study indicate that state shares subscription in the establishment of SOE or limited company with funds derived from State Budget are separated. Thus, the government no longer has any authority in the field of civil law as a business entity. A clear separation of the status of country as business and as government organizer carries consequences. With the separation, then there is clarity about the concept of the state financial losses. SOE as one form of business entity that aim to make a profit is a separate legal entity and has responsibilities that are separately anyway, though formed and capital originating from the state finances and the loss of one transaction or in legal entity cannot be categorized as a state finance loss because the state has functioned as a private legal entity.

Index Terms: Legal Standing, State Finance, State-Owned Enterprises

1 INTRODUCTION

In essence, the State-Owned Enterprises (hereinafter referred to as SOEs), owned by the state as an institution to meet the peoples' interest. In some respects, SOEs can be found its similarity with private companies, except the private shareholders. SOEs also process the inputs to produce outputs, and create an account costs, revenues, and profits. Although it has similarities with the private company, the SOE does not need to achieve the highest return as done by private companies. SOEs should pursue other achievement, and its economic performance is also very different from the private company. In a country, which adopts a *welfare state*, such as in Indonesia, the government participates in social, economic and cultural for peoples as consequences to realize social welfare. The view that a state should intervene in the socio-economic field directly to encourage, facilitate in realizing its welfare for social and economic life. Such understanding is, of course, the elaboration of the conception of the Welfare State. Conception of Welfare State places the state as having a central role in the empowerment of socio-economic aspects of society. Not surprisingly, the role of state is so large it looks from the widespread of responsibility dimension of countries that provide payments of state intervention symptoms on the affairs of the community at large. Accordingly, Jimly Asshiddiqie said that the institutionalization of the welfare state as "interventionist state".

The foregoing consequence a large state role in the running of economic activity to manage production branches that dominate the life of many to ensure the availability of its production results for the Indonesian peoples. It is no wonder, when looking at the activity of SOEs that perform the function of the state; Atmosoedirdjo put the state company as state administration. In implement its function as a financial support of the state must be consistent with the function of improving the welfare of the people. At this time, the SOE is one of the economic actors in addition to private and cooperative. As one of the national economy actors, SOE holding the strategic role of producing goods or services that are required in order to realize the greatest prosperity for the community. SOEs' donations in the form of tax payments to the state increased gradually from year to year. This is evident from tax revenues in 2000 amounting to Rp. 115.912 billion rupiah approximately USD 9.357 billion (over 8%) comes from state tax. In 2005 total state tax revenue is Rp. 351.973 billion rupiah. Although legal status of SOEs institutional is basically a public legal entity, the SOE may change its legal status to a private legal entity. Changes of legal status in its institutional are done in order to carry out the privatization program. Thus, it confirmed by Safri Nugraha as following:

Privatized companies first changed their legal status from public corporations to public limited companies before being privatized by government and listed on the stock market. The impact of the change in legal status, mainly from Perum to PT (Persero), represents the largest de facto change for Indonesia state enterprises because at this point they adjust their conservative stay of protected business into a competitive business-oriented one. From a de jure perspective, it is important that they comply with the business attitudes, ringh and obligation of real private companies and not state ones.

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Safari Nugraha recognize that legally, change the status into limited companies implicated for the necessary of SOE to subject to the rule of private. Furthermore, as confirmed by Arifin P. Soeria Atmadja, that limited company is an entity that is subject to the Act No. 40 of 2007 regarding Limited

Company, as a legal instrument that governing the private sector business entities. As a company in the form of limited company (PT), the *Persero* is a legal entity. Its legal consequences is equalized to human beings as legal subjects (*rechtspersoon*) which has the legal ability to make changes to the law, have rights and personal responsibility, has a wealth of its own separate from shareholders and its administrator. Thus, the limited company-owned wealth is not the wealth of the country. Therefore, all profits earned wealth is seen as the right of the agency itself. Likewise, if there is a loss is considered an individual load imaginable wealth of individuals. On the other hand, legal rule in Act No. 17 of 2003 on State finance mentioned that the state wealth which has been separated in SOEs is part of State finance. The definition of state finance as a unity resulting juridical implications that have a positive impact but it can also have a negative impact. On the positive side gives prudent impression accompanied by the threat of punishment when an error occurs in management and also gives priority to the reverse charge in the event of bankruptcy decision. In the negative side, the state as the owner responsible for the consequences caused by the different property under their control, as well as guarantees the fulfillment of achievements includes the whole wealth of the country. If there is a lawsuit is state-owned, the lawsuit may be expanded to include other state property that has nothing to do with the state-owned enterprises. Likewise, if there is a demand for bankruptcy, then demand it can easily be extended to the wealth of the country. The polemic came from Limited capital which is part of the State finance so that when the Limited suffered losses in its business transaction, it is considered a loss to the state. In this case, if the Limited loss in business transactions, it is considered potentially cause losses to the state.

2. METHODS

This study uses normative-legal research or commonly referred to as doctrinal research. The data obtained in this study will be analyzed using qualitative normative method with inductive logic. The population in this study is the Ministry of State-Owned Enterprises of the Republic of Indonesia, Ministry of Finance, and the overall state-owned enterprises nationwide 142 company consisting of the Board of Commissioners and Board of Directors.

3. RESULTS AND DISCUSSION

3.1 Mechanisms and implementation of the government share subscription in the implementation of state-owned enterprises

State-Owned Enterprises (SOEs) play a pivotal role in the Indonesian economy. The establishment of SOEs is a manifestation of the states' role as economic actor in Indonesia as well as having an important role in organizing the national economy to the public welfare. And also as civil law act Indonesia as a public legal entity, so that at the same time the state of Indonesia as a public legal entity subject and apply to them the norms of civil law or private law, where once it was a transformation of function and legal status of a legal act performed country. State treated the same as ordinary members of the public and can be sued and sued in front of ordinary court. Arrangements regarding SOE contained in Act No. 19 of 2003 on State-Owned Enterprises (hereinafter referred to as SOEs Act). It shows that SOE is a legal entity

established by a state public legal entity, by fulfilling one of the important requirements the establishment of a legal entity, which has a separate wealth, which is separated is the separation of state assets from the state budget to serve as the state shares subscription in SOE to further the development and management is no longer based on the state budget system, but based on the principles of a healthy company. SOE is a legal entity that is known at this time in the form of *Persero* (corporate) and PERUM. According to Von Gierke "legal entity such as a human become an embodiment which is really in the law association" as *eine leiblichgeistige lebenseinheit* whose meaning legal entity has become a body which forms will by intermediary devices or organs of the body (*verbandpersoblichkeit*). What they (*organen*) decide is the will of the legal entity. SOEs represent the ownership of the State. In its operations, the SOE is bound by various rules attached to it as part of the corporate or Perum. In Act of 2007 on Limited Company, confirm that the company/corporate is a legal entity, a limited company as a legal entity that can act in law traffic as legal subjects and has a wealth transferred from private wealth of management (*Personastandi in judicio*). Reviewing that correct or not the wealth of the State as the State assets separated in SOEs must not be separated from the discussion of legislation containing legal rules that contain order, prohibition, or ability as a standard for the behavior or attitude of acts that are considered inappropriate and should as well as the suitability of the criteria or specific characteristics of the company. The company is an independent legal entity that holds its own rights and obligations, including the right to property that is separate from the personal wealth of the establisher and its management. The companies gained recognition for "have the capacity in its own name to acquire and hold property, to enter into contracts, to sue and be sued, and to have an existence with duration independent of the persons comprising its shareholders." Based on such conceptions it is clear that each Limited Company must obtain juridical recognition of the status of their independence as a legal entity. In this regard, the question of the independence of the State-Owned Enterprises (SOEs) resurfaced some time later. Thus, the question arises in conjunction with SOE synergy efforts are being intensively carried out by the Government. SOEs' existence as an independent legal entity (*separate legal entity*) has received recognition in Act No. 19 of 2003. Thus, the recognition resulted in the enactment of the entire principle of independence of Limited Company into SOEs institutional, especially for SOEs Corporate. But, discrepancies related to SOEs institutional arrangements in the legislation have resulted in a legal haziness in normative level. Unsynchronized among others appears in Act No. 19 of 2003 on State-Owned Enterprises, Act No. 17 of 2003 on State finance and Act No. 40 of 2007 on Limited Company. SOEs Act explicitly has confirmed the entry into force of all provisions and principles of the company as stipulated in the Company Act for SOEs Corporate institutional. Such an arrangement, it is clear that all the principle of independence of Corporate in legal is prevail for SOE Corporate. As already noted, legal haziness occurs when the provision of SOEs Act is juxtaposed with the provisions of the State Finance Act. State finance Act categorizes the state financial wealth as part of the state. This provision seemed to provide legitimacy for the state to intervene on SOE Corporate management, which in essence is a separate legal entity. This then raises so many

implications both in the normative level and in practical level. One is the interference of the state in the management of State-Owned Enterprises is constantly being made to cause various problems not infrequently even bring up the indication monopoly. Such conditions do not actually need to happen if all stakeholders in the management of SOE understand the concept of self-reliance of Limited Company. Do not let the state intervention in the management of SOEs “blotting” the principle of SOEs independence itself. In this regard the assessment of the SOEs independence is important to be done. As the conception of independence of legal entity of company specified in Act No. 40 of 2007 on Limited Company, it is clear that the SOEs Corporate is independence/separate legal entity. Substantively, SOEs Corporate is a separate legal entity as form of limited company. Based on *Common Law* tradition, the main characteristics on the position of Company/Corporate as a separate legal entity is the existence of a strict separation between the management of the Company with the power of the owners *a major characteristic of the corporation is this distinction between the business and its owners*). Black’s Law Dictionary states that *an entity, other than a natural person, who has sufficient existence in legal contemplation that can function legally, be sued or sue and make decisions through agents as in the case of corporation*. Related to the philosophical reason of legal entity establishment, Nindyo Pramono stated that with the death of its founder, the assets of legal entity are expected to remain can provide benefits for others. Therefore, law creating the legal entity as the creations on “something” which by law is recognized and regarded as an independent legal subject like a person. Science of law then called the “something” as a legal entity (*recht person*). Given the legal entity is actually not the person within the real meaning of the legal entity in need of organs as a tool to perform all rights and obligations. To be a legal entity can interact socially with other legal subjects of law and order legal entities may conduct its operations it requires capital. The initial capital is owned by legal entities included in this case SEO comes from the founder separated. In such a context, the authors are in the opinion that the real property owned by the state is a wealth of SOE itself and not part of the state finance. This opinion is based on several arguments: a) theoretically it clear that the ownership of the separate assets from the assets of the owners/ management is a key characteristic for the existence of a legal entity. Thus, the concept will also be related to the ability of a legal entity to perform all rights and obligations arising out of the engagement is done by them; b) based on the theory of the limited company, it is clear that a limited company have their own property separate from the assets of the shareholders. Thus, the concept is also related to the responsibility of shareholders is limited to the shares they own in the company. Thus, the authors agree with the argument of legal experts Rajagukguk who said that the real wealth of the state contained within SOEs is a form of share ownership by state in SOEs and not part of the state finance. On this subject if it were necessary to understand the basic principles of limited company to be in the future misinterpretation property limited company does not reoccur.

3.2 Legal implications of the government share subscription in the implementation of state-owned enterprises

SOE is a business entity that is wholly or largely owned by the state capital through direct subscription from state assets separated. In this case, state assets separated is the asset or wealth of the state from the state budget for share subscription made by the state-owned and/or Perum as well as other limited company. While the separation of state finance is the separation of state assets from the State budget to serve as the state share subscription in SOE to further development and financial management are no longer based on a system of development and managing the state budget but is based on the principles of a healthy company. Given the position of SOEs Corporate as an independent legal entity with all juridical consequences, then by law the state should be interpreted in their position as shareholders like in a Limited Company. As a shareholder, the state prohibited from intervening or intervene whatsoever in the management of SOEs Corporate (*separation between ownership and control*). Back to the state share subscription into SOEs, the share subscription must be interpreted as a participation in a legal entity of Limited Company. This creates juridical consequences that all capital in a Limited Company is manifested in the form of shares in favor of the Limited legal entity itself. Thus, the authors argue that meaning of SOEs as part of state finance is an incorrect. If meaning continues then actually there has been a deviation on the provisions of the Corporate Law as the basis for the existence of SOE activity itself. Therefore, it is true in the future conduct revision of the provisions of State Finance, especially regarding SOE asset that categorized as part of the states’ finances. The problem arises related to state assets in the share subscription of SOE is when linked with the states’ financial scope as stipulated in Act No. 17 of 2003 on State finance. Based on the scope of state finance, the state asset used as share subscription of SOEs is still part of the state finance. Such provisions are clearly contrary to the principles of Limited Company independence. Such provisions blot the essence of SEOs as separate legal entity. On this, the authors argue if it were necessary to do a review of the provisions of the State Finance Act with especially regard to the wealth of SOEs. This is very important especially in globalization era in which each company is required to have a good management system is based on the concept of *Good Corporate Governance* (GCG) if wants to survive in this competition era globally. It would be very difficult for SEOs Corporate to be able to apply the principles of GCG; to be able to compete with foreign private companies throughout the management is still in the shadow of government intervention. Due to the damage of SOEs finance it means the damage of state financial, so it can be alleged corruption becomes a criminal act. Conversely, if the losses of state company instead of state losses into SOE losses itself as a company incorporated under the law. SOEs losses could be losses to the shareholders as less dividends or nothing at all. State as shareholder can still sue those losses. Public and private legal entities have differences in principle in the management of finance. Public legal entity to manage its finances is subject to public law and private legal entity to manage its finances is subject to private law. For example, the state as a public legal entity to manage its finances is subject to the regulations related to the state. While, state-owned enterprises as a company or corporate in

managing its finances are subject to private law relating to property assets held. But what happens in practice today in the implementation of Act No. 19 of 2003 on SOE, SOEs organ in this case are directors and board of commissioners, and even other stakeholders are faced with concerns and/or legal uncertainty in making business decisions for the interests and objectives of the Company/corporate and Perum. They will always over-shadowed the emergence of negative effects associated with business decisions executed. They are fully aware that in making business decisions correctly, even though none of the directors are able to ensure that the benefits are predicted to be obtained through business calculations are accurate, fair, and accountable, in accordance with the legislation in force with based on the principle of good ethic and prudence, the profit would have actually acquired. Concerns about the doubts arise for any losses incurred, will be interpreted as part of the losses that led to the corruption that is detrimental to public finance. But could be the loss arises not because their negligent, either intentionally or negligently of SOEs organ. But could it happen because of the profit opportunity is not achieved because of something beyond the ability and/or mismanagement. SOEs Act explicitly has confirmed the entry into force of all provisions and principles of the company as stipulated in the Company Act for SOE institutional. Through such an arrangement it is clear that all the principle of independence for the sake of law is valid for SOE Company. The blurring of law occurs when the SOE Act juxtaposed with the provisions of the State Finance Act. State Finance Act categorizes "the wealth of state companies as part of the state finance". This provision seemed to provide legitimacy for the state to intervene on SOE Company management, which in essence is an independent legal entity. This then raises so many implications both in the normative and practical levels. One is the intervention of state in the management of SOEs Company is constantly being made to cause various problems not infrequently even bring up the indication monopoly. These problems arise and make SOE Company being not clear because SOE Company entered the domain of public law. The fact indicates that the management of SOE Company wealth, there is no separation between the status of state as government administrators and as business actor (investors); state investment for SOEs Company has not treated the same as well as private investment in a Limited Company. Causes problems crucially among private companies and SOEs Company, which is the qualifying losses to the state that is not clear, whether the mistake in the decision-making or due to business risks that lead to state-owned companies suffered losses including state financial loss. This problem resulted in the majority of directors of SOE Company afraid to make business decisions because they are always faced with the threat of the states' financial losses and corruption. In this context, needs a clear separation of the status of the country as business actor and as the administrator of the government. With the separation of these then there is clarity about the concept of the state financial losses. SOEs Corporate as one form of business entity that aim to make a profit is a separate legal entity and has responsibilities that are separately anyway, though formed and capital originating from the state finances and the loss of one transaction or losses in the legal person cannot be categorized as a state financial loss because the state has functioned as a private legal entity and the legal entity shall apply the provisions of the Company act. If there are losses that occur in

a SOEs Company, the loss is not necessarily leads to state losses but the loss may also be the company losses (business risk) as a private legal entity. Regarding the company's liability for losses should use the doctrine of the *Business Judgment Rule*. In the Limited Company Act, not regulate in detail the concept of *Business Judgment Rule*. Article 85 paragraph (1) of the Company Act only mentions in general the principle of good faith and responsibility of directors in running the company. However, in the draft of the new Company Act, the concept of *Business Judgment Rule* has been confirmed in Article 95 paragraph (5) and Article 102 paragraph (4), in which the members of the Board of Directors shall be accountable for damages if it can prove that:

1. The loss was no fault or negligence;
2. Have maintains in good faith and in prudence for interest and in accordance with the purposes and objectives of the company;
3. There is a conflict of interest, either directly or indirectly, for all acts of management resulting in losses; and
4. Have taken action to prevent such losses arising or continuing.

Hence, in terms of the directors can prove four elements, then the losses of directors cannot be justified because the loss was a loss due to business risk. However, in the losses at SOEs Company, law enforcer and state officials, still holding on Article 2 letter g of the State Finance Act and General Explanation of Corruption Act stating that "State subscription who separated as state assets", and under the field of public law, so that if the state money is reduced one penny, then it could be considered state losses. Though, the losses in a company are not counted by the loss of one transaction alone but all transactions in the year. Because it can be a loss in one transaction but no for other transaction even profit and losses can be covered by the reserve fund of the company. Thus, the loss of SOE Company is not necessarily a disadvantage. State losses as a result of a criminal act can be caused by the action of an organ or apparatus itself is authorized to organize state power in the form of management and maintenance of state finance can also be caused by the actions of other parties (public/private) that ultimately lead to loss for state finances. The scope of state losses in the view of criminal law always will be associated with the formulation of the elements of a prohibited act and punishable by criminal laws, because it contains mistakes or due to the nature of that act has violated the law that could lead to feasibility and financial state becomes lost/decrease or result in lost revenue and receipts as a right which should be obtained by the state. State loss dimension is very broad, so to elaborate it cannot only be used one or two branches of law approach, but should be approached from several law courts at once in order to get a complete and comprehensive description.

4 CONCLUSIONS

Existence of SOE as a separate/independent legal entity has received recognition in Act No. 19 of 2003 on SOEs. Such recognition lead to the enactment of the principle of independence for Limited Company into SOEs institutional, especially for SOEs Company. However, discrepancies in the institutional arrangements relating to SOEs in the legislation have resulted in a legal haziness in normative level. Discrepancies among other in the SOE Act, State Finance Act, as well as the Limited Company Act. Actually, such conditions

do not occur if all stakeholders in the management of state-owned enterprises to understand the concept of independence of Limited Company. Don't let the state intervention in the management of SOEs Company "blot" the principle of independence of SOEs Company itself. Therefore, needed a reformulation of laws and regulations that ideal so as to create a law that able to encourage SOE working better, which in turn is able to realize its establishment goals for the prosperity of the people.

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