

CORRUPTION IN STATE ENTERPRISE ESPECIALLY CORPORATION: A STUDY OF THE MEANING OF STATE PROPERTY SEPARATED FROM THE STATE FINANCE

Ridwan Khairandy
Fakultas Hukum Universitas Islam Indonesia Yogyakarta
ridwankhairandy@fh.uii.ac.id

Abstract

This article seek to discuss the concept of the state's properties which are included in the state enterprises (*BUMN*), especially those which are in the form limited liability companies (*Persero*). From legal perspective, state's properties which are placed in a limited liability companies are separated properties. The inclusion of such properties in a limited liability company brings about a legal consequence, namely, such properties are then legally belong to the company instead of the state. A limited liability company is an independent entity, and hence, physically, the said state's properties are then deemed as the share. It suffices to conclude therefore, that the state can not in any way in possession of the company as a whole, but rather merely on the limited amount of share.

Keywords : State Enterprise, Limited Liability Company, separated state's properties.

There is so much critics rose in the middle of investigation, prosecution, and trial conducted by the apparatus in various corruption cases in State Enterprise, especially limited liability company. The legal apparatus are often mentioned that they do not understand the concept of legal entity such as Limited Liability Company.

The juridical consequences of capital infestation by state in the form of separated state properties and state enterprise's properties are also not well-understood. The result is the conduct of the apparatus in eliminating corruption in state enterprise became in contradiction with Act No. 40 2007 concerning limited liability company (in the past Act. No. 1 1995 concerning limited liability company) and Act. No. 19 2003 concerning State Enterprise which are the basis of the company activity existence.

Corporation as legal entity

State Enterprise, especially Limited Liability Company is basically a corporation, a legal entity which its purpose is to gain profit. By understanding the meaning and consequence of legal entity, we can get the whole understanding about Limited Liability Company.

Basically a legal entity is an entity which own rights and obligations to perform any act like a man who has their own property, to sue and to be sued before the court.¹

Corporation is a legal entity which has some substantive characters, which are:²

¹ Chidir Ali, *Badan Hukum*, Alumni, Bandung, 1987, page 19.

1. The Limited Liability

Basically the founders, share holders, or stake holders are not liable personally for the company loss or debt. If the legal entity is a limited liability company, the liability is only limited to the nominal amount of the owned share. They are not liable for further loss and debt.

2. Perpetual Succession

As an existing corporation for its own rights, the membership change does not affect of its status or existence. In the context of limited liability company, share holders can even transfer owned shares to third party. The transfer does not create any problem in the existence of the company. In a limited liability company which is in go public category and listed in stock market, there is even freedom to transfer the share.

3. Owns its own property

All the property is owned by the entity itself, not by the owner or share holder. This is an advantage of legal entity. Therefore, the property ownership is not based on member or shareholder.

4. Has Contractual Authority and Has Ability to Sue and to be Sued on its Name

Legal entity as legal subject is treated like a man who has contractual authority. The entity can enter into contractual relationship on its own name. As legal subject, the entity can sue and can be sued before the court.

Nindyo Pramono³ stated that the philosophy of legal entity establishment is that by the death of the founder, the entity's property is expected to be useful by other person. Thus, law creates "something" which is presumed and recognized as an independent subject like natural person by law. Then the "something" is called legal person in legal science.

In order to make the legal entity can interact in legal activity and do business activity, capital is needed. The capital is come from the separated founder's property. The capital becomes the property of the legal entity, separated from founder's property. Therefore, one of the main characteristic of limited liability company is the separation of property from the personal property of the founder.⁴

² See David Kelly, *et.al*, *Business Law*, Cavendish Publishing Limited, London, 2002, page 343-345.

³ Nindyo Pramono, "*Kekayaan Negara Yang Dipisahkan Menurut UU No. 19 Tahun 2003 tentang BUMN*", in Sri Rejeki Hartono, *et.al,ed*, *Permasalahan Seputar Hukum Bisnis: Persembahan kepada Sang Maha Guru*, Without Publisher, Jogjakarta, 2006, page 142.

⁴ *Ibid.*

Definition and Purpose of State Enterprise

According to Article 1 Act. No. 19 2003, State Enterprise is a legal entity which is most of or all of its capital owned by State through direct equity which come from separated state property.

From the above definition, the conclusion that can be taken is there are some elements which makes a company categorized as State Enterprise, which are:

1. Legal entity or company;⁵
2. Most of or all of the capital is owned by state. When the capital is not all owned by state, the state at least owned 51% of the capital in order to make the company categorized as State Enterprise.
3. In that effort, state do direct equity;

Because of direct equity, state is involved in bearing of the loss and gaining profit. Based on the elucidation of article 4 (3) Act. No. 19 year 2003, the separation of state property to be equity in State Enterprise can only be done through direct equity state to State Enterprise, therefore every direct equity must be decided through Governmental Decree.

4. The equity must be from separated state property.

Separated property here is the separation of property from State Budget to be a state equity to be capital of State Enterprise. After that the construction and the management is no longer based on State Budget system, but it will be based on the principle of a good company.⁶

A legal entity which can be categorized as State Enterprise must be a company which its capital come from direct equity by state. If there is a limited liability company established by State Enterprise, it can not be classified as State Enterprise, because the capital is from state, but from State Enterprise. One of the example is PT Pupuk Kalimantan Timur (PT PKT) which can not be categorized as State Enterprise, because in the Article of Association, can be seen that the capital of the company is from the equity of PT Pupuk Sriwijaya and cooperation of employee (koperasi karyawan).

In the case of PT PKT President Director, Omay K Wiriadmadja, corruption case District Court of South Jakarta argued that PT PKT is not State Enterprise. The argument is based on the

⁵ Because State Enterprise is a legal entity, based on the meaning company or entity, it must purposed to gain profit, not for social purpose. See Ridwan Khairandy, *Pengantar Hukum Dagang*, FH UII Press, Jogjakarta, 2006.

⁶ See the explanation of Article 4 clause (1) Act No. 19 2003.

fact that the share of PT PKT is not owned by state. 99,99% of PT PKT share is owned by PT Pupuk Sriwijaya inc. The equity of PT Pupuk Sriwijaya can not be categorized as direct equity of state to PT PKT. The equity is not from State Budget.⁷

Act No. 19 2003 clearly states that State Enterprise capital is direct equity from separated state property. By this separation, when state put equity in the company, the equity becomes the property of the legal entity. This separation of property is a legal consequence for a legal entity. Hence, the capital has legally become the company's property, not state property.

The sources of state equity for the establishment and equity of State Enterprise based on Article 4 (2)b Act No. 19 year 2003 are:

a. State Budget;

State Budget includes the projects managed by State Enterprise and/or state's claim for State Enterprise as the equity.

b. Reserve Capitalization;

The reserve capitalization is the addition of paid capital which comes from reserve.

c. Other Sources

Revaluation asset profit is included in other sources category.

Article 2 (1) Act No. 19 Year 2003 determines that purposes and objectives of the State Enterprise are: 1. to give contribution for national economic development in general, and for national income in specific; State Enterprise here is expected to improve the service quality to people and give contribution in improving the national economy growth and help state's finance. 2. to gain profit; According to the elucidation of Article 1 (1) a, although the purpose and the objectives of limited liability company is to gain profit, in some aspects in order to do public service, the company can be given special duty with paying attention in the good management of company. 3. run public interest in the form of providing high quality and proper goods or service for public interest; By those purposes and objectives, every business activity of State Enterprise in form of goods or service can fulfill the needs of society.; 4. Become the pioneer of activities which had not done yet by private and cooperation sector; and actively give guidance and help to economically weak entrepreneur, cooperation, and society.

According to the elucidation of Article 1 (1) d, pioneering activity is a business activity to provide goods and or service needed by society, but the activity could not be performed by private

⁷ See *Kompas*, Saturday, February 24 2007.

and cooperation sector, because it is commercially unprofitable. Therefore, the duty can be performed by appointing State Enterprise.

In a situation where there is an urgent need from society, government can appoint a State Enterprise whose function is to give public interest service and to perform cooperation program with economically weak entrepreneur.

Corporation

According to Article 1 (1) Act No. 19 2003, A corporation is a State Enterprise which its capital are divided into shares which is all or at least 51% of the shares owned by Republic of Indonesia and purposed to gain profit.

Based on above definition, the conclusion that can be taken is that there are elements of corporation, which are: 1) Corporation is a legal entity; 2) Corporation is a limited liability company; Considering that corporation is a limited liability company, the establishment and the management of the corporation is subjected to Act. No. 1 1995, with some exception. Article 3 and the elucidation of Article 3 Act No. 19 2003 stated that State Enterprise, in this context corporation is subjected to Act No. 1 1995 including the amendment and the implementation (peraturan pelaksana) regulation. One of the exceptions of Act no. 1 1995 is deviation in term of total shareholder. Act no. 1 1995 requires at least 2 shareholders. This provision is an exception for corporation, because in corporation there is time when state owns 100% of corporation shares; 3) The capital is divided into shares; State owns 100%, or at least 51% of the corporation shares. In the case of "PT Indosat (Persero) Tbk" privatization, state released the majority ownership of corporation shares to foreign private party. The consequence is the corporation became private company or ordinary limited liability company, therefore the company's name was changed into Pt Indosat Tbk.; 4) The purpose of establishing corporation is to gain profit. Corporation could be in the form of private company or public company. Public company according to Article 1 (3) Act No. 19 2003 is a corporation which its capital and total shareholder fulfill certain criteria or corporation who does public offering in accordance with the provision. Thus, corporation can be established from possibilities. The first possibility is the corporation has certain capital and certain shareholder total required in certain provisions. According to Article 1 (22) Act. No. 8 1995 about Capital Market, a company can be classified as public when the total shareholder is at least 300 persons and the company has at least Rp 3.000.000.000,00 (three billions rupiahs) paid capital or a total

shareholder and paid capital is decided by Governmental Decree. The second possibility is the corporation has done public offering in capital market (go public). In Indonesia, one of the corporations which included in this category is PT Bank Rakyat Indonesia Tbk, PT Telekomunikasi Indonesia Tbk, and PT Bank Mandiri Tbk.

Private company is a corporation which is not included in the public category. The example of this kind of corporation is PT Pertamina.

Separation of State Property in Corporation

In the explanation above, it is clearly seen that Corporation is Limited Liability Company. Although there is state element in the company, because of the legal entity is a limited liability company, the legal entity is subjected to Act No, 1 1995 which is the substantive basic to regulate limited liability company existence.

In the law perspective, Limited Liability Company has an independent position and free from any legal person from the founder. In one side limited liability company is a place assembles people to cooperate in a company, but in other side every act conducted for cooperation in Limited Liability Company is considered as its own act by law. Therefore every profit gained is considered as rights and property of the entity itself. It also applies when there is debt or loss is the burden of the Limited Liability Company which is paid from the company's property itself.⁸

Capital payment at the time of the establishment or at the addition of Limited Liability Company capital in the form of share is equity. Equity is a participation of a person in a legal entity. The equity is materialized into share institution. Share payment according to Article 27 (1) Act No. 1 1995 could be in the form of money and other type.⁹

Legally equity put in a corporation is no longer the property of the person who put the equity, but it becomes the property of the corporation itself. There is a separation of property between shareholder property and corporation property. By that characteristic, the liability of shareholder for the debt or loss of the corporation is limited. Debt or loss is paid sufficiently from the available property in the corporation.

With that concept, when a state put the equity in form of share in the corporation from separated state property, the property becomes the property of the corporation. It is no longer the

⁸ Rudhi Prasetya, *Kedudukan Mandiri Perseroan Terbatas Disertai Dengan Ulasan Menurut Undang-Undang No. 1 Tahun 1995*, Alumni, Bandung, 1995, page 9.

⁹ *Ibid*, page 14.

property of state. The consequence is all the property obtained from state equity or corporation business activities become the property of the corporation itself.

The problem rises when the concept is related with the definition of state finance and with accusing and criminal sanction for corruption which is directed to the behavior of corporation direction in performing business transaction which can inflict state financial loss.

According to Erman Rajagukguk,¹⁰ actually there is nothing wrong with the formulation of state finance in the elucidation of Act No. 31 1999 about Corruption Criminal Conduct which stated that state finance meant is all state property in any form, separated or not separated, including every part of state property and every rights that rises because of: a. In a possession, management, and responsibility of state functionary, in central or local level; b. In a possession, management, and responsibility of State Enterprise, foundation, legal entity, and company puts third party's capital based on agreement with state".

Separated state property in corporation physically in the form of share owned by state is not the property of the corporation.

According to Article 8 Act. No. 20 2001 about amendment of Act No. 31 1999 about Corruption Criminal Conduct stated that a person can be accused for a corruption criminal conduct when a person deliberately embezzles commercial paper by selling the share through unlawful conduct he kept because of the function or letting the share being taken or embezzled by other person to help him doing the conduct.

Erman Rajagukguk¹¹ added that in the reality the corruption accusation is applied in the State Enterprise Direction Conduct in the transaction which can create loss to state finance.

There is nothing wrong also in the definition of state finance in Act No. 17 2003 about State Finance. Article 1 No. 1 Act No. 17 2003 stated that state finance is all rights and obligation of state which can be measured by money, and all things in the form of money or goods which can become state ownership related to the application of the rights and obligation.

Article 2 Act No. 17 2003 mentioned that the scope of state finance based on Article 1 No. 1 above are: (1) State rights in collecting tax, spending and issuing money and receiving loan; (2) State obligation to perform public service governance duty and pay claim to the third party; (3)

¹⁰ Erman Rajagukguk, *Nyanyi Sunyi Kemerdekaan Menuju Indonesia Negara Hukum Demokratis*, Fakultas Hukum Universitas Indonesia, Lembaga Studi Hukum dan Ekonomi, Depok, 2006, page 386.

¹¹ *Ibid.*

State revenue; (4) State expense; (5) Regional revenue; (6) Regional expense; (7) State property/regional property separated and independently managed or other party in the form of commercial paper, claim, goods, or other rights that can be valued by money, including state property separated in the state enterprise/regional enterprise; and (8) Other party's property possessed by government in performing governmental and public service duty; and (9) Other party's property obtained by using facilities given by government.

In consistency with the concept of separation of property above, Erman Rajagukguk also opined that separated state property in State Enterprise physically in the form of share owned by state is not the property of the State Enterprise.¹²

Erman Rajagukguk¹³ said that the confusion begins to happen in the elucidation of Act No. 17 2003 regarding the definition and the scope of state finance which stated:

"Definition used in the formulation of State Finance is from object, subject, process and purpose side. From object side, State Finance includes all state rights and onligation which can be valued by money including policy and activity in fiscal, monetary, and management of state's separated property, and all things in form of money or goods which is able to be owned by state in the application of the rights and obligation. In the subject side, State Finance is all objects as mentioned above owned by state, and or possessed by Central Government, Regional Government, State Enterprise/Regional Enterprise and other institution related to State Finance. In the process side, State Finance is all activities related to the management of object as metioned above from the policy formulation and decision making until responsibility. From the purpose side, State Finance is all policies, activities, and legal relationships or object possessions as mentioned above in the state government activity.

The wide State Finance sector management can be grouped into fiscal management sub-sector, monetary management sub-sector, and separated state property management sub-sector".

In the observation of Nindyo Pramono,¹⁴ definition of State Finance formulated by both Acts above, there is a State Finance definition which includes State Property as a part of State Finance, but these Acts do not provide same parameter about the elements of State Finance. Act No. 31 1999 gives wide limitation or standard definition which is comprised of all State Property in

¹² *Ibid*, page 387.

¹³ *Ibid*.

¹⁴ Nindyo Pramono, *op.cit.*, page 136.

any form..., meanwhile Act No. 17 2003 gives narrow limitation of State Finance which is all rights and obligations which can be valued by money.

From only those two definitions, people can debate about it. If we refer to Act No. 31 1999, State Finance means all State Finance..., while in Act No. 17 2003, State Finance means rights and obligations. Does "all state property" have the same legal meaning with "state rights and obligations"? The answer is definitely different. In one side the form or the elements is all property or can be generalized by all state property. In the other side the form and the elements is rights and obligation. If it is observed deeper, rights and obligation has a strong relationship with subject of law. According to law, only subject of law which does have rights and obligation. Limited Liability Company is subject of law, because Limited Liability Company is legal entity. Property is a thing or object which can be owned or possessed by other subject of law who has the rights and obligation.¹⁵

From the explanation above, it can be concluded that Act No. 31 1999 defines State Finance in object point of view, while Act No. 17 2003 defines State Finance from subject point of view. From this side, everyone who is involved in legal application does not use same approach or criteria. The application will surely raise problem.¹⁶

Erman Rajagukguk¹⁷ stated that a mistake occurred again in Governmental Decree No. 14 2005 about The Procedure of State/Regional Claim Abolishment. Article 19 stated that conditional claim abolition absolute State Company or Regional Company claim abolition which its management handled by PUPN furthermore regulated by Ministry of Finance Decree. Hence this regulation does not separate the property of State Enterprise Corporation and state property as shareholder.

Government noticed the mistake in the thinking when facing non performing loan of PT Bank Rakyat Indonesia (Persero), PT Bank Negara Indonesia, and PT Bank Mandiri (Persero).

When government took step initiatively to abolish Article 19 and 20 Governmental Decree No. 14 2005 Minister of Finance stated:

"After this, claim management of state company or regional company is carried out based on Act of Limited Liability Company and Act of State Enterprise. Thus the law

¹⁵ *Ibid.*

¹⁶ *Ibid*, page 137.

¹⁷ Erman Rajagukguk, *op.cit.*, page 388.

used to regulate State Enterprise banks is Act of Limited Liability Company and Act of State Enterprise.”¹⁸

The proposal of the amendment triggered some debates in Commission XI of House of Representative, because it is considered derogates Article 2 (g) Act No. 17 2003 about State Finance. Then House of Representative was suggested to ask legal opinion of Supreme Court. The Supreme Court in its legal opinion justified the reason of Minister of Finance above.

Finally, through Governmental Decree No. 33 2006 government abolish Article 19 and 20 of Governmental Decree No. 14 2005. Then Article II (1) Governmental Decree No. 33 2006 determines the time of this Governmental Decree activation: a. Them management of State Company or Regional Company claim abolition to be managed in accordance with the active provision in the sector of Corporation and State Enterprise as well as the elucidation provision; b. Management...

By this provision, it is clear that the claim of State Enterprise and Corporation can not be categorized as state claim, but the claim of State Enterprise itself. Because claim is a part of Corporation property, all the property owned by State Enterprise is the State Enterprise itself, not state property.

The problem is which Act should be used to solve problem of State Finance related to state property. Separated state property in State Enterprise should be treated as *lex specialis*, therefore based on *lex specialis derogate legi generale* Act No. 19 2003 should be used as the solving basis. Related to the time of activation, Act No. 19 2003 is activated later, therefore based on *lex posteriori derogate legi priori* Act No. 19 2003 should be the legal basis.

One thing must be remembered, if the legal apparatus still follow the ideology of State Enterprise property is state property, state will be liable for all the debt of State Enterprise. State Budget will be drained for paying the huge debt of State Enterprise.

Conclusion

Legally the state equity in a legal entity in the form of Corporation is a separated state property. When state put the equity, the property becomes the property of Corporation. Corporation as legal entity has independent position. State property is physically in the form of share, it is not the property of the Corporation.

¹⁸ *Ibid*, page 389 cited *Media Indonesia*, July 11 2006.

Legal effort can be conducted by state towards board of directors behavior which creates loss for the corporation should not be conducted based on corruption criminal conduct. State as the shareholder can sue the board of directors for breach of fiduciary duty. The related board of directors can also be sued through criminal for example for embezzlement, falsification of data or financial report, and banking criminal conduct.

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