



STATE OWNED ENTERPRISES AND STATE FINANCE

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Abstract

State financial losses when associated with the cases of corruption in State-Owned Enterprises (SOE) had been an immense problem. The financial loss of a SOE could be considered as state loss by using an assessment of state losses, as stipulated in the State Treasury Act, which might cause some SOE managers might be accused as corruptors. Even though not all SOE losses were caused by corrupt act, but could also be caused by miss management acts or purely business loss. The doctrine of the business judgment rule and the management principles, the SOE in the form of limited liability company, should be run based on the principle of management of limited liability company, then consideration of the doctrine must be given to the law enforcement in SOE cases. The policies that equate SOE finance matter with the State finances will pose a risk to the development of SOE. The SOE will not be free to pursue the company goals to achieve maximum profits as mandated by the State-Owned Enterprise Act.

Keyword: State Owned Company, State Financial



A. Introduction

State-Owned Enterprises (the SOE) are one of the actors of economic activity in the national economy based on economic democracy and have an important role in the implementation of the national economy in order to achieve public welfare. Law Number 19 of 2003 concerning State-Owned Enterprises, hereinafter referred to as the SOE Act, stipulated that the purpose of establishment of SOE are:

- a. To give a contribution to national economic development in general and state revenue in particular.
- b. To pursue profit.
- c. To Organize public benefits in the form of providing high-quality and adequate goods and/or services for the fulfillment of the lives of people at large.
- d. To Pioneer business activities that cannot be implemented by the private sector and cooperatives.
- e. To actively provide a guidance and assistance to low level economic entrepreneurs, cooperatives and communities.

Based on these provisions, it can be seen that the purpose of establishing the SOE is focused on achieving two goals at once, namely commercial and social goals. It considered as commercial goal because the SOE is required to be able to pursue profits and considered as social goal because the SOE is also required to carry out a social mission, i.e. the obligation of providing guidance and assistance to low level economies, cooperatives and communities. Furthermore, in Article 3 of the SOE Act, it is stated that the SOE also subject to the provisions of other laws and regulations. In the elucidation of the Act stated the meant of other laws and regulations, among others are the provisions of Law Number 40 of 2007 including the amendments and implementing regulations and other laws and regulations that regulate the SOE and private business fields issued by state non-departmental departments/agencies.

In the provisions of Article 1 point 1 of the SOE Act stated the meaning of State-Owned Enterprise or the SOE is the company which all or part of their capital is owned by the state through direct participation derived from separated state assets. This is further emphasized in



Government Regulation (GR) No. 45 of 2005 concerning the Establishment, Management, Supervision and Dissolution of State-Owned Enterprises.

Article 1.2 of the SOE Act states that the Company hereinafter referred to as "Persero" is a SOE in the form of a limited liability company, the capital of which is divided into shares with all or at least 51% (fifty one percent) shares owned by the Republic of Indonesia whose main objective is to pursue profits.

Thus, simply and concisely, it can be interpreted that the SOE is a business entity that carries out business activities, with the capital is at least 51% (fifty one percent) owned by the state. Furthermore, Article 2 stipulated that the establishment, management, supervision and dissolution of the Persero is carried out based on laws and regulations applicable in the field of limited liability companies. It means that the principles of limited liability companies applied in the Persero as stipulated in the Limited Liability Company Act. Article 11 of the SOE Act states that all provisions and principles that apply to limited liability companies as stipulated in Law No. 40 of 2007 concerning Limited Liability Companies are applicable to the Persero.

B. The Guidance (Fatwa) of the Supreme Court

The Minister of Finance submitted a letter to the Supreme Court (MA) to request a legal guidance (*fatwa*). The Supreme Court issued a *fatwa* through its letter dated August 16, 2006 Number WKMA/Yud/20/VIII/2006 stating that state capital participation in state-owned enterprises is state property separated from management and the accountability mechanism of the state budget, but it should be based on the principles of healthy corporate management and subject to the applicable regulations stipulated in the Limited Liability Company Act.

Article 4 of Government Regulation Number 44 of 2005 concerning Procedures for Participation and Administration of State Capital in State-Owned Enterprises and Limited Liability Companies stipulated that every



participation and addition of state capital participation whose funds come from the State Budget are carried out in accordance with the provisions of legislation applicable in the field of state finance.

In the provision of Article 4 of Government Regulation Number 44 of 2005 concerning Procedures for Participation and Administration of State Capital in State-Owned Enterprises and Limited Liability Companies, there are some inconsistencies in the meaning of state capital participation in SOEs because the definition of state capital in SOEs according to Law Number 17 Year 2003 Regarding State Finance and Law Number 1 of 2004 concerning State Treasury included in difference of the scope of the state wealth.

The Implementing Regulation of the Minister of Finance, namely the Minister of Finance Regulation Number 96/PMK.06/2007 concerning Procedures for Implementation of the Use, Utilization, Transfer of State Property explained the meaning of central government capital participation, that is the transfer of state-owned property that originally derived from state wealth that was not separated into separated state assets that to be counted as state capital in the SOE, Province Owned Enterprise (POE), or other legal entities owned by the state/province. The purpose of the central government capital participation in the framework of the establishment, development and improvement of the performance of SOE/ POE or other legal entities owned by the state/region, is by consideration that the state wealth/property will be more optimal if managed by existing and future state-owned/province-owned companies or other legal entities owned by the state/regions. The entities that can receive central or province government capital participation are: State-Owned Enterprises (SOE); Province-Owned Enterprises (POE); and other legal entities owned by the state / region.

Central government capital participation in the form of state property which is initially planned to be included as central government capital participation, should be audited by government functional supervisory body to ensure the fair use of state property that included as central government capital participation by comparison with the state budget activities. In implementing the capital participation of the central



government, the property manager may require a statement of no objection from the shareholders or agencies deemed competent to represent the state as shareholder. These requirements are not required for central government capital participation in the form of state property and initial procurement has been planned for central government capital participation. Every central government capital participation in state property is determined by government regulations. The draft of government regulation concerning the central government's capital participation to the President is carried out by the property manager. All costs arising from the implementation of central government capital participation are borne by the recipient of central government capital participation.

C. Conclusion

By the presence Supreme Court *fatwa*, there is the different opinions as pros and cons emerged in the community. Some people interpret that the *fatwa* does not have legal binding power and can make the efforts to eradicate corruption be complicates because law enforcement officials can no longer enforce the provisions of the Anti Corruption Act to administrators of State-Owned Enterprises that are suspected of misusing their authority. This happens if the country's wealth has been separated so that wealth is no longer entered into the realm of public law but entered the realm of private law. But on the other hand this *fatwa* is considered positive because it provides legal certainty in fostering and managing state assets that are placed as capital of the Persero. In addition, with the existence of the *fatwa*, the Supreme Court will provide moral support to the directors of the SOE to be more courageous and not hesitant to take strategic business decisions and innovations in the development of the Persero, so that the state assets included as SOE capital can be maximized to improve profit of the Persero.

The *fatwa* of the Supreme Court is in compliance with universal legal theory. That is, a wealth including financial legal entity, is separate from the wealth of the management and its owner or shareholder. It is



obligatory for the Supreme Court to be consistent with its fatwa. MA as the final touchstone of law has an obligation to maintain and guarantee legal certainty. If the Supreme Court's Decision is not consistent with its fatwa, it will create legal uncertainty in Indonesia. So, it is obligatory for the Supreme Court to be consistent with its fatwa. In the future, if there is a legal problem related to separated state wealth, there are some cases that have a legal binding power, then it can be used as a stare decisis.



Bibliography

Law Number 19 of 2003 concerning State-Owned Enterprises

Law Number 40 of 2007 concerning Limited Liability Companies

Law Number 17 of 2003 concerning State Finance

Law Number 1 Year 2004 concerning State Treasury

Government Regulation Number 44 of 2005 concerning Procedures for Participation and Administration of State Capital in State-Owned Enterprises and Limited Liability Companies states: Every participation and addition of state capital participation whose funds come from the APBN.

Minister of Finance Regulation Number 96 / PMK.06 / 2007 concerning Procedures for Implementation of Utilization, Transfer of State Property.

Fatwa through his letter dated August 16, 2006 Number WKMA / Yud / 20 / VIII / 2006 states that government capital participation in state-owned enterprises is state wealth separated from management and accountability mechanisms of the state budget, but subsequently based on the principles of sound corporate management in the UUPT regulation.