CORRUPTION OFFENSES MANAGING DIRECTOR IN MAKING BUSINESS DECISIONS

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Abstract

Business decisions taken by the Board of Directors are solely an obligation for the Board of Directors so that SOE can grow sustainably, stably, and have high competitiveness, but an unavoidable reality is that a business entity does not only experience profits, but is also faced with phases of loss. Business decisions that have been made with full calculation and prudence are still not free from business risks that can result in the SOEs they manage experiencing losses, so that they are categorized as detrimental to state finances and lead to criminal justice processes. This study aims to (1) analyse losses in SOEs that can be qualified as state financial losses and (2) analyse what business decisions made by the President Director of SOEs are categorized as fulfilling the elements of corruption in criminal cases in the Central Jakarta District Court Decision Number 15/Pid.Sus-TKP/2019/PN.Jkt.Pst. This research uses normative juridical research methods using statute approach, conceptual approach, and case approach. The results showed that separated state assets are state assets originating from the state budget to be used as state equity participation in SOEs. State assets that become capital in the form of shares are no longer state assets. State assets in SOEs are limited to the ownership of the company's shares, so that if there is a loss in the SOE Persero, this is not a state loss, but a loss of the SOE. The business decisions made by the President Director of the SOE are categorized as fulfilling the elements of corruption due to a series of actions byKarenthat do not entirely reflect the principle of prudence in making decisions, nor do they fully fulfil the elements of Article 97 paragraph (5) of the Limited Liability Company Law.

Keywords: Corruption Crime, President Director, Business Decision, Anti-Corruption Law

INTRODUCTION

Article 33 paragraph (3) of the 1945 Constitution states that the state controls and utilizes the earth, water, and natural resources contained therein for the greatest prosperity of the people. State-Owned Enterprises (SOEs) together with other economic actors including cooperatives and the private sector represent economic democracy and are very important in organizing the country's economy for the progress of society (Harun, 2019).

SOEs is not a monolithic entity, there are 2 (two) forms of SOEs that are distinguished based on their organizational structure, namely Public Company (Perum) and Limited Liability Company (Persero), each form has its own characteristics in terms of objectives, management, and decision making (Salwa, 2024).

SOEs as legal entities have an independent position or status (Prasetya, 2016), but SOEs as pseudo-humans cannot do anything without the help of natural humans (Wijaya, 2018). Without the assistance of SOEs organs (General Meeting of Shareholders, Commissioners, and Directors), SOEs cannot carry out its legal obligations as a legal entity (Sesara, 2021).

The Board of Directors is like the life of an SOE, it is impossible for an SOE without a Board of Directors. The Board of Directors, in its position as an organ of the company, carries out management functions and representative functions (Widiyono, 2008). Directors are required to innovate in order to respond to changes in the very dynamic business world, but an unavoidable reality is that business decisions that have been made with full calculation and prudence are still not free from business risks that can result in the SOEs they manage experiencing losses, so that they are categorized as detrimental to state finances and lead to criminal justice processes (Mahyani, 2019).

The Director of SOE who has been a suspect in a corruption case, namely Galaila Karen Kardinah, who allegedly abused her authority as President Director of PT Pertamina (Persero) which ensnared her as a suspect in a corruption case when she acquired a partial shareholding in the Australian Basker Manta Gummy (BMG) Block in 2009, resulting in a loss of state finances of Rp568.06 billion.

In order to protect the authority of the Board of Directors in making decisions for the benefit of the company, Law Number 40 Year 2007 on Limited Liability Companies adopts the concept of Business Judgement Rule (BJR) which can be used as a golden parachute for the Board of Directors (Sastrawidjaja, 2012). The legal protection offered by the BJR protects the BOD from liability for any policy, business decision, or business transaction that causes losses to the company, as long as the policy or business decision or business transaction is carried out in good faith, prudence, honesty, in line with their responsibilities and authority. However, when faced with the reality of corruption in the real world, the ability of the BJR doctrine to protect the legal interests of the BOD is often ignored. Some judges argue that should the BOD not act recklessly or commit gross negligence, then the BOD should be held responsible for the losses they have caused (Prasetio, 2016).

The application of BJR is not as simple as it is written. Disharmony between the Corruption Eradication Law, the State Finance Law, and the Limited Liability Company Law results in inconsistencies in the viewpoint of law enforcement officials in applying when and how state financial losses occur. Losses in SOEs can be categorized as a criminal act of corruption or a corporate action that can be classified as BJR (Prasetio, 2014).

Based on the review in the library, there are several studies that are almost similar to this research, but in order to maintain originality and novelty value in this research, the author uses different variables, problem formulations, theoretical frameworks, and research methods. This research is more focused on analyzing the President Director's corruption in making business decisions.

RESEARCH METHOD

This research uses normative juridical research methods, namely legal research that places the law as a building system of norms (Fajar and Achmad, 2015). In this research, the author examines and analyzes in depth legal theories, concepts, and principles, as well as laws and regulations related to the research.

This research uses a statutory approach, concept approach, and case approach. Legislative approach to study whether there is a harmonized meaning of "state finances" and "separated state assets" listed in the provisions of Law Number 17 Year 2003 on State Finance; Law Number 1 Year 2004 on State Treasury; Law Number 19 Year 2003 on State-Owned Enterprises; Law Number 31 Year 1999, on the Eradication of Corruption as amended by Law Number 20 Year 2001 on the Amendment to Law Number 31 Year 1999 on the Eradication of Corruption. Conceptual approach to examine and study legal concepts or ideas about the BJR doctrine. A case approach by examining cases related to the issue at hand, namely the Decision of the Central Jakarta District Court Number

15/Pid.Sus-TKP/2019/PN.Jkt.Pst jo. DKI Jakarta High Court Decision Number 34/Pid.Sus-TPK/2019/PT.DKI jo. Supreme Court Decision Number 121/K/Pid.Sus/2020 on behalf of the defendant Galaila Karen Kardinah.

The normative juridical research method is a library legal research conducted by examining library materials or secondary data related to the problem under study.

This research uses deductive reasoning analysis techniques. The author analyzes by examining cases related to the issue at hand that have become court decisions that have permanent legal force. Then inventorying and identifying laws and regulations, then analyzing related cases and laws and regulations by interpreting the law, and then drawing conclusions from the results of the analysis.

The next step is to reconstruct the material, namely rearranging the legal material in an organized, sequential, logical manner, so that it is easy to understand and interpret. The final step is to systematize the legal material, namely placing the legal material in order according to a systematic framework of discussion based on the order of the problem.

RESULTS AND DISCUSSION

State-Owned Enterprise Losses to State Financial Losses

Legal experts argue that SOE assets are not state assets because they are state equity participation, while law enforcers argue that SOE assets are part of state assets. The legal basis for the difference of opinion is as follows:

1. The assets of SOEs are part of state finances.
    a. The General Elucidation of Law No. 31/1999 on the Eradication of Corruption as amended by Law No. 20/2001 explicitly includes the finances and/or assets of SOEs as part of state finances.
    b. Article 1 point 1 and Article 2 letter g of Law No. 17 of 2003 on State Finance include SOEs in the state finance regime, except that these provisions do not use the term SOE, but rather State Company.
    c. Article 50 of Law No. 1/2004 on State Treasury indicates that there has been a separation of state assets or finances from corporate finances due to the risk of transfer. According to Atmadja, money that is initially private and enters the state treasury simultaneously when a Limited Liability Company deposits its share of operating profits or taxes, then the money becomes state money and is automatically regulated by the State Finance Law and the State Treasury Law (Atmadja, 1986).
    d. Article 1 point 7 and the Explanation of Article 6 paragraph (1) of Law No. 15/2006 on the Supreme Audit regime and are subject to audit by the BPK.
2. The assets of SOEs are not part of state finances.
    a. Article 1 point 10 of the SOE Law and Article 4 of the SOE Law stipulate that the capital of SOEs comes from state assets that have been separated from the state budget. Legally, money invested by the state becomes corporate wealth and not state property. As SOE capital comes from state assets that have been separated from the state budget, the administration and direction of these entities is now guided by ideas of good corporate governance rather than the state budget system (Pramono, 2001).
    b. Article 3 paragraph (1) of the PT Law emphasizes that shareholders are only liable for the deposit of shares they own, not their personal assets. In the context of state losses experienced by SOEs, it does not mutatis mutandis become state losses. In the event that the state (the government, represented by the Ministry of SOEs or the Ministry that supervises SOEs) must assume responsibility as a shareholder, it is only limited to the value of the shares owned.
    c. Article 2A of Government Regulation No. 44 of 2005 concerning Procedures for Investing and Managing State Capital in State-Owned Enterprises and Limited Liability Companies, as amended by Government Regulation No. 72 of 2016, further strengthens the understanding that the assets and/or finances of SOEs are not elements of state finances on the basis of the following arguments (Noor, 2022):
        1) The wealth owned by the state in SOEs is in the form of shares. Shares are not part of the state budget, but rather an ownership right to a valuable asset with the logical consequence of dividends.
        2) The state has a relationship with SOEs because the state is the shareholder and capital owner of the organization. Capital participation is carried out through state assets which are then converted into shares / state capital in the SOE itself.
        3) The SOE acquires ownership of the converted state assets.

Differencesinterpretation of state assets related to SOE assets among legal experts and law enforcers has not simple implications.law experts and law enforcers have implications that are not simple. The implicationsbecome complicated in corruption cases involving Directors of SOEs, because in the handling of corruption offenses, state loss is one of the elements of thehandling of corruption crimes, state losses are one of the main elements and guidelines for law enforcement officials.elements and guidelines for law enforcement officials in conducting investigations,investigation, prosecution, and verdict, as referred to in Article 2 paragraph (1) and Article 3 of the PTPK Law.

A legal entity formed by the governmentwith the status of separated state assets implies that since the separatedpart of the state's assets into the assets of a legal entity, there has been ajuridical transformation of public finance into private finance that is fully subject to civil law.Similarly, the legal position of government officials whoas a shareholder, his public immunity as a sovereign no longer applies and he is subject to and appliesand to him is subject to and fully applies private law even though the company is one hundred percent state-owned.This is in accordance withAsshiddiqqie's view, which states that the wealth of legal entities is different from the wealth of people who establish and invest in them.with the wealth of the person who establishes and invests in this case, the state (Asshiddiqie, 2016).

Based on Article 66 of the Company Law, the Board of Directors is obliged to submit an annual report to the GMS no later than 6 (six) months after the Company's financial year ends, after being reviewed by the Board of Commissioners. This report must contain at least a financial statement comparing the balance sheet of the end of the financial year just past with the previous financial year, a year-end income statement, a cash flow statement, a statement of changes in equity, and notes to the financial statements are all included. Where there are many profitable transactions, a loss incurred in one transaction does not necessarily mean a loss for the Limited Liability Company. If there is a loss, it is not necessarily a loss for the SOE Persero because there may be profits from the previous year that are not distributed or covered by operating reserves. Thus, losses are calculated on the basis of at least one year and do not refer only to 1 (one) or a few transactions.

SOE losses are not always detrimental to shareholders, which is related to the concept of separation of wealth adopted by Limited Liability Companies and in line with the concept of limiting the responsibility of company organs. The risk of not receiving dividends, including the loss of capital gains (margins), as well as the loss of SOE assets, either partially or wholly, should have been known or at least taken into account by the state as a shareholder.

According to Article 1 paragraph (22) of the State Treasury Law, state losses are shortages of cash, securities, and goods that are real and certain in amount as a result of unlawful acts, whether committed intentionally or negligently. Dividends do not reduce state funding, but only reduce state revenue. The state will lose as a stakeholder if the share price drops and the overall wealth of the SOE decreases. Therefore, the state only needs to show that the BOD, who bear full responsibility for the administration of the Company, committed an unlawful act due to their negligence. This is in accordance with the concept of BJR, which states that directors lose their protection if it is proven that they have disregarded the interests of the company, relevant laws and regulations, and the standard fiduciary duty of care and loyalty (Prasetio, 2014).

According to Noor's research, losses of Persero SOEs are not always considered as state financial losses, unless there is an obvious illegal act committed by the Board of Directors, for example when participating in government tenders and mark-up the value of the project, or commit fraudulent acts or other illegal acts, including abuse of Persero dividends. In principle, the loss of an SOE is the loss of the SOE itself, as long as it is still in the business activities or business transactions of the SOE. It should be understood that policies and/or decisions in business must indeed go hand in hand with the risk of loss, meaning that although the management of the company is always profit-oriented, but not infrequently what is obtained is only a loss. If the losses are still under the scope of the law and guidelines, then by law such policies or business decisions should not have criminal implications, especially for the Directors who make the policies and/or business decisions (Noor, 2022).

Application of the BJR Doctrine in Supreme Court Decision Number 121 K/Pid.Sus/2020

The verdict of the Central Jakarta District Court Number 15/Pid.Sus-TKP/2019/PN.Jkt.Pst., decided that Karen was legally and convincingly proven guilty of committing a corruption crime in violation of Article 3 of Law Number 31 of 1999 concerning Eradication of Corruption, as amended by Law Number 20 of 2001 concerning Amendments to Law Number 31 of 1999 concerning Eradication of Corruption, in conjunction with Article 55 paragraph (1) to 1 of the Criminal Code, Karen was sentenced to imprisonment for 8 (eight) years and a fine of Rp1,000,000,000.00 (one billion rupiah).

In his dissenting opinion, Member Judge Anwar stated that Karen as President Director of PT Pertamina had made the decision to acquire the BMG Block jointly.

In the dictum of the DKI Jakarta High Court Decision Number 34/Pid.Sus-TPK/2019/PT.DKI, the Panel of Appellate Judges upheld the decision of the court of first instance, although Karen was acquitted of all charges (ontslag van alle rechtsvervolging) by the Supreme Court Decision Number 121/K/Pid.Sus/2020, with the consideration that Karen's actions as President Director and Director of PT Pertamina remained within the boundaries of BJR becausethere is no evidence of fraud, conflict of interest, unlawful acts, or willful misconduct. The difference in sentences handed down by judges in the first instance and cassation court decisions shows that there is a lack of uniformity in viewing the BJR principle, thus affecting the Judges' consideration in giving decisions.

BJR consists of a number of duty of care principles whose elements must be cumulatively fulfilled by the Board of Directors of a company. Theoretically, the principle of duty of care consists of a series of actions that reflect rational consideration, sufficient information, good intentions, and are carried out in the interests of the corporation. These principles are also normatively regulated in Article 97 paragraph (5) of the Company Law.

The series of actions of Karen Agustiawan together with Siahaan, Kristanto, and GenadesPanjaitan did not entirely reflect the duty of care towards the company, nor did they fully fulfill the elements of Article 97 paragraph (5) of the PT Law as reflected in the following series of actions:

a. Ignoring or failing to consider in depth the recommendations of the Board of Commissioners and its initial commitment to involve PT Pertamina in the BMG Block auction.
b. Ignoring the recommendation of the external team, PT DKI and Sydney to request the completion of important documents to ROC, Ltd. which, if not completed, would put the investment and acquisition of the BMG Block by PT Pertamina at risk;
c. Not conducting in-depth due diligence on ROC, Ltd.

Although Karen allegedly did not fully implement the principles of BJR, Karen's series of actions and decisions in the acquisition and investment of the BMG Block, cannot also be considered as a corruption crime, because there is no evidence of Karen's malicious intent in the state losses incurred and the benefits received by ROC, Ltd. from her decision. In addition, the prosecutor also did not construct the benefits received by Karen from her decision as Director of PT Pertamina.

Another important point that needs to be examined is the position of SOE subsidiaries, which are private companies that are corporately controlled by the SOE as the parent company. SOE subsidiaries are accountable to the state as the owner of the capital. Thus, a subsidiary of a SOE is responsible to its parent company (SOE), not to the state. The legal consequences of the separate entity of funds that are state assets mean that if there is a loss incurred by a subsidiary of PT Pertamina (Persero), this will not have an impact on state losses because PT Pertamina Hulu Energi is not regulated by the State Finance Law or the SOE Law.

CONCLUSION

Separated state assets are state assets that come from the state budget to be used as state equity participation in SOE, then the state gets shares for the capital that has been deposited. These shares are recorded as state assets. State assets in SOE are limited to ownership of company shares, so that if there is a loss in SOE Persero, this does not become a state loss, but a loss of the SOE itself, unless it can be proven that the decline in the amount of SOE Persero's assets is due to the President Director not implementing the principles of Good Corporate Governance, so the state only needs to prove that there has been an unlawful act.

The business decision taken by the President Director of PT Pertamina (Persero) is categorized as fulfilling the elements of corruption due to Karen's series of actions which do not entirely reflect the principle of prudence (duty of care) in making decisions and also do not fully fulfill the elements of Article 97 paragraph (5) of the PT Law. The President Director in making business decisions has errors or omissions or other things that are categorized as violations of fiduciary duty, giving rise to personal responsibility for the losses suffered by the company.The actions of the President Director of PT Pertamina (Persero), which are categorized as ignoring the principle of fiduciary duty, include:

a. Disregard the recommendation of the Board of Commissioners not to acquire the PI of BMG Australia Block.
b. Ignoring the recommendation of the external team, PT DKI and Baker Mc Kenzie Sydney to request the completeness of the data and documents of the investment proposal from the preliminary study (pleminary study) by the proposer, as well as analyzing the risk of the investment proposal (advanced study stage).
c. Ignoring the results of the Due Diligence Report conducted by the External Team of PT DKI, which stated that it is very high risk if PT Pertamina acquires a 10% PI.

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