CONTRADICTIONS IN THE LEGAL STATUS OF STATE-OWNED ENTERPRISE (BUMN) SUBSIDIARIES IN THE PARENT HOLDING COMPANY

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Abstract

The creation of a cluster-based holding company in a State-Owned Enterprise (BUMN) related to core business fields requires careful attention and precise implementation. One must be cautious because issues regarding legal procedures and the legal status of BUMN can still arise. This writing discusses the legal relationship between BUMN Persero and its subsidiaries based on the theory and doctrine of limited liability companies, as well as the contradictory legal status of BUMN subsidiaries within the parent holding company. The research method used in this writing is normative legal research. The findings demonstrate that the piercing the corporate veil doctrine can be employed in terms of evidence, where control of subsidiaries must be exercised by the holding company. Legal responsibility is applicable not only to companies, but also to shareholders as specified in Article 3 paragraph (2) of Law Number 40 of 2007 on Limited Liability Companies (UUPT). Once BUMNs become subsidiaries in a holding company, their status as BUMNs, whether BUMN Perum or Persero, changes since their shares are now sourced from the holding company instead of the state. Therefore, BUMNs that become subsidiaries no longer possess legal standing or status as BUMNs, and the state assumes authority over aspects of control concerning BUMNs that have become subsidiaries of the holding company. This authority is indirectly held by the state via the parent/holding company, which represents the government in terms of share ownership, with the majority of shares originating from subsidiaries.

Keywords: *Contradiction, Legal Status, Subsidiaries, Parent Holding Company*

1. INTRODUCTION

Business currently plays a crucial role in driving the country's economy. The existence of State-Owned Enterprises (BUMN) serves as a foundation for Indonesia's economy based on Article 33 paragraph (2) of the 1945 Constitution. BUMN is a Limited Liability Company (PT) established under Law Number 40 of 2007 concerning Limited Liability Companies (UUPT). Referring to Article 9 of Law Number 19 of 2003 concerning State-Owned Enterprises (UU BUMN), BUMN can take the form of Public Corporations (Perum) and Limited Liability Companies (Persero). It is clear that there is a significant difference between Perum and Persero, especially in terms of share ownership.

Perum itself is a State-Owned Enterprise with 100% of its shares owned by the government or state, while Persero is a State-Owned Enterprise with 51% of its shares owned by the government or state. If BUMN significantly differs in its establishment from regular Limited Liability Companies (PT), the establishment of PT is limited to the articles of incorporation, provided it is registered and meets the requirements set by the Ministry of Law and Human Rights. The legal basis for Perum is outlined in Government Regulations (PP), where the legal status of the BUMN entity comes into effect after the issuance of such PP (Natun, 2018).

To maintain its status, position, and existence in today's competitive corporate landscape, it is crucial for State-Owned Enterprises (BUMN) as a public institution to conduct its activities within the framework of establishing its subsidiaries (Guntik & Yustiawan, 2022). As stipulated in Article 1 paragraph (2) of Minister of State-Owned Enterprises Regulation No. 3 of 2012 regarding Guidelines for the Appointment of Directors and Managers of State-Owned Enterprise Subsidiaries.

A subsidiary is a legal entity in the form of a limited liability company, the majority of whose shares are controlled by the State-Owned Enterprise (BUMN). It is evident that BUMN possesses a unique characteristic as an economic entity partially or wholly owned by the state through direct capital injection originating from state-owned private assets. State-Owned Enterprise companies are subject to regulations and principles applicable to regular Limited Liability Companies (PT), as specified in Article 1 paragraph (1) and Article 11 of the Company Law, in conjunction with Article 3 of the State-Owned Enterprises Law.

SOE subsidiaries are not regulated in the SOE Law. As stated in Article 1 paragraph (2) of PER-04/MBU/06/2020 concerning Amendments to the Regulation of the Minister of Public Service. Guidelines for the appointment of directors and auditors of SOE subsidiaries starting April 2020 are regulated in detail in PER-03/MBU/2012 (Waskito, 2016). If the members of the PT are not personally responsible for contracts or agreements made on behalf of the company or the company and are not responsible for the loss or risk of the company, then based on the rules of UUPT, the responsibility of the PT becomes inevitable in relation to holding companies and subsidiaries. It is interesting when a PT becomes an SOE. If a SOE implements a capital policy in the form of equity participation in a PT, then the legal status of the PT which is a subsidiary of the SOE raises the question of whether it can be classified as a PT (Limited Company).

The issue of the legal status of subsidiaries of SOEs, whether SOEs or not, has often been controversial and has attracted debate since the enactment of the SOE Law. This is because the SOEs that invest in these subsidiaries all or most of the shares are government/state assets. Disputes arise when legal issues arise. Even in the judicial realm, the opinions of judges on this issue still vary or there is a dissenting opinion. A concrete example can be seen in Supreme Court Decision No. 21 P/HUM/2017. The decision of BUMN is a subsidiary of BUMN holding company has changed to PT as a continuation of state/government ownership. The holding company gets special rights provisions to ensure that the state continues to exercise control or supervision over BUMN subsidiaries through BUMN holding companies.

Legal disputes over subsidiaries of SOEs have not been clearly resolved and are still subject to multiple interpretations. Permeneg BUMN No. 03/MBU/2012 states that subsidiaries of SOEs are PTs whose shares are mostly owned by SOEs, or PTs whose management and supervision are carried out by SOEs. However, the existence of SOE subsidiaries is still under discussion as stated in Constitutional Court Decision No. 01/HPU-PRES/XVII/2019. In the minutes of the decision, the legal status of SOE subsidiaries is the same as SOE subsidiaries, because the SOE subsidiaries can be classified as one of the partners working with SOEs, namely as one of the SOE subsidiaries supporting SOEs. With other partners and/or companies that are described as different/separate from other parties.

The interesting thing about the two decisions above is that, considering the Supreme Court Decision Number 21P/2017, the Supreme Court stated "the form of BUMN which

is a subsidiary of BUMN is still BUMN". In this case, the Court has a different opinion and view by stating that although a subsidiary of a BUMN cannot be designated as a BUMN, it still has the status of a subsidiary of a BUMN (usually in the form of a PT) because it was established by investing shares owned by the BUMN. On the other hand, the establishment of an SOE holding may cause problems and criticism among some circles. Some SOEs are well managed, but others still apply traditional management practices. Ideally, SOEs should not be merged. Basically, SOEs have good and healthy performance and SOEs that have poor performance. SOEs that become subsidiaries should not be a burden to the holding company (Widjayanti, 2011).

The implementation of the establishment of a cluster-based holding company (BUMN) related to the same core business field requires great care and its implementation must be carried out carefully. This is because legal issues may still arise in carrying out the ownership procedures, one of which is regarding the legal position or status of SOEs. This problem may be caused by the definition of SOEs stipulated in the SOE Law (Anggraeny, 2016).

Referring to Article 1 paragraph (1) of the BUMN Law, where only BUMNs that are part of a holding company and have met the criteria to be included as BUMNs. What is meant by "direct capital participation from individual state assets". Where the BUMN Law indirectly states that BUMNs are part of a subsidiary of a holding company that does not meet the criteria for BUMN. On the other hand, there are also potential problems related to the government's authority and supervision (if the government) of SOEs as subsidiaries in the share ownership program (Utomo, 2014).

Based on the explanation in the background above, the issues faced are: What is the legal relationship between State-Owned Enterprise (BUMN) Persero and its subsidiaries based on the theories and doctrines of limited liability company law? And what contradictions exist in the legal status of subsidiaries of State-Owned Enterprises (BUMN) within the parent holding company?

2. RESEARCH METHODS

2.1. Type of Research

The type of research is normative juridical, which studies legal rules, legal principles, and legal doctrines in order to answer legal questions that arise and seek solutions or solutions. This is the essence of legal perspective. In contrast to descriptive scientific research that investigates whether existing facts are caused by certain factors, legal research always investigates new arguments, theories, or concepts as problem solving that can reveal the exact truth and convey facts as data (Mahmud, 2016).

This type of research is conducted through the analysis of legal norms (existing regulations) so that it is normative research. In addition, this research is also an educational research, as it systematically discusses and analyzes the relationship between parts of the text, takes into account obstacles, and estimates future development opportunities.

The topic of this research is legal concepts, norms, principles and doctrines. Therefore, this research contains norms used in decision-making. In addition, it is also a literature study, meaning further investigation and analysis of secondary materials obtained from the research.

2.2. Research Specifications

The research specification is descriptive and the data is analyzed qualitatively in the form of interviews and words (descriptive text) obtained from official documents such as laws and regulations.

2.3. Data Collection Types and Techniques

The type of data is secondary data. The data sources are:

Primary legal materials are binding legal materials and laws that are normative in nature and have authority from public sources such as legal regulations, official records, or protocols in determining legal regulations (Mahmud, 2016). The provisions of the regulations or regulations are: 1) 1945 Constitution. 2) Law No. 40 of 2007 concerning PT. 3) Law No. 19 of 2003 concerning SOEs. 4) Government Regulation No. 72 of 2016 concerning Amendments to Government Regulation No. 44 of 2005 concerning Procedures for Participation and Administration of State Capital in State-Owned Enterprises and Limited Liability Companies. 5) Supreme Court Decision No. 21 P/HUM/2017 6) Constitutional Court Decision No. 01/PHPU-PRES/XVII/2019.

Secondary legal materials are legal materials that are not legal / official documents, namely legal documents that contain comments on primary legal sources. In this case, it will be published in the form of books, articles, and legal journals with the reference topic of writing the problem, namely the conflict of legal status of BUMN subsidiaries in the holding company parent.

Tertiary legal materials are legal materials whose purpose is to gain an understanding of the point of view of the object under study, such as legal dictionaries and others.

The data collection technique is to collect data on the problem at hand. The collection of legal materials is a literature study. In other words, collecting materials by reading and researching secondary data (library study), including library references and primary, secondary and tertiary legal materials. Interviews play a role in clarifying the secondary data obtained and searching for primary data.

2.4. Research Approach

Basically, this research uses an approach to obtain accurate, reliable and credible information on information from various sources and information related to legal issues faced and solutions sought (Mahmud, 2016). The approach uses a conceptual and legal approach. The approach is a legal approach and a conceptual approach. Based on the problem of various legal provisions that apply in relation to the problem studied from a regulatory point of view. In this research, of course, when developing concepts, it must stay away from legal regulations and principles developed in legal science.

2.5. Data Analysis Technique

After being analyzed qualitatively, data was collected during the research, which is descriptive in nature, and presented descriptively in an illustrative manner. The results of this research are able to distinguish the legal status of SOE subsidiaries in holding companies.

3. RESULTS AND DISCUSSION

3.1. Legal Relationship Between SOE Persero and its Subsidiaries Based on the Theory and Doctrine of Limited Liability Company Law

The Piercing the Corporate Veil principle prevents fraud arising from unlawful acts on behalf of the company, whether caused by third-party transactions or from misleading acts. This principle has been adopted in the UUPT for the purpose of providing some recognition of the application of the principle of piercing the veil as a legal provision that applies and is binding for companies in Indonesia. UUPT can be used as a legal umbrella for the business world. Its use as a legal umbrella depends on the legal regulation itself regarding the level, scope, and binding nature contained therein. This situation is included in the concept of justice and legality. The concepts of legality and justice are applied in the UUPT as an implementation of the principle of peeling the corporate veil in several companies in Indonesia.

As is known, the UUPT and its proposed amendments do not specifically regulate the provisions regarding holding companies and their subsidiaries, so the UUPT still treats subsidiaries as separate legal entities from the holding company. However, there are exceptions in relation to the principle of separation of legal entities as stated in Article 3 paragraph (1) of the Company Law. Based on Article 3 paragraph (2) of the Company Law, the rules of Article 3 paragraph (1) of the Company Law do not apply, namely:

1. Not fulfilling the company's requirements to become a legal entity.
2. The existence of direct or indirect impacts on shareholders.
3. The existence of impacts when shareholders are involved in illegal or unlawful activities.
4. There is an impact on shareholders who directly or indirectly use the company's assets illegally and the company is insufficient to pay the company's debts.

The formulation of this article is based on the principle of piercing the corporate veil, meaning that if the conditions in Article 3 paragraph (2) of the Company Law are fulfilled, then not only the company but also its shareholders can be asked to bear the legal burden. Furthermore, this practice has shown that in the case of a holding company and its subsidiaries, the principle of piercing the corporate veil even when the subsidiary only acts as an instrument or instruments for the holding company to pursue the personal interests of its shareholders.

Other factors that cause the implementation of the Piercing the Corporate Veil principle in holding companies are:

1. The holding company and subsidiaries have the same management team.
2. The holding company uses the company's assets for personal interests.
3. No election of directors and members is allowed in the GMS.
4. The holding company owns all or most of the shares of the subsidiary.
5. The day-to-day operations of the holding company are not separate from the subsidiary.
6. The subsidiary does not conduct any business activity in the absence of work from the holding company or only conducts business with the holding company.
7. The holding company provides large loans to subsidiaries.
8. The existence of very small capital for the subsidiary compared to its business.

9. The holding company pays the salaries of its subsidiaries' employees and bears other expenses of its subsidiaries.
10. The subsidiary acts in the interest of the holding company.
11. More attention is paid to the interests of the holding company, especially for the management of the subsidiary, than the interests of the subsidiary.

Therefore, the principle of piercing the corporate veil principle that shifts the responsibility of the corporation to its shareholders and directors. The principle of piercing the corporate veil by the shareholders, then in this case the shareholders are responsible for the company's creditors, considering that the actions in this case have harmed the company's assets and made it impossible to fulfill obligations to creditors.

Referring to the theory of the principle of piercing the corporate veil which combines the economic and legal interests of the parent company, because the principle of piercing the corporate veil in Indonesia is still relatively new, it is still necessary to develop its application in the Indonesian positive legal system. The founders of the legal entity theory recognized that corporate legal acts are essentially carried out by humans in the legal entity, and that these people can be misused to do evil when they are still legal entities. As a subject, it depends on the authority to act.

The principle of piercing the corporate veil relates to the exception to the limited liability of shareholders. This principle encourages shareholders to account for their personal assets if the company suffers losses and is unable to pay its debts, such as: 1. There is fraud, 2. There is injustice, 3. There is an element of oppression, 4. Illegal, 5. Controlling shareholders is not in place, 6. Alter ego of major shareholders.

Piercing the Corporate Veil theory is very useful for legal interests, especially for holding companies with legal acts of their subsidiaries. Because when there is legal entanglement, of course this will cause legal consequences.

It is clear that the legal structure between a holding company and its subsidiaries in Indonesia is based on the principle of Piercing the Corporate Veil, which involves removing the veil between shareholders or between the holding company and its subsidiaries, resulting in the loss or blur of independence. This is because the Piercing the Corporate Veil principle demonstrates that a Limited Liability Company (PT) within the corporate group is inseparable from the desires of the shareholders occupying that position, namely the holding company. In this context, this principle serves as an exception to the distinct situation between the PT as a subsidiary and the holding company as the shareholder, thereby eliminating the principle of limited liability for shareholders. By eliminating the principle of piercing the corporate veil and the holding company's involvement in managing the corporate group as a shareholder, the barriers to limited liability are automatically removed (Harahap, 2017).

3.2. Contradictions in the Legal Status of State-Owned Enterprise (SOE) Subsidiaries in the Parent Holding Company

The legal status of a subsidiary is a legal entity which in this case is separate from the holding company. The subsidiary has independent rights and obligations as a legal entity, and its management is subject to the authority of each legal entity in accordance with the regulations in the Company Law and the company's articles of association, and the directors of the subsidiary must manage the subsidiary's business honestly and responsibly in carrying out the management of the company. The directors of the

subsidiary will act as supervisors, and the GMS of the subsidiary will be the manager of the management and assets carried out by the directors of the subsidiary, and is fully responsible for the management and management decisions of the company.

Shareholders of subsidiaries have indirect control over the company's operations, in accordance with the policies of the board of directors. The role of shareholders is basically only to control the company's policies through the GMS mechanism, and is not responsible for the implementation of the functions of the board of directors in general. The participation of the holding company in the subsidiary's business as a shareholder is basically facilitated by placing trusted people as directors and officers of the subsidiary, so that the holding company can directly "direct" the course of the subsidiary's business. Through such business relationships and networks and contractual subsidiaries, where this is legally not in accordance with the company's articles of association.

As explained at the outset, a holding company can be likened to a public company, and by law the principle of limited liability applies therein. The principle of limited liability and piercing of the corporate veil is a form of exception. The principle of separate liability is regulated in Article 3 paragraph (1) of the PT Law.

The legal status of BUMN as a subsidiary can be seen from the aspect of the authority of the Minister of BUMN in relation to the appointment of directors of BUMN subsidiaries and committee members. The provisions of Article 14 paragraph (1) of the BUMN Law, in this case the Minister responsible for BUMN and acts as GMS, where this is done when all shares in the Persero are owned by the government / state and acts as a shareholder of the Persero GMS.

The company has limited liability when all or none of its shares are owned by the government/state. Of course, the Minister acts as the GMS, and the Minister has the authority to appoint and dismiss directors and appoint and dismiss members based on the rules of Article 15 and Article 27 of the BUMN Law. However, this power is not found in GR 44/2005 combined with GR 72/2016. Article 2 paragraph (2) of Permenneg BUMN 3/2012 states that: "The appointment of members of the board of directors and members of committees in subsidiaries is carried out by the subsidiary's GMS. The regulation regulates the appointment of directors and members of committees of SOE subsidiaries which is carried out by the subsidiary's GMS and not by the Minister of SOE. In this perception, it is clear that the legal status of SOE subsidiaries is not SOEs.

Based on the latest information, PTPN will undertake corporate actions by reducing its 14 subsidiary companies to 3 subsidiaries (SugarCo, PalmCo, and SupportingCo). Specifically, the consolidation results in 35 sugar factories, which were previously managed by PTPN II, VII, IX, X, XI, XII, and PTPN XIV. Starting from the year 2021, PTPN III has established the quasi-holding company SugarCo. SugarCo's mission is to revitalize the domestic sugar industry and increase domestic sugar production. Furthermore, PTPN V, VI, and XIII will merge to form PTPN IV, creating the quasi-holding company PalmCo. PalmCo aims to enhance productivity and performance in oil palm plantations and their processed products beyond the set targets. Additionally, a subsidiary holding company, SupportingCo, will be formed, incorporating PTPN II, VII, VIII, IX, X, XI, XII, and XIV, which will be merged into PTPN I. SupportingCo itself will become a leading plantation asset management company in Indonesia (Uly, 2023).

This reduction or simplification does not mean that employees will be laid off. In fact, in this case you can absorb more because the business can continue to grow.

Improved performance can be achieved through more efficient and effective operations related to corporate governance aspects. Efficient efforts will certainly be a better and more efficient performance of PTPN.

4. CONCLUSION

The principle of Piercing the Corporate Veil applies to the state that has a holding company of BUMN, in which case if the state performs actions / actions that harm the company directly, and the use of the company's assets becomes unauthorized, directly or indirectly resulting in the company's assets are insufficient to pay the company's debts. In other words, the principle of Piercing the Corporate Veil can be implemented and proven by the existence of control or controlling of subsidiaries carried out by the holding company as long as it concerns the actions covered by the principle of Piercing the Corporate Veil. If the conditions stipulated in Article 3 paragraph (2) UUPT have been fulfilled, then legal responsibility can not only be charged to the company but also to shareholders. The conditions that fulfill the element of piercing the corporate veil are the conditions as stipulated in Article 3 paragraph (2) of the Company Law. It is important to know that the application of the principle of Piercing the Corporate Veil can also be done even though the subsidiary only functions as a vehicle or tool for the holding company to pursue the personal interests of its shareholders.

When a State-Owned Enterprises (BUMN) becomes a subsidiary of a holding company, in this case, its position or legal status no longer remains that of a State-Owned Enterprise, whether in the form of a Public Corporation (Perum) or a Limited Liability Company (Persero). This is because the shares of the State-Owned Enterprise, which has become a subsidiary, no longer have legal status as a State-Owned Enterprise. Even though the State-Owned Enterprise, which has become a subsidiary, has lost its legal status as a State-Owned Enterprise, the government still retains ultimate authority over its supervision as it is a subsidiary of the holding company. This authority is indirectly held by the government through the State-Owned Enterprise, and the State-Owned Enterprise itself serves as the holding company, representing the government with a majority of shares in its subsidiaries.

There is an urgent need for refinement or amendment to the Company Law, especially regarding the clarity of regulations governing the relationship between the holding company and its subsidiaries within a holding company structure. This refinement should facilitate judges in making decisions, considering that the principles of justice emphasize swiftness, simplicity, and cost-effectiveness. The broadening of the concept of piercing the corporate veil should also be accompanied by strict sanctions for executives of the parent company proven guilty of actions detrimental to the subsidiary for the benefit of the parent company, causing potential harm to both the subsidiary and third parties. There should be clarity regarding the legal status of the independence of subsidiaries and the holding company's responsibility for its subsidiaries under the holding company structure. This is essential given the absence of specific regulations explicitly addressing these issues. It is hoped that such clarity can elucidate the aspects of the holding company's responsibility for the actions and legal affairs of its subsidiaries.

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