

THE LOSS OF STATE-OWNED ENTERPRISE (BUMN) AS NOT STATE LOSS IN SEPARATION PRINCIPLE PERSPECTIVE

Siska Ambarwati
Universitas Brawijaya, Indonesia
siskaambar232@gmail.com

Yuliati
Universitas Brawijaya, Indonesia
yuliaticholil@ub.ac.id

Hanif Nur Widhiyanti
Universitas Brawijaya, Indonesia
hanifnurwidhiyanti@gmail.com

Abstract

The study aims to analyze, first, the BUMN sub-holding loss as a state loss and secondly, the responsibility of the BUMN holding company for the BUMN sub-holding loss. There is a dualism in the conception of state assets that are separated from BUMN in Indonesian laws and regulations. The research methods was normative legal research with a statutory approach and a case approach. The shares of BUMN sub-holding don't come from the state but come from the BUMN and also the public. The capital investment which it does by the BUMN holding company to the BUMN sub-holding doesn't make the BUMN sub-holding become a BUMN. In the Group Company, the principle of a separate entity continues to apply which leads to the principle of limited liability holding as a subsidiary shareholder. However, if BUMN as the majority shareholder has the right to actively intervene and it is proven that there is control of the company, then the principle of piercing the corporate vision can be applied. So the BUMN holding company must be responsible for BUMN sub-holding because of the control carried out by these BUMN holding companies. The results show that the BUMN sub-holding loss isn't state loss.

Keywords: BUMN; Companies; Corruption; Finance; Holding; Loss; State.

A. INTRODUCTION

Indonesia adheres to the concept of a welfare state. The clause "promoting public welfare" as stated in the fourth paragraph of the Preamble to the 1945 Constitution indicates that the Unitary State of the Republic of Indonesia adheres to a welfare state system.¹ The conception of the welfare state assumes that the state is run to prosper all its people, which in practice is marked by the inclusion of the state in the economic

1 Constitutional Court Decision No. 48/PU-XI/2013, page. 106

activities of its people.² BUMN in Indonesia was born as the implementation of the political economy as mandated by Article 33 paragraphs (2) and (3) of the 1945 Constitution of the Republic of Indonesia.³ Article 33 paragraph (2) of the 1945 Constitution, states that sectors of production that are important for the country and affect the life of the people shall be under the powers of the State. And Article 33 paragraph (2) of the 1945 Constitution, states that the land, the waters and the natural resources within shall be under the powers of the State and shall be used to the greatest benefit of the people. With the existence of Article 33 paragraph (2) and paragraph (3) of the 1945 Constitution, it is a guarantee for the government to participate in the country's economy. The government's role will become more real if the government owns the company country.⁴

In its development, the right to control by the state has been manifested in the form of BUMN since the enactment of Act No. 19 of 2003 concerning State-Owned Enterprises (hereinafter referred to as the BUMN Law). The definition of BUMN in the BUMN Law is a business entity whose entire or most of its capital is owned by the state through direct participation originating from separated state assets. State assets that are separated from BUMN, by Act No. 17 of 2003 concerning State Finance (hereinafter referred to as the State Finance Law) is included in the definition and scope of state finance. Article 2 letter g of the State Finance Law states that the state finances include state/regional assets managed on its own or by other parties in the form of cash, securities, receivables, goods, and other rights that can be valued in money, including assets separated on state enterprise/local company. This gives rise to the dualism of the conception of state assets that are separated from BUMN in Indonesian laws and regulations. At first glance, it is emphasized that state assets that are separated into BUMN remain the property of the state, while in the second view, once the state separates its wealth to be used as equity participation in the BUMN, the relationship between state ownership and the wealth is severed and the wealth is transferred to BUMN.⁵

The BUMN runs a business like any other business entity, which aims to make a profit-oriented.⁶ In the capital provided by the State Budget to the BUMN, of course, it is always hoped that the finances can be returned

-
- 2 Merdiansa Papatungan, Diskursus Kewenangan Audit BPK terhadap Keuangan BUMN (Perseroan) Pasca Putusan MK Nomor 62/PUU-XI/2013, *Mimbar Hukum*, Volume 29 No. 3 October 2017, page. 432-443.
 - 3 M. Iqbal Asnawi, Implikasi Pengelolaan BUMN Persero dalam Kerangka Welfare State Berdasarkan Mekanisme Perseroan Terbatas, *Jurnal Hukum Samudra Keadilan*, Volume 2 No. 1 January-June 2016, page. 126-144.
 - 4 Frans Affandhi, *Business Judgment Rule* Dikaitkan dengan Tindak Pidana Korupsi yang Dilakukan oleh Direksi Badan Usaha Milik Negara terhadap Keputusan Bisnis yang Diambil, LL.M. Thesis, Sumatera Utara University, 2015, page. 20
 - 5 Bayu Novendra & Aulia Mutiara Syifa, Miskonsepsi Pembebanan Tanggung Jawab kepada Direksi Badan Usaha Milik Negara dalam Jerat Tindak Pidana Korupsi", *Sasi*, Volume 26 No. 4 October-December 2020, page. 458-473.
 - 6 Sartika Nanda Lestari, Business Judgment Rule sebagai Immunity Doctrine bagi Direksi Badan Usaha Milik Negara di Indonesia, *Notarius*, Volume 8 No. 2 September 2015, page. 302-315.

and returned to the state treasury. Thus, the BUMN which is the center of efforts to improve the economy will increase the company's activities.⁷ One of them is the establishment of a BUMN sub-holding whose capital is obtained from the BUMN as the holding company. A holding company or commonly called a holding company whose main task is to invest in the sub-holding and subsequently supervise the activities of managing sub-holding.⁸ The holding company is a company in the form of a limited liability company that carries out the central leadership of the group company.⁹

The BUMN sub-holding is a limited liability company most of whose shares are owned by a BUMN or a limited liability company controlled by a BUMN.¹⁰ Similar to the BUMN where most of their capital comes from the state (APBN), the BUMN sub-holding obtain most of their capital from the BUMN assets. As a holding company, the BUMN certainly plays an active role in regulating and controlling the operations of subsidiaries. Therefore, when a BUMN subsidiary suffers a loss, the loss is also considered a state loss.

As happened in the decision of the Supreme Court Number 121 K/Pid.Sus/2020. Karen Agustiawan as the Upstream Director of PT. Pertamina (2008-2009 period) and also as the President Director of PT. Pertamina (Persero) became a defendant in the alleged corruption case of BUMN capital investment in Basker Manta Gummy (BMG) Australian Block in 2009. According to Drs Soewarno's Public Accounting Firm, Karen's actions have cost the state IDR 568,066,000,000.

The Jakarta Corruption Court sentenced Karen Agustiawan to 8 years in prison and fines of IDR 1 billion, subsidiary to 4 months in prison. At the cassation stage, the Supreme Court called Karen's decision a business judgment rule and not a crime. According to the cassation panel, the decision of the directors in a company activity can't be bothered by anyone even though the decision ultimately causes losses to the company.¹¹ In the judge's consideration, it was also stated that the losses were suffered by PT. Pertamina Hulu Energi is a subsidiary of PT Pertamina (Persero) were not real state losses and as the Constitutional Court Decision Number 01/PHPU-Pres/XVII/2019 dated 27 June 2019 stated that "the BUMN equity participation in the BUMN sub-holding does not turn the sub-holding into BUMN".¹²

7 Lugis Anfi, Implikasi Putusan Mahkamah Konstitusi tentang Kedudukan Hukum Anak Perusahaan BUMN terhadap BUMN, Bachelor Thesis, Institut Agama Islam Negeri (IAIN) Salatiga, 2020, page. 17.

8 Ahmad Yani & Gunawan Widjaja, *Seri Hukum Bisnis Perseroan Terbatas*, Raja Grafindo Persada, Jakarta, 2008, page. 153

9 Sulistiowati, *Aspek Hukum & Realitas Bisnis Perusahaan Grup di Indonesia*, Penerbit Erlangga, Jakarta, 2010, page. 1

10 Regulation of the Minister of State for State-Owned Enterprises Number: PER-03/MBU/2012 concerning Guidelines for Appointing Members of the Board of Commissioners of Subsidiaries of State-Owned Enterprises

11 Andrian Pratama Taher, March 10th, 2020, Available on Website: *MA Vonis Bebas eks Dirut Pertamina Karen Agustiawan*, <https://tirto.id/ma-vonis-bebas-eks-dirut-pertamina-karen-agustiawan-eD27>, Accessed November 6th, 2020.

12 Decision No. 121 K/Pid.Sus/2020, page. 37

Many studies related to the BUMN sub-holding especially about the status of BUMN sub-holding. The status of BUMN sub-holding is very important to know so that when the subsidiary losses, it will be clear who will be responsible for the loss, including: first, Inda Rahadiyan¹³ tried to review the position of BUMN company as a separate law entity about financial separation state on the capital of BUMN. The results of his research are BUMN Persero as a separate legal entity is entitled to have its assets that are separated from the assets of its management including the personal assets of its shareholders. Second, in the context of BUMN, the inclusion of state assets into the capital of BUMN is a result of separating the BUMN assets as regulated in Act No. 19 of 2003 about BUMN. And the third, BUMN along with its subsidiaries is an independent legal entity in which its management must be done by certain rules (good corporate governance) without any interference from any parties.

Second, the idea conveyed by Julio Julio Thimotius Kapitan Smaud Natun¹⁴ with the theme of BUMN subsidiary ownership status. Based on the theory and legal doctrine of the company, BUMN company is an independent legal entity. So, BUMN capital from state assets should be interpreted as BUMN wealth, separate from state wealth. BUMN takes an active role in controlling the BUMN subsidiary. So, with this control, it can be proven that the responsibility of BUMN towards BUMN subsidiary is not limited, therefore it can be said that BUMN subsidiary is not owned by the State.

Third, the idea conveyed by Rizal Choirul Ramadhan¹⁵ with the theme is the legal position of BUMN as a subsidiary of the holding company. This study concludes that BUMN is a subsidiary of the holding company, the status is not BUMN. Subsidiary shares do not come from the state but come from the BUMN which is the parent company. Even though the BUMN subsidiary no longer has status as BUMN, the state/ government still has the authority to supervise the BUMN subsidiary. This authority represents the State/government that owns the majority of the subsidiary's shares.

The primary difference between the three previous studies and this research is that this study purpose is to find out and analyze about due to the dualism of the conception of state assets that are separated from the BUMN in Indonesian laws and regulations, there are differences in perceptions regarding equity participation in the BUMN sub-holding. The BUMN as a legal entity receives state capital participation as separated state assets, while equity participation in the BUMN sub-holding comes from the BUMN holding company. As a result, if there is a loss to the BUMN sub-holding, it is considered a state loss. This will cause problems and the

13 Inda Rahadiyan, Kedudukan BUMN Persero sebagai *Separate Legal Entity* dalam Kaitannya dengan Pemisahan Keuangan Negara pada Permodalan BUMN, *Ius Quia Iustum*, Volume 20 No. 4 October 2013, page. 624

14 Julio Thimotius Kapitan Smaud Natun, Status Kepemilikan Anak Perusahaan BUMN, *Mimbar Keadilan*, Volume 12 No. 1 February-July, page. 11-12

15 Rizal Choirul Ramadhan, Kedudukan Hukum Badan Usaha Milik Negara Sebagai Anak Perusahaan Dalam Perusahaan Holding Induk, *Media Iuris*, Volume 4 No. 1 February 2021, page. 88-89

absence of legal certainty for the community as well as the criminalization of the BUMN directors if there is a loss to the BUMN sub-holding.

B. RESEARCH METHODS

This paper used a form of normative research.¹⁶ The approach used was the statutory approach and case approach. The statutory approach was used to review laws and regulations¹⁷. It was carried out by examining all laws and regulations related to the researched problem, while the author examines the Supreme Court Decision Number 121 K/Pid.Sus/2020 for the case approach. Primary legal materials were legal materials that binding and authoritative. The primary legal materials in this study include Act No. 19 of 2003 concerning State-Owned Enterprises, Act No. 17 of 2003 concerning State Finance, Act No. 40 of 2007 concerning Limited Liability Companies, Act No. 31 of 1999 in conjunction with Act No. 20 of 2001 concerning the Crime of Corruption, Act No. 1 of 2004 concerning State Treasury, Supreme Court Decision Number 21 P/HUM/2017, Supreme Court Decision Number 121 K/Pid.Sus/2020, Constitutional Court Decision Number 01/PHPU-Pres/XVII/2019. Meanwhile, secondary legal materials include literature related to the legal issues studied which come from books, comprehensive manuscripts, scientific works in the form of journals, articles, legal expert opinions, and the internet. Legal material search techniques used document study techniques, and study analysis used qualitative analysis.

C. RESULT AND DISCUSSION

1. Loss of BUMN Sub-Holding is Not State Loss

The BUMN Law defines the BUMN as a business entity whose capital is wholly or most of the capital owned by the state through direct participation originating from separated state assets. Furthermore, Article 4 paragraph (1) of the BUMN Law explains that capital originating from the BUMN comes from separated state assets. The expression of separated state assets in the BUMN Law has always been a debate in the conception of state finances because, in the State Finance Law, state assets that are the capital of BUMN are included in the scope of state finances. If state assets in the BUMN are seen as state assets in a broad sense, then the consequence is the possibility of state intervention in the management of the BUMN for example, the criminalization of the BUMN directors if there is a loss in the management of the BUMN.

Arifin P. Soeria Atmadja's opinion can be seen from the formulation of state finances contained in Article 2 letters g, h, and i. In Article 2 letter g, state finances that have been separated, especially in the form of shares, should have the legal status of the money no longer being state finances but has turned into private money, meaning that it

16 Johny Ibrahim, *Teori & Metode Penelitian Hukum Normatif*, Bayumedia, Malang, 2012, page.57

17 Peter Mahmud Marzuki, *Penelitian Hukum*, Kencana, Jakarta, 2008, page. 93

is subject to Act No. 40 of 2007 concerning Limited Liability Companies.¹⁸ This is by the doctrine in legal entities, namely the separation of wealth and owning one's wealth.

When the state invests in companies with good corporate governance principles, there is a possibility of business risk as a result of managing the company. Business risk can occur at any time despite applying the principles of Good Corporate Governance, good faith, fiduciary duty, self-dealing transactions. If the company earns a profit, it earned in the form of dividends will be deposited into the APBN or used for business development. However, if the company suffers losses as a result of making business decisions, even though the company's organs do not commit acts against the law, it can turn into a criminal act of destroying state assets (corruption), then this is an act against the law, injustice, as well as legal uncertainty for corporate organs.¹⁹

The definition of state losses is contained in several laws in Indonesia, namely the State Treasury Law, the Corruption Eradication Law, and the BPK Law. In the State Treasury Law and the BPK Law, there is the same understanding of state losses. The State Treasury Law and the BPK Law explain that "State losses are shortages of money, securities, and goods, which are real and definite in amount as a result of unlawful acts, either intentionally or due to negligence".²⁰ Meanwhile, according to the Law on the Eradication of Criminal Acts of Corruption, it is explained that "State financial losses can be interpreted by defining them as state finances, namely state financial losses are losses of all state assets in any form, separated or not separated, including all parts there of state assets and all rights and obligations arising from being controlled, managed, and accounted for by officials of state institutions, both at the central and regional levels, the BUMN/BUMD, foundations, legal entities, and companies that are included in the state capital or companies that enter third party capital based on agreements with the state."²¹

Act No. 31 of 1999 in conjunction with Act No. 20 of 2001 concerning the Eradication of Criminal Acts of Corruption, 2 articles contain elements of "harming state finances" namely articles 2 and 3.

Article 2 of the corruption law reads that:

"Anyone who illegally commits an act to enrich oneself or another person or a corporation, thereby creating losses to the state finance or state economy, is sentenced to life imprisonment or minimum imprisonment of 4 (four) years and a maximum of 20 (twenty) years, and fined to a minimum of IDR 200,000,000,- (two hundred million Rupiahs) and to a maximum of IDR 1,000,000,000,- (one billion Rupiahs)."

18 Arifin P. Soeria Atmadja, *Keuangan Publik dalam Perspektif Hukum: Teori, Praktik, & Kritik*, Third Edition, Rajawali Press, Jakarta, 2010, page. 77

19 Tami Rusli, Tanggungjawab Organ BUMN dalam Pengelolaan Kekayaan BUMN Dikaitkan dengan hak Negara sebagai Pemegang Saham, *Pranata Hukum*, Volume 14 No.1 January 2019, page. 2

20 Article 1 number 22 of Act No. 1 of 2004 concerning the State Treasury

21 General Explanation of Act No. 31 of 1999 concerning the Eradication of Corruption Crimes

Article 3 of the corruption law reads that:

Anyone to enrich oneself or another person or a corporation, abuses the authority, opportunity, or facilities given to him related to his post or position, which creates losses to the state finance or state economy, is sentenced to life imprisonment or a minimum sentence of 1 (one) year and a maximum sentence of 20 (twenty) years or the minimum fine of IDR 50,000,000,- (fifty million Rupiahs) and a maximum fine of IDR 1,000,000,000,- (one billion Rupiahs).

Whereas the formulation of the two articles shows that there is an element of "creates losses to the state finance or state economy" as a result of the following actions:

- a. Illegally commits an act to enrich oneself or another person or a corporation; and
- b. The benefit oneself or another person or a corporation, abusing the authority, opportunity, or means available to him because of his position or position.

The element against the law in a corruption case is an important and decisive thing for the existence of a criminal act of corruption that must be accounted for, both official responsibility and personal responsibility. The consequences of personal liability are related to criminal liability.²²

The details of state losses are inseparable from state financial losses in the fields of criminal law, private law, and administrative law. State losses can occur within the scope of criminal law, private law, and administrative law. The act of harming state finances is a "criminal act", the principle being measured is "the existence of a formal act that violates the law" and the material consequence of a real and definite state financial loss, which can be calculated with a value.²³ In the context of criminal law, a fault is one of the main elements in addition to acts against the law and must be fulfilled so that as a legal subject a criminal act can be convicted. According to Sudarto, it is not enough to punish someone if that person has committed an act that is against the law. Applies or what is called "the principle of no crime without fault" (Keine Strafe Ohne Schuld or Geen Straf Zonder Schuld or nulla poena sine culpa), culpa in a broad sense also includes intentional.²⁴ In the context of criminal law, for the loss to the state to become a crime, then as formulated by Simons, a crime includes:

- a. threatened with a criminal act;
- b. against the law;
- c. committed by the guilty person;

22 Abdul Latif, Tafsir Hakim terhadap Unsur Melawan Hukum Pasca Putusan MK atas Pengajuan UU PTPK, *Jurnal Konstitusi*, Volume 7 No. 3 June, page. 49

23 Yos Johan Utama, *Memahami & Menghindari Perbuatan Merugikan Keuangan Negara Dalam Tindak Pidana Korupsi & Pencucian Uang*, Thafamedia, Yogyakarta, 2015, page. 62-63

24 Sudarto, *Hukum & Perkembangan Masyarakat*, Sinar Baru, Bandung, 1983, page. 85.

- d. the person is considered responsible for his actions.²⁵

The concept of state losses in private law is the result of:

- a. Acts against the law (*onrechtmatigedaad*);
- b. Violating the contract (*default*); and
- c. There is a state of compulsion beyond human control (*overmacht*).²⁶

Meanwhile, state losses in the administrative law are losses that must refer to legality and authority²⁷, which can lead to abuse of authority and cause the state losses.

BPK clearly distinguishes between BUMN losses due to business risks and reduced BUMN wealth due to unlawful acts. The losses that arise due to unlawful acts are called state losses, while the BUMN losses due to business risks are called business losses.²⁸ A company's losses are based on transactions in one financial year, not transactions in six months, or three months, or one transaction.²⁹

BUMN as a legal entity has the characteristics of assets that are separate from the assets of the owners and managers. The separated state assets are used as capital for the establishment of the BUMN company. Separated state assets are sourced from the State Budget (APBN) whose participation is realized in the form of shares.³⁰ The shares that have been purchased are then managed to support the business activities of BUMN by referring to corporate principles.³¹ So, if BUMN gets a loss, it's not a state loss but the BUMN loss.

If the capital of BUMN company is obtained from direct state participation originating from separated state assets, it's different with BUMN sub-holding. The shares of BUMN sub-holding don't come from the state but they come from the BUMN company and also the public.³²

25 Andi Hamzah, *Asas-Asas Hukum Pidana*, Revision of Third Edition, PT Rineka Cipta, Jakarta, 2008, page. 88.

26 D.Y. Witanto, *Dimensi Kerugian Negara Dalam Hubungan Kontraktual (Suatu Tinjauan Terhadap Risiko Kontrak Dalam Proyek Pemerintahan barang/Jasa Instansi Pemerintah)*, Cetakan Pertama, CV Mandar Maju, Bandung, 2012, page. 72

27 Suhendar, *Konsep Kerugian Keuangan Negara: Pendekatan Hukum Pidana, Hukum Administrasi Negara, & Pidana Khusus Korupsi*, Cetakan Pertama, Setara Press, Malang, 2015, page. 153

28 Information from BPK, Decision of the Constitutional Court of the Republic of Indonesia Number 62/PUU-XI/2013, page. 201

29 Erman Rajagukguk, *Perlindungan Hukum Terhadap Risiko Pengambilan Keputusan Yang Diambil Oleh Direktur & Komisaris*, paper presented at the Discussion Panel "Governance and Risk of Criminalization: Cases in the Telecommunications Industry" organized by the Indonesian Institute of Commissioners and Directors (LKDI), in Jakarta, 30 April 2014, page. 28-29

30 Ridwan Khairandy, *Korupsi di Badan Usaha Milik Negara Khususnya Perusahaan Perseroan: Suatu Kajian atas Makna Kekayaan Negara yang Dipisahkan & Keuangan Negara*, *Ius Quia Iustum* Volume 16 No. I January 2009, page. 76

31 Afida Ainur Rokfa, et. all, *Kedudukan Hukum Kekayaan BUMN Persero dalam Pelaksanaan Sita Umum Akibat Kepailitan*, *Jurnal Ilmu Kenotariatan*, Volume 1 No.1 February 2020, page.37

32 Julio Thimotius Kapitan Smaud Natun, *Op.cit.*, page. 2

When the BUMN sub-holding is formed and the BUMN includes the capital, this participation from the BUMN as the holding company doesn't come from the state but comes from BUMN in the form of a limited liability company as a legal entity that has assets separate from shareholders.³³ So, if the BUMN sub-holding gets the loss, it's not state loss. Although, the capital of the BUMN sub-holding comes from BUMN company whose capital is obtained from separated state assets.

The author's agreement with the judge's consideration in the Supreme Court Decision Number 121 K/Pid.Sus/2020 which states that the loss of PT. Pertamina Hulu Energi which is a PT. Pertamina sub-holding, not state loss. The loss of PT. Pertamina Hulu Energi is a fluctuation in asset value (impairment) in the books/records according to financial accounting standards. And in the Constitutional Court Decision, Number 01/PHPU-Pres/XVII/2019 states that BUMN equity participation in BUMN sub-holding will not change the status of a BUMN sub-holding to a BUMN.³⁴ And in this case, there was no act against the law and bad intentions (*mens rea*). Karen Agustawan's actions were purely a business decision to develop PT. Pertamina is trying to increase oil and gas reserves.

2. Responsibility of BUMN Holding Company for BUMN Sub-Holding Loss

A company is said to be the controller for another company if the company has more than half of the values of the total shares or by the composition that has been determined by agreement.³⁵

A business group generally has a parent company which name is a holding company whose purpose is to control shares or management of the company it owns or controls. In the business group, there are two relationships, namely:

- a. A subsidiary company, the name of subsidiaries whose percentage of shareholding by the parent company is the majority, generally exceeding 50% of the subsidiary's shares. The power control by the holding company includes the authority to determine policies that are considered important for the company.
- b. An affiliated company, which is a company whose share ownership is controlled by another company, but in general the percentage of share ownership of the parent company exceeds 50% of the subsidiary's shares.³⁶

To optimize the economy and maintain an open existence and competitive condition, its existence in an open and competitive condition, BUMN as one of the economic pillars to carry out its activities

33 *Ibid*, page. 6

34 Decision No. 121 K/Pid.Sus/2020, page. 37

35 Stephen W. Mayson, Derek French, & Christopher Ryan, *Company Law*, sixth edition, Blackstone Press limited, London, 1989, page. 28.

36 Zaeni Ashyhadie & Budi Sutrisno, *Hukum Perusahaan & Kepailitan*, Erlangga, Jakarta, 2012, page. 154

can form a subsidiary or sub-holding company.³⁷ To meet the community's need for petroleum materials and increase state income as well as support the creation of added value for the company through the synergy of several companies and the company's efforts to achieve a competitive advantage that exceeds other companies,³⁸ PT. Pertamina as one of the BUMN enterprises in Indonesia also has several sub-holding.

Pertamina's business activities in the upstream sector which are managed by the upstream directorate include exploration, drilling, development, and production of oil, gas, and geothermal, providing technology services, as well as drilling services and services both domestically and abroad. Not only that, but the upstream sector also carries out a merger and acquisition (M&A) strategy for oil and gas blocks domestic and abroad. One of PT. Pertamina sub-holding that perform merger and acquisition function is PT. Pertamina Upstream Energy (PT. Pertamina Hulu Energi). Therefore, in the judge's consideration in the Supreme Court's decision Number 121 K/Pid.Sus/2020 it was stated that the losses of PT Pertamina Hulu Energi is a sub-holding of PT. Pertamina was a company, not a real state loss and as stated in the Constitutional Court Decision Number 01/PHPU-Pres/XVII/2019 say that " BUMN equity participation in BUMN sub-holding will not change the status of a BUMN sub-holding to a BUMN."³⁹

In Article 1 number 2 of the Regulation of the Minister of BUMN 3/2012 concerning Guidelines for Appointing Members of the directors and commissioners of State-Owned Enterprises Subsidiaries (hereinafter referred to as Regulation 3/2012) it is emphasized that BUMN sub-holding are limited liability companies whose shares are mostly owned by BUMN or limited liability company controlled by BUMN.⁴⁰ Based on the regulation, it is explained that the shares in the BUMN sub-holding come from BUMN and also the public, but it is still unclear about the status of the BUMN sub-holding.

The explanation regarding the legal certainty of the BUMN sub-holding position is contained in the Supreme Court Decision Number 21 P/HUM/2017 which is a Supreme Court decision that has permanent and definite legal force regarding the review of Government Regulation Number 72 of 2016 concerning Amendments to Government Regulation Number 44 of 2005 concerning Procedures for State Equity Participation and Administration in State-Owned Enterprises (BUMN) and Limited Liability Companies, the Supreme Court thinks that BUMN which is BUMN sub-holding it's still BUMN company. It doesn't turn into ordinary

37 Julio Thimotius Kapitan Smaud Natun, *op.cit.*, page. 1

38 Sulistiowati, *op.cit.*, page. 24

39 Decision No. 121 K/Pid.Sus/2020, page. 37

40 Regulation of the Minister of State-Owned Enterprises Number 3 of 2012 concerning Guidelines for Appointing Members of the Board of Directors and Members of the Board of Commissioners of Subsidiaries of State-Owned Enterprises

Limited Liability Companies.⁴¹ BUMN that became a subsidiary of the BUMN holding company turned into a limited liability company because state ownership through the holding company was still recognized by giving special rights so that control over BUMN sub-holding could still be carried out by the state through BUMN so that BUMN sub-holding could get special assignments.⁴² In addition, it was also stated that "...the ownership of the shares owned is still in the hands of the state through the BUM holding...". The description explains that the majority of shares in the BUMN sub-holding are owned by BUMN as the holding company. Although the majority of shares come from BUMN funds, the source of BUMN wealth still comes from the state.

However, the existence of BUMN sub-holding is firmly rejected as stated in the Constitutional Court's decision Number 01/HPU-PRES/XVII/2019. Constitutional Court Decision Number 01/PHPU-Pres/XVII/2019 dated 27 June 2019 is the Constitutional Court's Decision on the lawsuit of the presidential-vice presidential candidate Prabowo Subianto-Sandiaga Uno regarding the results of the 2019 Presidential Election when Ma'ruf Amin's position as Chairman of the Supervisory at Bank Mandiri Syariah and BNI Syariah is disputed. The Constitutional Court stated that a BUMN sub-holding cannot be defined as a BUMN, but is still a BUMN sub-holding (limited liability company) because it was established through investment in shares owned by BUMN.

The Constitutional Court has the authority to examine laws against the Constitution, this is stated in Article 24C paragraph (1) of the 1945 Constitution of the Republic of Indonesia. In addition, the Constitutional Court's decision is final and binding on both cassation and judicial review. This decision must be respected and implemented by the government and other state institutions as well as society in general related to the decision.⁴³ The Constitutional Court's decision is declaratory, so whether it is implemented or not by the Government or the DPR or MA depends on the political will of the institution.⁴⁴ In addition, the Constitutional Court's decision is also final and binding in general (*erga omnes*) and the same as the law (*negative legislator*).⁴⁵ Meanwhile, the authority of the Supreme Court is to examine statutory regulations under the Act against the Act by Article 24A of the 1945 Constitution of the Republic of Indonesia. According to Mahfud MD, the Constitutional Court and the Supreme Court have a cross of authority in examining legislation because

41 Aria Dipura, 2020, *Tinjauan Hukum Mengenai Status Anak Perusahaan BUMN*, Available on Website: <https://www.ybp-law.com/tinjauan-hukum-mengenai-status-anak-bumn/>, Accessed April 28th, 2021.

42 Supreme Court Decision No. 21P/HUM/2017

43 Ni'matul Huda, Problematika Pengaturan Tindak Lanjut Putusan mahkamah Konstitusi dalam Perkara Pidana oleh Mahkamah Agung, *Ius Quia Iustum*, Volume 21 No. 3 October 2020, page. 442

44 Ni'matul Huda, *Perkembangan Hukum Tata Negara Perdebatan & Gagasan Penyempurnaan*, FH UII Press, Yogyakarta, 2014, page. 62.

45 Budi Suhariyanto, Masalah Eksekutabilitas Putusan mahkamah Konstitusi oleh Mahkamah Agung, *Jurnal Konstitusi*, Volume 13 No. 1 March, page. 174

both have the same authority in the examination of the Act although with different levels.⁴⁶

Article 11 of the BUMN Law explains that all provisions and principles that apply to limited liability companies apply in the BUMN Law as regulated in Act No. 1 of 1995 concerning Limited Liability Companies which has now been updated to become Act No. 40 of 2007 concerning Limited Liability Companies. One of the characteristics of a limited liability company is the existence of limited liability for shareholders, directors, and commissioners. In this case, for every act committed by a limited liability company as a legal entity, only the legal entity itself is responsible. Shareholders are not responsible, except to the extent of the value of the shares entered.⁴⁷

However, to increase the enforcement of justice and prevent injustice (to promote justice and to prevent inequity) in certain circumstances and certain events, the principle of separation of the company from the shareholders, on a case-by-case basis, needs to be removed by breaking through walls or protection, which is called piercing the corporate veil or shifting/lifting the veil.⁴⁸

The loss or elimination of the limited liability protection of shareholders is stated in Article 3 paragraph (1) of the limited liability corporate law. The exception to the doctrine of limited liability of shareholders in corporate law is called the doctrine of piercing the corporate veil. The principle of piercing the corporate veil can also be applied to companies in the business group in the relation between the parent company and its subsidiaries.⁴⁹ Normally, the problems of Group Companies still apply based on the principle of a separate entity which leads to the principle of limited liability holding as a subsidiary shareholder. However, in the group of companies, where the subsidiary:

Capitalized by Holding, so that the Subsidiary is really under the holding's capital and under capitalizes:

- a. In the under-capitalized state, the Subsidiary is not independent of the existence of the economy and the company
- b. The subsidiary only acts a role and works as an agent in conducting the holding business.

Thus, in the case of such a group company, the holding company or the parent company is responsible for the debts of the subsidiary company. In such a case, where the subsidiary company is dominated and used as a tool by the holding company, then the holding should be responsible for the subsidiary's debts because it has become an alter ego for the holding company. The implementation of the elimination of a limited liability, so that the responsibility is redeemed to the holding

46 *Ibid*, page. 175

47 Munir Fuady *Hukum Perusahaan*, Citra Aditya Bakti, Bandung, 2008, page. 125

48 Yahya Harahap, *Hukum Perseroan Terbatas*, Sinar Grafika, Jakarta, 2019, page. 76

49 Miranda Chairunnisa, et. all, Pertanggungjawaban Perusahaan Induk terhadap Perusahaan Anak dalam Hal Terjadinya Pencemaran dan/atau Kerusakan Lingkungan Hidup, *USU Law Journal*, Volume 2 No. 2 November 2013, page. 35

company by the principle of piercing the corporate veil, based on reasons of justice and propriety.⁵⁰

BUMN supervises the subsidiary as the holding company. The Subsidiary is a separate but consolidated entity in the BUMN as the holding company.⁵¹ BUMN company uses a financial reporting system with an annual report with a consolidated system, namely by combining financial statements between the holding company and the subsidiary company.⁵²

The role of the holding in a company decision can occur when the directors of a subsidiary are under the control and shadow of the majority/controlling shareholder so that business decisions made in bad faith can ensnare shareholders or the holding company with the principle of piercing the corporate veil.⁵³

BUMN as the majority shareholder has the right to intervene actively, not just passive shareholders. In this case, the principle of piercing the corporate vision can be applied and applied if it can be proven by the control of the holding company over the subsidiary. So that BUMN must be responsible for BUMN sub-holding because of the control carried out by this BUMN.⁵⁴ The Strategic Operational Arm implementation was carried out by PT. Pertamina to PHE caused PHE as a legal entity to be no longer independent. The limited liability held by PHE is ruled out based on the Piercing The Corporate Veil principle. PT. Pertamina based on the Strategic Operational Arm can be held responsible for the investment of the subsidiary.⁵⁵

D. CONCLUSION

Based on the analysis, then it can be concluded are: first, the BUMN sub-holding loss isn't state loss. The shares of BUMN sub-holding don't come from the state but come from the BUMN and also the public. When the BUMN sub-holding is formed and the BUMN includes the capital, this participation from the BUMN as the holding company doesn't come from the state but comes from BUMN in the form of a limited liability company as a legal entity that has assets separate from shareholders. So, the opinion of the judges in Supreme Court Decision Number 121 K/Pid.Sus/2020 which states that the loss of PT. Pertamina Hulu Energi is a sub-holding of PT.

50 Yahya Harap, *Op.cit.*, page. 82

51 Henny Juliani, Kedudukan Kekayaan Negara yang Dipisahkan pada Badan Usaha Milik Negara (BUMN), *Masalah-masalah Hukum*, Volume 45 No. 4 July 2016, page. 289

52 Tina Amelia, Tanggung Jawab Terbatas Induk Perusahaan BUMN terhadap Anak Perusahaan BUMN Pra & Pasca Putusan Mahkamah Konstitusi Nomor 01/PHPU-PRES/XVIII/2019 tahun 2019, *Sol Justicia*, Volume 3 No. 2 December 2020, page. 117

53 Parameshwara, Kriminalisasi terhadap Direksi dalam Pengurusan Perseroan Terbatas, Ph.D. Thesis, Sumatera Utara University, 2017, page. 333

54 Munir fuady, *Op.cit.*, page. 66.

55 Rochmad Abu Bakar, Analisis Yuridis Tanggung Jawab Direksi Holding Badan Usaha Milik Negara atas Kerugian Investasi Anak Perusahaan Badan Usaha Milik Negara dalam Kaitannya dengan Kerugian Negara (Studi Kasus: Investasi PT. Pertamina melalui PT. Pertamina Hulu Energi di Australia), LL.M. Thesis, Gajah Mada University, 2019, page. 122

Pertamina is not a state loss is in accordance with the theory of corporate law. Second, the Group Company still applies the principle of a separate entity which applies to the principle of limited liability as a shareholder. However, the limited liability principle can be removed if the subsidiary only acts a role and works as an agent in conducting the holding business as happened in the Supreme Court Decision Number 121 K/Pid.Sus/2020 where PT. Pertamina Hulu Energi is a sub-holding of Pertamina representing PT. Pertamina in the investment project of state-owned oil companies in Australia's Basker Manta Gummy (BMG) Block in 2009, the principle of piercing the corporate veil can be applied so that BUMN holding must be responsible for BUMN sub-holding because of the control carried out by these BUMN holding company.

BIBLIOGRAPHY

Books:

- Ahmad Yani & Gunawan Widjaja, 2008, *Seri Hukum Bisnis Perseroan Terbatas*, Raja Grafindo Persada, Jakarta;
- Andi Hamzah, 2008, *Asas-Asas Hukum Pidana*, Revision of Third Edition, PT Rineka Cipta, Jakarta;
- Arifin P. Soeria Atmadja, 2010, *Keuangan Publik dalam Perspektif Hukum: Teori, Praktik, & Kritik*, Third Edition, Rajawali Press, Jakarta;
- D.Y. Witanto, 2012, *Dimensi Kerugian Negara Dalam Hubungan Kontraktual (Suatu Tinjauan Terhadap Risiko Kontrak Dalam Proyek Pemerintahan barang/Jasa Instansi Pemerintah)*, Cetakan Pertama, CV Mandar Maju, Bandung;
- Johny Ibrahim, 2012, *Teori & Metode Penelitian Hukum Normatif*, Malang, Bayumedia;
- Munir Fuady 2008, *Hukum Perusahaan*, Citra Aditya Bakti, Bandung;
- Ni'matul Huda, 2014, *Perkembangan Hukum Tata Negara Perdebatan & Gagasan Penyempurnaan*, FH UII Press, Yogyakarta;
- Peter Mahmud Marzuki, 2008, *Penelitian hukum*, Kencana, Jakarta;
- Sudarto, 1983, *Hukum & Perkembangan Masyarakat*, Sinar Baru, Bandung
- Suhendar, 2015, *Konsep Kerugian Keuangan Negara: Pendekatan Hukum Pidana, Hukum Administrasi Negara, & Pidana Khusus Korupsi*, Cetakan Pertama, Setara Press, Malang;
- Stephen W. Mayson, Derek French, & Christopher Ryan, 1989, *Company Law*, sixth edition, Blackstone Press Limited, London;
- Sulistiowati, 2010, *Aspek Hukum & Realitas Bisnis Perusahaan Grup di Indonesia*, Jakarta, Penerbit Erlangga;
- Yahya harahap, 2019, *Hukum Perseroan Terbatas*, Sinar Grafika, Jakarta;

Yos Johan Utama, 2015, *Memahami & Menghindari Perbuatan Merugikan Keuangan Negara Dalam Tindak Pidana Korupsi & Pencucian Uang*, Thafamedia, Yogyakarta;

Zaeni Ashyhadie & Budi Sutrisno, 2012, *Hukum Perusahaan & Kepailitan*, Erlangga, Jakarta;

Journals:

Abdul Latif, Tafsir Hakim terhadap Unsur Melawan Hukum Pasca Putusan MK atas Pengajuan UU PTPK, *Jurnal Konstitusi*, Volume 7 No. 3 June 2010;

Afida Ainur Rokfa, et. all, Kedudukan Hukum Kekayaan BUMN Persero dalam Pelaksanaan Sita Umum Akibat Kepailitan, *Jurnal Ilmu Kenotariatan*, Volume 1 No. 1 February 2020;

Bayu Novendra & Aulia Mutiara Syifa, Miskonsepsi Pembebanan Tanggung Jawab kepada Direksi Badan Usaha Milik Negara dalam Jerat Tindak Pidana Korupsi, *Sasi*, Volume 26 No. 4 October-December 2020;

Budi Suhariyanto, Masalah Eksekutabilitas Putusan Mahkamah Konstitusi oleh Mahkamah Agung, *Jurnal Konstitusi*, Volume 13 No. 1 March 2016;

Henny Juliani, Kedudukan Kekayaan Negara yang Dipisahkan pada Badan Usaha Milik Negara (BUMN), *Masalah-masalah Hukum*, Volume 45 No. 4 July 2016;

Inda Rahadiyan, Kedudukan BUMN Persero sebagai *Separate Legal Entity* dalam Kaitannya dengan Pemisahan Keuangan Negara pada Permodalan BUMN, *Ius Quia Iustum*, Volume 20 No. 4 October 2013;

Julio Thimotius Kapitan Smaud Natun, Status Kepemilikan Anak Perusahaan BUMN, *Mimbar Keadilan*, Volume 12 No. 1 February-July 2019;

M. Iqbal Asnawi, Implikasi Pengelolaan BUMN Persero dalam Kerangka Welfare State Berdasarkan Mekanisme Perseroan Terbatas, *Jurnal Hukum Samudra Keadilan*, Volume 2 No. 1 January-June 2016;

Merdiansa Papatungan, Diskursus Kewenangan Audit BPK terhadap Keuangan BUMN (Perseroan) Pasca Putusan MK Nomor 62/PUU-XI/2013, *Mimbar Hukum*, Volume 29 No. 3 October 2017;

Miranda Chairunnisa, et. all, Pertanggungjawaban Perusahaan Induk terhadap Perusahaan Anak dalam Hal Terjadinya Pencemaran dan/atau Kerusakan Lingkungan Hidup, *USU Law Journal*, Volume 2 No. 2 November 2013;

Ni'matul Huda, Problematika Pengaturan Tindak Lanjut Putusan Mahkamah Konstitusi dalam Perkara Pidana oleh Mahkamah Agung, *Ius Quia Iustum*, Volume 21 No. 3 October 2020;

RidwanKhairandy, Korupsi di Badan Usaha Milik Negara Khususnya Perusahaan Perseroan: Suatu Kajian atas Makna Kekayaan Negara yang

Dipisahkan & Keuangan Negara, *Ius Quia Iustum* Volume 16 No. I January 2009;

Rizal Choirul Ramadhan, Kedudukan Hukum Badan Usaha Milik Negara Sebagai Anak Perusahaan Dalam Perusahaan Holding Induk, *Media Iuris*, Volume 4 No. 1 February 2021;

Sartika Nanda Lestari, Business Judgment Rule sebagai Immunity Doctrine bagi Direksi Badan Usaha Milik Negara di Indonesia, *Notarius*, Volume 8 No. 2 September 2015;

Tami Rusli, Tanggungjawab Organ BUMN dalam Pengelolaan Kekayaan BUMN Dikaitkan dengan hak Negara sebagai Pemegang Saham, *Pranata Hukum*, Volume 14 No.1 January 2019;

Tina Amelia, Tanggung Jawab Terbatas Induk Perusahaan BUMN terhadap Anak Perusahaan BUMN Pra & Pasca Putusan Mahkamah Konstitusi Nomor 01/PHPU-PRES/XVIII/2019 tahun 2019, *Sol Justicia*, Volume 3 No. 2 Desember 2020;

Research:

Frans Affandhi, *Business Judgment Rule* Dikaitkan dengan Tindak Pidana Korupsi yang Dilakukan oleh Direksi Badan Usaha Milik Negara terhadap Keputusan Bisnis yang Diambil, LL.M. Thesis, Sumatera Utara University, 2015;

Lugis Anfi, Implikasi Putusan Mahkamah Konstitusi tentang Kedudukan Hukum Anak Perusahaan BUMN terhadap BUMN, Bachelor Thesis, Institut Agama Islam Negeri (IAIN) Salatiga, 2020;

Parameshwara, Kriminalisasi terhadap Direksi dalam Pengurusan Perseroan Terbatas, Ph.D. Thesis, Sumatera Utara University, 2017;

Rochmad Abu Bakar, Analisis Yuridis Tanggung Jawab Direksi Holding Badan Usaha Milik Negara atas Kerugian Investasi Anak Perusahaan Badan Usaha Milik Negara dalam Kaitannya dengan Kerugian Negara (Studi Kasus: Investasi PT. Pertamina melalui PT. Pertamina Hulu Energi di Australia), LL.M. Thesis, Gajah Mada University, 2019;

Paper:

Erman Rajagukguk, Perlindungan Hukum Terhadap Risiko Pengambilan Keputusan Yang Diambil Oleh Direktur & Komisaris, paper presented at the Discussion Panel "Governance & Risk of Criminalization: Cases in the Telecommunications Industry" organized by the Indonesian Institute of Commissioners & Directors (LKDI), in Jakarta, 30 April 2014;

Internet:

Dipura, Aria., 2020, *Tinjauan Hukum Mengenai Status Anak Perusahaan BUMN*, Available on Website: <https://www.ybp-law.com/tinjauan-hukum-mengenai-status-anak-bumn/>, Accessed April 28th, 2021;

Taher, Andrian Pratama., March 10th. 2020, Available on Website: *MA Vonis Bebas eks Dirut Pertamina Karen Agustiawan*, <https://tirto.id/ma-vonis-bebas-eks-dirut-pertamina-karen-agustiawan-eD27>, Accessed November 6th, 2020;

Regulation:

Act No. 1 of 2004 concerning the State Treasury (State Gazette of the Republic of Indonesia of 2004 Number 5, Supplement to the State Gazette of the Republic of Indonesia Number 4355);

Act No. 17 of 2003 concerning State Finances (State Gazette of the Republic of Indonesia of 2003 Number 59, Supplement to the State Gazette of the Republic of Indonesia Number 4286);

Act No. 19 of 2003 concerning State-Owned Enterprises (State Gazette of the Republic of Indonesia of 2003 Number 70, Supplement to the State Gazette of the Republic of Indonesia Number 4297);

Act No. 20 of 2001 concerning Amendments to Amendments to Act No. 31 of 1999 concerning Eradication of Criminal Acts of Corruption (State Gazette of the Republic of Indonesia of 2001 Number 134, Supplement to the State Gazette of the Republic of Indonesia Number 4150);

Act No. 40 of 2007 concerning Limited Liability Companies (State Gazette of the Republic of Indonesia of 2007 Number 106, Supplement to the State Gazette of the Republic of Indonesia Number 4756);

Constitution of 1945 Republic of Indonesia;

Constitutional Court Decision Number 48/PUU-XI/2013;

Decision Number 121 K/Pid.Sus/2020.

Decision of the Constitutional Court of the Republic of Indonesia Number 62/PUU-XI/2013 concerning Material Testing Article 2 letter g and letter i of Act No. 17 of 2003 concerning State Finance; and Article 6 paragraph (1), Article 9 paragraph (1) letter b, Article 10 paragraph (1) and paragraph (3) letter b, and Article 11 letter a of Act No. 15 of 2006 concerning the State Audit Board;

Regulation of the Minister of State-Owned Enterprises Number 3 of 2012 concerning Guidelines for Appointing Members of the Board of Directors and Members of the Board of Commissioners of Subsidiaries of State-Owned Enterprises.

Supreme Court Decision Number 21P/HUM/2017;