



The board of Directors accountability in managing state-owned enterprises in Indonesia

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Abstract

State Ownership Enterprise management in Indonesia has private law aspects and public law aspects because there is state finance aspect at SOEs capital. SOEs directors have risks in making business decisions that make SOEs not competitive than private companies. This research describes the concept of state financial management and management of SOEs so as to know the boundary between SOE losses caused by business risk and corrupt acts of the SOEs Directors. This research is a normative legal research that using legislation approach and conceptual approach. The data are secondary data. Data analysis using analytical descriptive method. The directors of SOEs use the principle of Business Judgment Rule doctrines which stipulates that the Board of Directors is not responsible for any loss caused by a business decision making action, if the action by the Board of Directors is based on the good and caution.

Keywords: business judgment rule, company, director, state ownership enterprise, state revenue and expenditure budget

1. Introduction

The provisions of Indonesia Constitution Chapter VIII formulates the financial matters, the realization of the implementation of the mandate of Article 23 of the 1945 Constitution is the promulgation of Indonesia Law No. 17 of 2003 on State Finances, Indonesia Law No. 1 of 2003 on State Treasury, Law No. 15 of 2004 on Audit of State Financial Management and Accountability and Law No. 15 Year of 2006 on the State Audit Board.

The provisions of the State Finance Law formulate the meaning of state finances are all rights and obligations of the state that can be assessed with money, as well as everything in the form of money or in the form of goods that can be made state property due to the implementation of these rights and obligations, which include the right of the state to levy tax, issuing and circulating money, and making loans; the state's obligation to carry out the public service task of the state government and to pay the third party's invoices, state revenues, state expenditures, regional revenue, regional expenditures, state property / regional wealth managed solely or by others in the form of money, securities, accounts receivable, other rights which may be valued by money, including property which is separated from a state / regional company, the wealth of other parties controlled by the government in the context of the administration of governmental and / or public affairs, the wealth of other parties obtained by using the facilities provided by the government^[1].

The provisions of the State Treasury Law to define the meaning of the state treasury are the management and

accountability of state finances, including separated investment and wealth, set out in the state revenue and expenditure budget (APBN) and regional revenue and expenditure budgets (APBD)^[2]. The audits of state financial management and responsibility carried out by Audit Board of the Republic of Indonesia (BPK) cover all elements of state finance^[3].

The State Audit Board is charged with auditing state financial management and accountability by the Central Government, Regional Government, other State Institutions, Bank Indonesia, State-Owned Enterprises, Public Service Bodies, Regional Government Enterprises, and other agencies or bodies managing state finances^[4]. The effort of saving the state finances through the broad definition of state finance arrangements, ideally would be very promising for the efforts to save the state finances from deviations, but becomes a problem, when correlated with other laws and regulations. Establishment and ratification of Law Number 19 of 2003 on State-Owned Enterprises has created a contradictory climate and raises a polemic of state financial status within the State-Owned Enterprise both in terms of ownership and management and supervision.

Separation of state assets from the State Revenue and Expenditure Budget to be used as state equity participation in SOEs, for subsequent development and management is no longer based on the State Budget system, but on the principles of a healthy company by following the governance and

¹ Article 2 Law No. 17 of 2003 on State Finances.

² Article 1 paragraph (1) Law No. 1 of 2004 on State Treasury.

³ Article 3 paragraph (1) Law No. 15 of 2004 on Audit of State Financial Management and Accountability.

⁴ Article 6 paragraph (1) Law No. 15 of 2006 on the State Audit Board.

provisions in the Act Number 40 Year 2007 regarding Limited Liability Company. Thus, the State Revenue and Expenditure Budget (APBN) also includes State Budget projects managed by state-owned enterprises and / or state receivables to state-owned enterprises which are used as state equity participation. The regulation of state finance status within State-Owned Enterprises (SOEs) in the package of the State Finance Law and the Law on State-Owned Enterprises and Limited Liability Company Law shows significant differences regarding ownership claims, management and financial audits in state-owned enterprises. The State, on the one hand, wants to save the state's finances in the state-owned corporation of corruption and misuse in its management, but on the other hand SOEs (Persero) are faced with efforts to further promote SOEs (Persero) through a sound SOE mechanism, according to the principles of Good Corporate Governance (GCG). SOE mechanisms with various policies and breakthroughs contain two possibilities of extraordinary progress or loss of transactions made on a business judgment. This is a problem because the directors of SOEs will be afraid to take decisions so that SOE management cannot run properly. Therefore, parameters are needed to distinguish between management of state-owned enterprises and business judgment so that the directors of SOEs can make good decisions in the management of SOEs.

2. Methodology

This research is a normative legal research that discusses the norms of responsibility of directors in the management of BUMN related to the aspect of Limited Liability Company and state finance aspect. The approach used is the approach of legislation and conceptual approach. The legislation approach is used in the discussion of accountability of prevailing laws and regulations, including SOE Law, State Finance Law, Corporate Law and Anticorruption Law. The data were collected in the form of secondary data such as legislation through library research. Data analysis using analytical descriptive method that describes the concept of state financial accountability as well as accountability of the management of SOEs to further linked the accountability of SOE management that impact on the state finances

3. Literature Review

3.1 State property in capitalized state-owned enterprises (SOEs)

The Law on State-Owned Enterprises explicitly affirms the enactment of all the provisions and principles of the company as stipulated in the Company Law for the Institutional of State-Owned Enterprises. However, when the provisions of the SOE Law are juxtaposed with the provisions of the State Finance Law that categorize the 'wealth of state enterprises as part of the state finances'. This provision seems to provide legitimacy for the state to intervene on the management of state-owned company which is actually an independent legal entity. SOEs capital comes from state assets separated from State Revenue and Expenditure Budget (APBN), so the management of SOEs is not bound to the state budget system or state financial system. With his position as a state-owned company can perform their duties independently and professionally. State assets that are deposited as state-owned

capital belong to SOEs, because as a legal entity SOEs own property own. The wealth of SOEs is separated from the founders' wealth as well as the wealth of the SOEs management^[5].

Article 1 Law No. 40 of 2007 on Limited Liability Companies explains the definition of Limited Liability Company is a Business Entity in the form of legal entity which is a partnership of capital, established under the agreement, conduct business activities with the authorized capital wholly divided into shares and meet the established requirements in this law and the rules of the Executor. This business activity is a legal entity, so this type of business has separate powers with its shareholders. Limited Liability Company is a legal entity. In accordance with the characteristics of legal entities is the separation of wealth meaning that a legal entity has its own wealth. Legal Entity is a human or artificial person, that is, human form a body having same status, position, and authority as human being^[6].

Separation of wealth of Limited Liability Company is a legal entity that has its own wealth and wealth of the company has been separated with the wealth of its shareholders^[7]. Separation of wealth gives impact to its shareholders in the case of limited liability if a time of loss occurs. Shareholders are responsible only to the shares they own. In principle, which is responsible for the activities undertaken by the company as a legal entity^[8]. SOEs as Limited Liability Company, related to the implementation of national development priority in infrastructure, Government Regulation on Investment has set about it. SOEs play a very important role in the economy of the Indonesian nation. SOE establishment is a manifestation of the role of the State as one of the economic actors in Indonesia and has an important role in the implementation of the national economy in order to realize the welfare of society.

The formation of SOE is also an act of civil law of Negera Indonesia as a public legal entity, so that at the same time the State of Indonesia as a public legal entity shall be subject to and apply to it civil law norms or private legal functions, which the State did. The state is required to be equal to ordinary members of society, and can be sued and sued in public court. It indicates that SOE is a legal entity formed by State public legal entity, by fulfilling one of the important requirement terebentuknya a legal entity, which has a separate wealth, in which is meant separated is the separation of state assets from SOEs for subsequent coaching and management is no longer based on the state budget system, but its guidance and management is based on sound corporate principles. States can become shareholders in a Limited Liability Company through SOEs as regulated in Article 1 number 1 of the SOE Law explaining the meaning of SOEs ie business entities in whole or in part capital is owned by the state through direct inclusion derived from separated state assets.

⁵ Gatot Supramono, *BUMN Ditinjau Dari Segi Hukum Perdata*, Rineka Cipta, Jakarta, 2016, p. 13.

⁶ Ridwan Khairandy, *Hukum Perseroan Terbatas*, FH UII PRESS, Yogyakarta, 2014, p. 2.

⁷ Adrian Sutedi, *Buku Pintar Hukum Perseroan Terbatas*, Raih Asa Sukses, Jakarta, 2015, p. 16.

⁸ Munir Fuady, *Perseroan Terbatas Paradigma Baru*, PT. Citra Aditya Bakti, Bandung, 2008, p.8.

Thus SOE is a company whose majority shareholder is the State. The purpose of SOEs is generally the same as the companies in general, that is to achieve a profit. The profits derived by SOEs themselves will be included in State property, as revenue from the State.

3.2 Risk of Decision-Making Taken By the Director

3.2.1 Business Judgment Rules Principle as A Reason for Rejection and Duty of Care (Obligation to Be Careful)

Businesses use the principle of the Business Judgment Rule as a justification when they are charged and charged with a criminal act of corruption. While the principle of Business Judgment Rule actually aims to protect the Board of Directors of any business decisions, either loss or profit, which is a transaction of a company by fulfilling the principles of prudence and good faith for the benefit of the company. The Business Judgment Rule is one of the existing doctrines in corporate law which stipulates that the Board of Directors is a company that is not responsible for any loss caused by a business decision-making action, if such action by the Board of Directors is based on sound judgment and caution. Thus the principle of Business Judgment Rule is that the Board of Directors of SEO get legal protection, so there is no need to justify the shareholders or the court for their decision in managing the company.

Based on the principle of Business Judgment Rule, business considerations by the board of directors can not be challenged or disputed or rejected by the court or by shareholders. The members of the Board of Directors shall not be held liable for the consequences arising from having taken a business consideration by the members of the Board of Directors concerned, even though such considerations are erroneous, except in certain other respects. The Principle of Business Judgment Rule is implicitly accommodated in Article 92 and Article 97 of Company Law explained in Article 92 paragraph 1 that in executing the management of a company by the Board of Directors, which is intended for the interest of the company, which must be in accordance with the wishes, intentions, objectives of the company. And contained in Article 92 paragraph 2 is explained in exercising its authority, the Board of Directors shall have the right and authority to execute the appropriate management of the Company's existing policy, and in accordance with the basic budget of the company and the Limited Liability Company Law.

Article 97 paragraph 1 that the management accountability of the company by the Board of Directors which has been described in article 92 paragraph 1 Limited Liability Company Law. And Article 97 paragraph 2 of the Limited Liability Company Law explains every member of the Board of Directors in the stewardship must implement it in good faith and responsibility. And article 97 paragraph 3 of the Law of Limited Liability Company that if there is a loss in the company due to the result of errors and negligence of the Board of Directors in carrying out its duties, then every member of the Board of Directors shall bear responsibility and personally in solving the problem.

State-Owned Enterprises in the form of Limited Liability Companies often suffer huge losses due to the decision of the Board of Directors. This decision of the Board of Directors can be viewed as a policy for the progress of a State-Owned

Enterprise. However, due to the presence of capital in the (limited state) of the Limited Liability Company, therefore law enforcers may assume that it can be said to be a criminal act of corruption. What should law enforcers be able to sort out the causes that occur in the loss of a SOE.

In the event of a state loss arising in a SOE, it is purely from the business risk itself, whose decision is taken with the principle of prudence and good faith. Therefore, in the settlement should be able to use the principle of Business Judgment Rule and can be said not as a criminal act of corruption. Basic consideration that can be taken with the principle of Business Judgment Rule is that not every decision taken by the Board of Directors provides benefits for the company. In reality, in the activity or business world there is profit and loss obtained by the company in its business activity. Nevertheless, the Board of Directors in making its decisions or committing other crimes is basing only for the company (no personal interest) with the principle of prudence and good faith.

Board of Directors as the management of SOE in the form of Limited Liability Company. The Board of Directors of a Limited Liability Company may consist of one or more persons, depending on the Company's operational requirements. Exceptions to the Company in its effort to collect, manage funds, and issue letters of credit, and the Public Company. The mandatory has at least 2 members of the Board of Directors.

There is a division of duties and authority of the Board of Directors whose members consist of 2 or more persons as determined on the basis of the resolution of the General Meeting of Shareholders. In the event that the General Meeting of Shareholders is unable to determine the distribution and authority of such task, the members of the Board of Directors shall determine themselves on the basis of a decision of the Board of Directors. There are duties and responsibilities of the Board of Directors that is to run the Company's management. Although the management is exercised by the Board of Directors in its sole discretion in good faith and responsibility, it shall remain within the limits prescribed by the Law and its Articles of Association.

In executing the Management of the Company, the Board of Directors as the Board of Directors may authorize in writing to the employees of the Company to engage in certain legal acts in the name of the Company. Referred to as the management of the Company, the Board of Directors may represent the Company in court or out of court. It is the authority of the Board of Directors indefinitely and unconditionally, as long as its authority is not in conformity with the applicable Laws and Articles of Association and also the resolutions of the General Meeting of Shareholders. If the number of members of the Board of Directors is more than one person, then the person who has the authority to represent the Company is each member of the Board of Directors. With the exception of the other defining Basic Fundamentals, such as the Articles of Association that determine only the President Director who has the authority. The members of the Board of Directors do not possess the authority to represent the Company within the Court for disputes between the Company and the members of the Board of Directors concerned. This is not valid if the member of the Board of

Directors has a conflict of interest with the company. Under these conditions, eligible to represent the company are other members of the Board of Directors or if all members of the Board of Directors have a conflict of interest, then the authority is exercised by the board of commissioners.^[9]

The Board of Directors in the Law on State-Owned Enterprise Article 1, paragraph 9, namely: "The Board of Directors is an organ of State-Owned Enterprises which is responsible for the management of State-Owned Enterprises for the interests and purposes of State-Owned Enterprises, as well as representing State-Owned Enterprises both inside and outside the court." Furthermore Article 5 of the SOE Law stipulates that the management of SOEs shall be carried out by the Board of Directors who is fully responsible for the management of SOEs for the interests and purposes of SOEs as well as representing BUMNs, both inside and outside the court. In performing its duties, members of the Board of Directors must comply with the articles of association of SOE and the laws and regulations and shall implement the principles of professionalism, efficiency, transparency, independence, accountability, accountability, and fairness.

Whereas in the Anticorruption Law mentioned only Article 1 paragraph (1) is: "The corporation is a collection of people and or wealth that is organized either a legal entity or non-legal entity". And Article 1 paragraph (3) Anticorruption Law meaning of each person's word is an individual or including a corporation. The Board of Directors may be personally liable to be eligible for any loss arising out of error or negligence. The existence of errors or negligent by the board of directors viewed from the formalities of the action, in accordance with the laws and regulations of the company^[10].

The application of the principle of Business Judgment Rule in Limited Liability Company Law, its mutatis mutandis is valid to the board of commissioners as stipulated in Article 114 and Article 115 of Limited Liability Company Law. Nevertheless, in theory the Business Judgment Rule Principle is unknown to the Board of Commissioners because the common law system embraces single board officer, the management and supervision is done by the chief officer of the company.

In managing the SOE also needed general principles which is a ground idea and should be the frame of reference as a barrier in any financial management of SOEs, in order to be accountable from various aspects of the law. The principles of common law are also used as a basis for realizing good corporate governance, clean corporation and good corporate managers^[11]. This is because the state-owned corporation manages the state's finances, although according to Article 4 paragraph (1) of the SOE Law, declares the capital of SOE is and is derived from separated state assets. However, because the definition of state finances based on the general explanation of the Anticorruption Law, the SOE capital is qualified as a definition of state finances as stipulated in the Law, so that if the cause of losses in its management can be categorized as detrimental to state finances. The main duty of

the director is to the company as a whole not to shareholders either individually or in groups, in accordance with the position of a director as a trustee within the company. This position requires a director not to act carelessly in doing his duty (duty of care)^[12]. In performing his duties a director shall not take advantage for himself upon the enterprise (duty of loyalty)^[13]. Violation of both principles in relation to fiduciary duty may cause the director to be held personally liable for his actions^[14].

Any policy, practice or procedure of financial management activities or property of the State conducted by a corporation or a Legal Entity, which is a Business Judgment Rule that causes a loss to the company may be detrimental to the state as well, so it can be categorized as a criminal act of corruption. Although in this case the application of Anticorruption Law is not premium remedium (first attempt) but more ultimate remedium oriented (last resort). From the above explanation can be explained again that the principle of Business Judgment Rule can be used as a justification reason is the removal of the nature of the law against the action so that what has been done or done by the defendant can be said to be the right and proper deeds. If viewed in terms of the chronology of the case examples that the judges judge.

3.2.2 Personal Responsibility of the Director of Limited Liability Company

The provisions of Article 1 Sub-Article 5 of the Limited Liability Company Law are defined as the duties of the Board of Directors of the Company described in Article 92 Paragraph (1), (2) of the Limited Liability Company Law and Article 97 Paragraph (2) of the Limited Liability Company Law when the Board of Directors represents the Company, both inside and outside the court, the task of representation whereas when the directors take care of the Company by exercising the leadership of the Company, referred to as the management task. The Board of Directors in carrying out the out-of-court repa- ration include contracting or business transactions with third parties, representing the Company to sign the contract, representing the Company to meet with state officials and many others. Represent the Company in and out of court may be conducted in the following manner by itself, by the employee appointed to it, commissioner if the Board of Directors is unable, in accordance with Company Statue or performed by a third party as an agent of the Company. In performing its duties the Board of Directors may ask others to represent it. Such representation may be provided to internal parties of the Company as well as to external parties of the Company^[15]. In the representative therein shall apply the principle of agency or agency. One of them is the delegare nonpotest delegate, that is, someone who has received a certain assignment assignment can not delegate the task

⁹ M. Yahya Harahap, *Hukum Perseroan Terbatas*, Sinar Grafika, Jakarta, 2009, p. 54.

¹⁰ Asyhadie, Zaeni, *Hukum Kerja: Hukum Ketenagakerjaan Bidang Hubungan Kerja*, PT. Raja Grafindo Persada, Jakarta, 2007, p. 102.

¹¹ Marwan Effendy, *Penerapan Perluasan Ajaran Melawan Hukum dalam Undang-Undang Tindak Pidana Korupsi*, Dictum, Jakarta, 2005, p.17

¹² Denis Keenan & Josephine Biscare, *Smith & Keenan's Company Law For Students*, Financial Times, Pitman Publishing, 1999, p. 317.

¹³ Joel Seligman, *Corporations Cases and Materials*, Little Brown and Company Boston New York Toronto London, 1995, p. 112.

¹⁴ Philip Lipton dan Abraham Herzberg, *Understanding Company Law*, Brisbane, The Book Law Company Ltd, 1992, p. 342.

¹⁵ Munir Fuady, *Doktrin-doktrin Modern dalam Corporate Law dan Eksistensinya dalam Hukum Indonesia*, Citra Aditya Bakti, Bandung, 2010, p. 59.

without the knowledge of the first party delegating the task. Therefore, if the Board of Directors asks a person to assist in carrying out his duties, the person shall not assign the duties of the Board of Directors without the permission of the Board of Directors concerned. For the management of the Company, the Board of Directors is in charge of the day-to-day activities. Management by the Board of Directors is limited by Article 92 paragraph (2) of the Limited Liability Company Law, which in that article states that the authority of the management of the Company by the Board of Directors in accordance with the appropriate policies as determined in the Limited Liability Company Statute and the laws and regulations. Stewardship of directors can be distinguished into *beheren deeds* and actions *beschickking* or *van eigendom deeds*.

The extent of authority and responsibility of the board of directors of a Company so that the board of directors must perform its duties with good faith and full of responsibility. The Board of Directors as the manager of the Company is the holder of the fiduciary of the shareholders. Fiduciary owned by directors causes directors to have a very high authority. Therefore, a director is required to be able to have the care and ability (duty of care and skill), good faith, loyalty and honesty to his company with a high degree (high degree).

The Board of Directors in carrying out the task of handling and representing the Company in court and outside court must be fully responsible for the interest of the Company is called fiduciary duty executed by the Board of Directors by means of goodwill (*bona fides*), proper purpose, freedom of responsibility (unfettered discretion) and has no conflict of duty and interest^[16]. The Board of Directors' good intentions can be seen when the Board of Directors is really concerned with the interests of the Company, shareholder and stakeholder, Proper purpose (right objectives) run by Company Statute, law and public interest.

A director will not be held liable for misconduct of judgment, when the board of directors performs his duty in good faith and with great care. The judge in this case is not allowed to conduct a business assessment in the form of a second guess of business decisions taken by the board in accordance with the business decision theory (business judgment rule). Although every decision taken by the Board of Directors is protected by the business judgment rule, the Board of Directors must remain in good faith, with caution and full loyalty in running the management of the Company.

3.2.3 Ultra Vires (Exceeding the Authority of the Company)

Ultra vires are applied to activities prohibited by Company Statute and acts that go beyond the authority granted by Company Statute and the laws and regulations as well as actions that are contrary to prevailing regulations and public order. Basically any act of ultra vires is null and void because the act has no juridical basis, the Company does not have the authority of either the Company Statute or the applicable laws and regulations. The demand for justice causes some actions classified in ultra vires not to be canceled, as follows: (a)

Restitution of return of transferred assets with ultra vires transactions is unlikely to be returned; (b) The Company has been compensated against any losses incurred by such ultra vires transaction; (c) The cancellation of the transaction shall be prejudicial to the rights acquired free of any third party in good faith outside the contract; and (d) Transactions containing such ultra vires have been ratified by the GMS or by resolutions of shareholders.

According to Sutan Remi Syahdeni, mistake is deliberate, while negligence (*culpa*) there are three levels of *culpa lata* or heavy negligence, *levis culpa* or fair negligence, and *levissima culpa* or minor negligence. In Article 104 paragraph (2) of the Limited Liability Company Law does not explain what kind of negligence has resulted in the Board of Directors being personally responsible for the Bankruptcy of the Company it leads. Thus, the Board of Directors shall be held accountable for its performance regardless of such incident or serious negligence. According to Sutan Remi Syahdeni, the Board of Directors of the Company in performing its duties is only responsible if its negligence is gross negligence^[17].

The Board of Directors may also be subject to Article 1365 and 1366 of the Civil Code. The two articles are the basis of a person to be subject to the principle of unlawful acts (*onrechtmatige daad*), which affirms that a person who violates the law in this case the Limited Liability Company Law and Company Statute shall have the obligation to indemnify the disadvantaged party due to his carelessness or negligence. According to Purnadi Purwacaraka, a Board of Directors may be said to have committed an act against the law because the director deliberately committed an act that caused harm to others or intentionally kept silent, while he already knew that he had to do an act not to harm others as a civil deviation. In addition to being liable by civil cases, the negligence or errors of such directors may also be imposed with criminal provisions through Article 398 and Article 399 of the Criminal Code^[18].

Briefly, Article 398 of the Indonesian Criminal Code explains that directors and commissioners may be sentenced to imprisonment for one year and four months if directors and commissioners cause damage to the Company or other parties. Whereas according to Article 399 of the Criminal Code, directors and commissioners may be subject to imprisonment for seven years if the person making a fraud by reducing the rights of creditors and negligent in making the bookkeeping as required in the articles of association and legislation.

4. Discussion

4.1 Management of SOEs

State-owned Enterprise (SOE) management is based on the principles applicable to a limited liability company, the company's organ is not responsible to the minister but to the GMS. The role of the minister only existed at the time of the first appointment of corporate organs. The legal status of SOE and Limited Liability Company as a private or other private legal entity is the same as a limited liability company, the

¹⁶ Ridwan Khairandy, *Perseroan Terbatas*, Total Media Yogyakarta, Jogjakarta, p. 209.

¹⁷ Remi Sutan Syahdeni, *Hukum Kepailitan Memahami Undang-Undang Nomor 37 Tahun 2004 tentang Kepailitan*, Pustaka Utama Grafiti, Jakarta, 2010, p. 349.

¹⁸ Indonesia Criminal Code.

legal status of SOEs shareholder is the same as the legal status of Limited Liability Company as a private legal entity or private legal entity in the form of Limited Liability Company, namely as subject of private law, as the object of dispute is civilization and broken his promise.

The legal status of SOE and Limited Liability Company as a private legal entity shall encompass the state finance either in whole or in part in the conduct of unlawful acts or misuse of authority including against private law (broken promise) and unlawful in the sense of maladministration, namely the existence of a factual act or action committed by a defendant as the director of a state-owned enterprise (Persero) is contrary to the laws and regulations and misuses the authority "can harm the state finance" or "state economy" in practice is categorized as a criminal act of corruption^[19].

The act of corruption as an act that harms the state can not only be based on the essence of following its formal deed formulation, ie, "against the law of enriching oneself or others, or a corporation." but more important and fundamental to the material formula, namely "harm the state finances". this "state loss" element is always identified with "state finances". the possibility of a corruption act involving a corporation in a limited liability company (Persero), whose shares are, among others, state-owned, means to formally challenge the law and enrich itself, another person or a corporation. However, such act is materially harmless to the state's finances because the position and legal status of the company is no longer the state's finance, but the company's own finances, in which the government as its shareholder has the same legal standing as the other private shareholders^[20].

The provisions of Article 1 number 1 and number 2 of the SOE Law indicate the definition of the SOE itself as a company and the state, the aims and objectives of the establishment of state enterprises by the state are (a) contributes to the development of the national economy in general and the state revenue in particular; (b) the pursuit of profit; (c) to administer public benefit in the form of the provision of goods and / or services of high quality and sufficient for the fulfillment of the livelihood of the public; (d) be a pioneer of business activities that can not be implemented by the private sector and cooperatives; and (e) participate actively in providing guidance and assistance to entrepreneurs of economically weak, cooperative, and community groups^[21]. SOEs as corporations, obviously in accordance with the above provisions are companies whose capital is owned by the state through direct participation, but in law enforcement practices against state-owned enterprises in Indonesia there are still pros and cons if the crime of state-owned enterprises persero associated with corruption crimes that determine the element of state loss is one of the constitutive elements of a corrupt act^[22].

The participation of state capital in the framework of establishment or participation in SOEs whose capital is

sourced from State Revenue and Expenditure Budget (APBN) shall be stipulated by Government Regulation. The existence of differences in the role of the state, represented by the government, as a private legal entity within the Limited Liability Company, the Limited Liability Company losses caused by irregularities and the company as well as corruption can not be called as detrimental to the state, as regulated in the Anticorruption Law^[23].

In practice there are some legal aspects of state losses in the Limited Liability Company, if associated with state finance it can be seen the purpose of state finances narrowly defined and the meaning of state finances in a broad sense. Law enforcement today, there are often differences in interpretation of the definition of state finances, namely understanding in a broad sense and narrow^[24]. State finances in the narrow sense include only the management of state finances subfields of fiscal management and more specifically the management of the State Revenue Budget (APBN). If based on the formulation, state finance is all aspects covered in the state budget proposed by the government to the Parliament each year. In other words, the state budget is a description of state finances in a narrow sense so that the supervision of the state budget is also the oversight of state finances. The meaning of state finances in the broad sense of the approach is from a very broad-range of objects, wherein the state's finances include policies and activities in the fiscal, monetary and management of disposable state assets or finances derived from the State Revenue Budget (APBN), the Revenue Budget Regional Expenditure (APBD), and finances coming from State Business Units or State-Owned Enterprises.

The above financial interpretation can be seen from the systematic approach of management and accountability aspects, but also must pay attention to the interests of all people, in accordance with the concept of the modern legal state. Given the development of the conception of a modern legal state is a blend of concepts of state law and the welfare state. This concept is the task of the state or government not merely as a security guard or public order alone, but assumes the responsibility of realizing social justice, public welfare and for the greatest prosperity of the people^[25]. Governments in a welfare state are required to play a wider and more active role, as the scope of people's welfare is widespread and encompasses various aspects of life. The task of the government through such SOEs as *bestuurzorg* known as public service or the implementation of public welfare conducted by the government^[26]. Lawmakers may not regulate all rights, obligations and interests in a complete legislation.

According to Romli Atmasasmita, the most important mechanism in the Limited Liability Company Law is the obligation of the Board of Directors to hold the Annual General Meeting of Shareholders or if it is deemed necessary by the extraordinary General Meeting of Shareholders, as well

¹⁹ Article 1 paragraph (3) Law No. 37 Year 2008 About Ombudsman of the Republic of Indonesia.

²⁰ Arifin P. Soeria Atmadja, *Keuangan Publik Dalam Prespektif Hukum, Teori, Kritik dan Praktik*, Rajawali Pers, Jakarta, 2009, p. 103.

²¹ Article 2 paragraph (1) Law No. 19 of 2003 on State Owned-Enterprises.

²² Article 2 and Article 3 Law No. 31 of 1999 and Law No. 20 of 2001 on Anticorruption.

²³ Abdul Latif, *Hukum Admintrasi Dalam Praktik Tindak Pidana Korupsi*, Prananda Media Group, 2014, p. 250.

²⁴ Article 23 Indonesia Consitution 1945.

²⁵ Bagir Manan, *Politik Perundang-undangan Dalam Rangka Mengantisipasi Liberalisme Perekonomian*, FH-UNILA, Bandar Lampung, 1996, p. 16.

²⁶ Utrecht, E., *Pengantar Hukum Tata Usaha Negara Indonesia*, NV Bali Buku Indonesia, Jakarta, 1957, p. 22-23.

as the obligation of the Board of Directors to perform its duties properly and shall comply with the General Meeting of Shareholders except as permitted under the Limited Liability Company Law ^[27]. The provisions of Article 155 of the Limited Liability Company Law can be prosecuted in accordance with the Anticorruption Law, the criminal prosecution of a corporation is possible because it has received the proceeds of corruption or used as a means to commit a criminal act of corruption. In corporation relations with corruption, which must be proven is a state financial loss that has a causal relationship with the actions of the corporation.

Discussing the actions of the corporation can not be separated from civil liability as well as criminal liability. State finance shall be declared as all state assets in any form, separated or not separated, including the property of the state and all rights and obligations arising from being in the control, administration and accountability of state officials at both central and regional levels. To understand the provision, it is necessary to interpret what the meaning of the mastery, the meaning of the management and the meaning of the accountability of the state.

4.2 Concept of State Ownership in SOEs

The concept of state control can be seen from the provisions of Article 33 of the 1945 Constitution, which is closely related to several theories of state power, according to Van Vollenhoven, the State as the highest organization of a nation authorized to regulate everything and the State based on its position has the authority for the rule of law.

While according to J.J. Rousseau states that the power of the State as a body or people's organization derives from the result of a community agreement (social contract) whose essence is a form of unity that defends and protects the collective power, personal power and property of each individual. The State in this case is seen as having the character as an institution of the general public, so that it is given the authority or power to organize, manage and maintain (supervise) the full utilization of all natural resource potentials within its territory intensively.

Its relationship with the right of state control with the greatest prosperity of the people will realize the obligations of the state as follows (a) All forms of utilization (earth and water) and the yields (natural resources), must significantly enhance the prosperity and welfare of the people, (b) protect and guarantee all the rights of the people contained in or on earth, water and certain natural resources which can be produced directly or enjoyed directly by the people; and (c) prevent any action of any party which would cause the people not to have a chance or to lose their rights in the enjoyment of natural resources ^[28].

These three obligations explain all guarantees for the purpose of the state's right of control over natural resources which also gives an understanding that in the right of control, the state only performs *bestuursdaad* and processing (*beheersdaad*), not to conduct ownership (*eigensdaad*).

Based on the above concept of mastery it turns out these formulas contain several elements of the same. The definition of state ownership rights is the state through which the government has the authority to determine the use, utilization and right of natural resources in the scope of organizing, managing, managing and overseeing the management and utilization of natural resources. Therefore, to the natural resources that are important for the state and to control the livelihood of the people, as it relates to public utilities and public services, it must be state-acknowledged and run by the government. Because of these natural resources, must be enjoyed by the people in fairness, affordability, in a fair and equitable atmosphere of prosperity and public welfare.

4.3 Concept of State Finance Management

State finances in a broad sense include state rights and obligations that can be assessed with money, including state property not covered by the state budget. Meanwhile, state finances in the strictest sense are limited to state rights and obligations that can be assessed with money, including state property listed in the state budget for the year ^[29]. The purpose of the strict separation of the state financial substance in a broad sense with the substance of state finances in the narrow sense that there is uniformity of understanding. In essence, state finances in the narrow sense is a part of state finances in a broad sense. In relation to the state, state finances in the narrow sense constitute the state budget of income and expenditure or state budget. The substance of state finances in the strict sense is different from the substance of state finances in the broad sense so that they can not be equally juridical. Thus, the substance of state finances in the narrow sense is only directed to the state budget of income and expenditure which is set every year in the form of law.

Activities relating to income and expenditure were initially understood as state finances, which were then reflected in the formulation of the provisions of the 1945 Constitution. Whereas initially, what is meant by money or state finances in the 1945 Constitution of the Republic of Indonesia before the amendment is the state budget of income and expenditure only. In this narrow sense it is assumed that all state money, entry and exit, is accounted for entirely through state budget revenues and expenditures. There is no other money that includes the notion of state money outside the state budget of income and expenditure. That the state budget of income and expenditure has two aspects, namely the calculation of state revenue and calculation of state expenditure. The format or format, the preparation of the state budget of revenues and expenditure is set forth in the form of Law on State Budget ^[30]. Thus the concept of management of state finances can be seen from the side of state financial management is technically implemented through two arrangements, namely general management / administration that contains elements of mastery and special management that contain elements of obligation. General management is closely related to the administration of government duties in all fields and its

²⁷ Romli Atmasasmita, *Analisis Ekonomi Mikro tentang Hukum Pidana Indonesia*, p. 124.

²⁸ Mohammad Hatta, *Penjabaran Pasal 33 Undang-Undang Dasar 1945*, Mutiara, Jakarta, 1977, p. 28.

²⁹ Muhammad Djafar Saidi dan Rohana Huseng, *Hukum Penerimaan Negara Bukan Pajak*, PT. Raja Grafindo Persada, Jakarta, 2008, p. 11.

³⁰ Jimly Asshiddiqie, *Pokok-pokok Hukum Tata Negara Indonesia Pasca Reformasi*, PT. Bhuana Ilmu Komputer, Jakarta, 2008, p. 833-834.

actions can bring the consequences of expenditure and or generate state revenues. While the special arrangement or the handling of komptabel have the obligation to carry out the commands that come from general management.

The President as head of government holds general power of state finance management as part of governmental power. In practice, the president's powers are not self-administered by the president, but (a) Authorized to the finance minister, as fiscal manager and government representative in separated state property ownership; (b) Is authorized to minister / head of state institution and non-state government institution, as user of budget / user of ministry of state / institution he leads; and (c) Submitted to the governor / regent / mayor as head of local government as the embodiment of the implementation of the principle of decentralization, to manage regional finances and represent regional governments in separated regional property ownership. Such delegation of authority does not include monetary authority, including among others issuing and circulating money, whose implementation is regulated by law. The finance minister as the presidential assistant in finance is essentially Chief Financial Officer (CFO) of the Government of the Republic of Indonesia, while every minister / head of the institution is essentially Chief Operational Officer (COO) for a particular area of government.

This principle needs to be implemented consistently in order to have clarity in the distribution of authority and responsibility, the implementation of check and balance mechanism, and to encourage efforts to increase professionalism in the administration of government duties. The presidents' authority over the management of state finances delegated to state officials, including general authorities arising from general management, and special authorities arising from special arrangements.

4.4 Concept of State Official Accountability Through SOEs

Authority is arguably one of the main studies in the state administration system. Theory of authority will also have an impact on the form of accountability of state administrators when there is an awkwardness of a policy taken. In the law of governance the state administration officials are the main actors in performing the actions and legal actions of the principal functions of government and the function of government service, but in doing the actions and actions must have clear authority. As a source of authority comes from attribution, delegation and mandate. Before knowing the attribution, delegation and mandate, but it is not independent of the understanding of authority and authority.

Conceptually, the term authority or authority is often paralleled by the Dutch term "bevoegdheid" (meaning authority or power). Authority is a very important part of the Law of Governance (Administrative Law), because the new government can perform its functions on the basis of the authority it obtains. The definition of authority in the Indonesian General Dictionary means the same as the authority, namely the right and power to do something^[31].

In the Constitutional Law, power represents the right to do or not to do. Authority implies rights and obligations. The right contains the freedom to do or not to take certain actions or to require another party to take certain actions. The obligation to contain the obligation to perform or not to take certain actions in the law of state administration authority of government derived from the legislation is obtained through means of attribution, delegation and mandate.

Where the authority exercised by the government is not in accordance with the laws and regulations or authorities it is abused or applied arbitrarily resulting in the violation of the rights of the citizens, the citizens are given legal protection (rechtsbescherming), among others through the Administrative Court. Authority or authority is a term commonly used in the field of public law. But actually there is a difference between the two. That the term authority (authority, gezag) should be distinguished from authority (competence, bevoegheid). Authority is the so-called formal power, the power derived from the powers granted by the Law, whereas authority is only about a certain "part of" (part) of authority. In authority there are authority (rechtsbevoegdheden). The authority is the sphere of public legal action, the scope of governmental authority, not only includes the authority to make the government's decision (bestuur), but includes the authority in the course of execution of duties, and authorizes and distributes the main authority set forth in legislation. Authority as a concept of public law consists of at least 3 (three) components, namely influence, legal basis, and legal conformity. The component of influence is that the use of authority is intended to control the behavior of legal subjects. The basic components of the law that the authority must always be subject to its legal basis. The conformity component implies the existence of a standard of authority that is the general standard (all types of powers) and the special standard (for certain types of authority)^[32].

In the administrative law literature there are two ways to obtain governmental authority: attribution and delegation; sometimes, mandate, is placed as a separate way to gain authority. In simple terms these three sources of authority can be explained that the authority of attribution is the authority of the body or government administration officer obtained directly from the legislation, while the authority of the delegate means the authority of the body or government administration officer derived from the delegation of the body or other government administration officer. In this case the delegation authority / delegation authority is required from delegate to the delegate because the juridical responsibility will be transferred to the delegate. The mandate is not a transfer of authority but the exercise of authority by the administrative ranks on behalf of the definitive official when the definitive official is absent. An attribution refers to the original authority on the basis of the provisions of constitutional law. Attribution is the authority to make a decision (besluit) directly derived from the law in a material sense. Another formula says that attribution is the formation of certain authority and its giving to certain organs. Who can form the

³¹ Philipus M. Hadjon, *Pengantar Hukum Administrasi Indonesia*, Gadjah Mada University Press, Yogyakarta, 2005, p. 87.

³² Ateng Syafrudin, *Menuju Penyelenggaraan Pemerintahan Negara yang Bersih dan Bertanggung Jawab*, Jurnal Pro Justisia, Bandung, Universitas Parahyangan, Edisi IV Tahun 2000, p. 22.

authority is the authorized organ based on legislation^[33].

In a law-democratic state, government action imposes an obligation or burden on its people, it can only be done (halal) if it obtains the consent of the people through its representatives in parliament. Attribution means the granting of a (new) authority by the people through their parliamentary representation to the government, where such authority was not previously owned by the government. With the granting of authority, it means that the government's actions become legal (halal) and juridically have a general binding force, because it has obtained approval from the people through its parliamentary representatives, which is then poured into various laws at both the central and regional levels^[34].

The authority of the attributes (legislators) can be distinguished originally, ie originally obtained from the government at the central level and from the regional government. Attribution originally obtained from the central government, originating from the MPR in the form of Constitution and other MPR Decrees and sourced from the Parliament together with the Government in the form of Act. While the attribution originally derived from the local level, sourced from the DPRD and local government in the form of local regulations and sourced from the Village Representative Agency (BPD) and village government in the form of Perdes. Attribution occurs granting the authority of the new government by a provision in the legislation that gives birth to a new authority of competent legislators to provide the attribution of government authority^[35].

The delegation is the authority transferred from the authority of the attribution of an organ of government to the other organs so that the delegator can authorize the authority on its behalf, whereas in the Mandate there is no transfer of authority but the mandator gives authority to other organs (mandataris) to make a decision or take an action on its behalf. In addition, in criminal law adheres to the principle of "personal responsibility", criminal liability is a personal responsibility. In casu in this case it is necessary to distinguish responsibilities according to administrative law with criminal law. In administrative law apply the principle of liability position (liability position), whereas in criminal law apply the principle of personal responsibility (personal responsibility). Personal responsibility is a criminal responsibility that is the responsibility of the law charged to a person for the error or consequence of a personal act. Given the substantial aspects of personal responsibility that need to be known is if there has been an act arbitrary and not in accordance with the objectives and associated with the abuse of authority (detournement de pouvoir).

Any use of authority therein contains responsibility, but must also be separated on the procedure of obtaining and exercising authority because not all officers exercising the authority of the government automatically bear legal responsibility. Officials who obtain and exercise authority by attribution and

delegation are those who perform duties and or work on the basis of the mandate are not those who bear legal responsibility.

5. Conclusions

The concept of management of state finances can be seen from the side of state financial management is technically implemented through two arrangements, namely general management / administration that contains elements of mastery and special management that contain elements of obligation. General management is closely related to the administration of government duties in all fields and its actions can bring the consequences of expenditure and or generate state revenues. While the special arrangement or the handling of komptabel have the obligation to carry out the commands that come from general management. Equity participation to SOEs is part of special management but SOEs must perform their duties independently and professionally. State property deposited as state-owned capital belongs to SOEs. The establishment of BUMN is also an act of civil law of the State of Indonesia as a public legal entity, so that at the same time the State of Indonesia as a public legal entity shall be subject to and apply to it the civil law norms or functions of private law, at once there is a transformation of function and legal status over legal acts committed by the State.

In managing SOEs, the directors of SOEs use the principle of Business Judgment Rule which is one of the existing doctrines in corporate law which stipulates that the Board of Directors is a company that is not responsible for any loss caused by a business decision making action, if the action by the Board of Directors is based on the good and caution. The extent of authority and responsibility of the board of directors of a Company so that the board of directors must perform its duties with good faith and full of responsibility.

The Board of Directors in performing the task of handling and representing the Company in court and outside court must be fully responsible for the interest of the Company shall be called fiduciary duty executed by the Board of Directors by means of goodwill (bona fides), proper purpose, freedom of responsibility (unfettered discretion) and has no conflict of duty and interest. If the directors of SOEs do not carry out their duties in good faith (bona fides), proper purpose, unfettered discretion and have no conflict of duty and interest, then the directors of SOEs are responsible for losses incurred, including financial losses state in the SOE.

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³⁴ SF. Marbun, *Peradilan Administrasi Negara dan Upaya Administratif di Indonesia*, Yogyakarta: FH UII Press, 2011, p. 137-138.

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