LEGAL STATUS OF STATE FINANCE IN HOLDING STATE OWNED ENTERPRISES

A BACHELOR DEGREE THESIS

By:

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INTERNATIONAL PROGRAM

FACULTY OF LAW

UNIVERSITAS ISLAM INDONESIA

YOGYAKARTA

2019

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Presented as the Partial Fulfillment of Requirements
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Yogyakarta

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"Very little is needed to make a happy life; it is all within yourself, in your way of thinking." – Marcus Aurelius

"Finish each day and be done with it. You have done what you could. Some blunders and absurdities no doubt crept in; forget them as soon as you can. Tomorrow is a new day. You shall begin it serenely and with too high a spirit to be encumbered with your old nonsense." – Ralph Waldo Emerson

DEDICATION

This thesis is dedicated to:

My beloved family. Papa, Mama, and My Sister Pipin. Thank you for all of your support.

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ABSTRACT

According to Law 17 of 2003 concerning State Finances which is strengthen by Constitutional Court Decision Number 62/PUU-XI/2013 and Number 48/PUU-X1/2013, state assets that still included in the state finance scope still have to pass the supervision of the government. However, based on Law Number 19 of 2003 about State-Owned Enterprise, Holding State Owned Enterprises does not include as State Owned Enterprises which make Holding State Owned Enterprises should refer to Law No. 40 of 2007 on Limited Liability Company. With the status of Holding SOEs as limited liability company as a legal entity of its own, then the law should treat the owner or shareholders and management or directors, separate from the limited liability company itself. Thus, this research was made to analyze and give a clearer view of the legal status of the state financial in Holding SOEs based on Government Regulation no. 72 of 2016. The method approach of this research will be using the juridical normative approach with literature studies as the methods of collecting data in this research which done in order to obtain legal materials and also any possible knowledge or information in a form of books, journals, news, documents, and others. In the process of analyzing this research, will be using the qualitative method of analysis where the data that have been provided will be collected and will be described in the form of information and explanations which is reviewed by experts, legal theories, and researcher's arguments. Then qualifying it and connecting the theory or doctrine related to the formulation of the problem in this study, as well as making conclusions to determine the results and also a recommendation. The result of this thesis is that Both the State Finance Law and also Constitutional Court Decision Number 62/PUU-XI/2013 and Number 48/PUU-X1/2013 are contradicted with Holding State Owned Enterprises nature as a Legal entity which has a limited responsibility, where basically the founders or shareholders or members of a corporation are not personally responsible for corporate losses or debts. In this context, if the corporation is a Limited Liability Company, the responsibility of the shareholders is limited to the shares it owns in the company which in this case is the State.

Keywords:

State Finance, Holding State-Owned Enterprises, Separate Legal Entity.

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CHAPTER I

INTRODUCTION

A. Context of Study

To achieve prosperity, in general, cannot be done by individuals but must be done jointly between the community and government. Achieving prosperity is a shared responsibility. For the welfare of the people, the government participates in economic activities. This must be done because in many ways that cannot be done completely by the community.[1] Therefore, the presence of the state in the economy of the country is so important in order to proclaim the goals of the state itself. Economic development aims to achieve a higher level of prosperity.

The management of the national economy is indeed an important pillar in the development of a country in order to bring the welfare of society into reality. The state in the implementation of the national economy acts as both the regulator and the economic actors themselves. The role of the state as an economic actor is manifested through the establishment of State-Owned Enterprises (SOEs) which aims to organize the general benefit of providing goods and services as well as seeking profits against state revenues.[2]

However, as a business entity, State-Owned Enterprises are established to seek profits and thus require capital to run their business activities. Based on the definition of State-Owned Enterprises according to article 1 paragraph 1 Law No.

[1]Ani Sri Rahayu, *Pengantar Kebijakan Fiskal*, Bumi Aksara, Jakarta, 2010, p. 14

[2] Alfin Sulaiman, *Keuangan Negara pada Badan Usaha Milik Negara dalam Perspektif Ilmu Hukum*, PT. Alumni, Bandung, 2011, p. 1

19 of 2003 about State-Owned Enterprises, State-Owned Enterprises is a business entity wholly or part of its capital is owned by the state through direct participation derived from separated state assets.

Pursuant to the definition of State-Owned Enterprises above, State-Owned Enterprises' capital comes from separated state assets. Separated state's assets itself is a state asset derived from the state budget (APBN), which will be used as state's capital participation to State Owned Enterprises.[3]

Talking about the issue of state property indeed cannot leave out the discussion of state finances. Definitions of state finances under article 1 number 1 of Law No. 17 of 2003 on state finance are all rights and obligation of the state which can be judged as money, as well as everything in the form of money or goods which may be the property of the state in connection with the exercise of such rights and obligations."

In the case of state finances in article 2 letter g, it is said that the state finances also include separated state assets.[4] That means, separated state assets that were meant for State-Owned Enterprises' capital, are also included in the state finances.

The Law of State Finance has also been reinforced through the Constitutional Court Decision No. 48/PUU-IX/2013 and No. 63/PUU-IX/2013 which was declared on September 18, 2014, which has confirmed the status of state assets that came from state finances, and separated from the State Budget to be included into equity participation in State-Owned Enterprises is a part of the

[3] *Ibid*. p., 2
[4] See Law No. 17 of 2003 on State Financial Article 2 letter g

state financial regime.[5] This Constitutional Court Decision clearly stating that the state assets separated in the State Owned Enterprises include within the scope of state finances so that the supervisory authority is still carried out by the Government.

However, it contradicts with the background of State-Owned Enterprises as a legal entity, because it is not appropiate to merge the owner's wealth with the legal entity's wealth. Requirements of establishing a legal entity according to Prof. Meyers (1948) itself, are:[6]

1. The existence of his own wealth
2. The existence of a specific purpose
3. There are its own interests
4. There is a regular organization

The legal entity has a separate property entirely with the personal property of its members, founders, and administrators. This property is derived from the income of members or the income from the act of separation of its founder who has the purpose to establish the legal entity.[7] Therefore, one of the main characteristics of a legal entity is the separate property, the separate property of the founder's personal wealth.[8]

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[5] http://www.bpk.go.id/news/pemisahan-kekayaan-negara-di-bumn (accessed on May 7th, 2018, at 11:07 p.m.)

[6] Abdulkadir Muhammad, *Hukum Perdata Indonesia*, PT. Citra Aditya Bakti, Bandung, 1990, p. 31

[7] *Loc.cit*

[8] Ridwan Khairandy, *Hukum Perseroan Terbatas*, dalam Nindyo Pramono, *Kekayaan Negara yang Dipisahkan Menurut UU No. 19 Tahun 2003 tentang BUMN*, FH UII PRESS, Yogyakarta, 2014, p. 61

The meaning of separate state assets according to Law of State-Owned Enterprises Article 1 number 10 is the separated state assets is the state's assets derived from the state budget (APBN) to be used as state equity participation in State-Owned Limited Liability Company and/or Public Enterprise and other limited liability company. From the definition, it means that the separated state assets are the assets that came from the state budget (APBN) that used as State-Owned Enterprises' capital. Which according to the explanation of Article 4 paragraph (1) Law No. 19 of 2003 on State-Owned Enterprises separated is the separation of state assets from the state budget of revenues and expenditures to become state equity participation in SOEs for subsequent coaching and management is not based on the state budget system of income and expenditure, but its guidance and management is based on the principles of a healthy company.

Recently, Government Regulation No. 72 of 2016 on the amendment to Government Regulation No. 44 of 2003 regarding Procedures for Participation and Stock Capital Administration in State Owned Enterprises and Limited Companies has been released. This amendment has been released in order to reinforce the formation of state-owned holding companies (Holding SOEs). The establishing a holding company in a State-Owned Enterprises (SOEs) (Holding SOEs) itself has numbers of potential laws that may arise.

In Government Regulation No. 72 of 2016, there is a provision whereby State Equity Participation derived from state assets in the form of state-owned

shares in SOEs to other SOEs is done without through APBN mechanism.[9] Apparently, this provision is also contradictory to Law 17 of 2003 concerning State Finances which is also contradictory to Constitutional Court Decision Number 62/PUU-XI/2013 and Number 48/PUU-X1/2013 stating that state assets that still included in the state finance scope still have to pass the supervision of the government.

If we refer to the Article 1 number 1 of Law Number 19 of 2003 about State-Owned Enterprise, which has the phrase of 'wholly or part of its capital is owned by the state through direct participation derived from separated state assets gives consequences that Holding State-Owned Enterprises does not include as State-Owned Enterprises too. When looking at the definition of 'direct capital participation', it means that the one that can be considered as State-Owned Enterprises itself is only the Parent Company which make Holding State-Owned Enterprises should refer to Law No. 40 of 2007 on Limited Liability Company.

With the status of Holding SOEs as limited liability company as a legal entity of its own, then from then on the law treats the owner or shareholders and management or directors, separate from the limited liability company itself. Which means that the shareholders have no interest in the company's assets.

According to the explanation above, there is a conflict between the state's financial position as part of the state's wealth which is separated in the Law of State Finance also Government Regulation No. 72 of 2016 and the Law of State-Owned Enterprises. Thus, this research was made to analyze and give a clearer

[9] See Government Regulation No. 72 of 2003 on the Amendment to Government Regulation No. 44 of 2003 Regarding Procedures for Participation and Stock Capital Administration in State Owned Enterprises and Limited Companies

view of those legal issues with the title, "Legal Status of State Financial in Holding State-Owned Enterprises".

B. Problem Formulation

Based on the context of study that has been described above, the problem in this research will be focused what is the legal status of the state financial in Holding State-Owned Enterprises based on Government Regulation No. 72 of 2016?

C. Research Objective

Based on the problem formulation that stated above, the purpose of this study is to analyze the legal status of state financial in Holding State-Owned Enterprises based on the Government Regulation No. 72 of 2016.

D. Definition of Terms

This research use operational definitions as follows:

1. Legal is of or relating to law; falling within the province of law; Established required, or permitted by law.[10]
2. Status means Standing, state or condition; the legal relation of individual to rest of the community: The rights, duties, capacities and incapacities which determine a person to a given class; a legal personal relationship, not

[10] Bryan A. Garner Ed., *Black's Law Dictionary*. St. Paul, MI, USA, 1999, p. 2613

temporary in its nature nor terminable at the mere will of the parties, with which third persons and the state are concerned.[11]

3. State Finance is all rights and obligations of the state which can be judged by money, as well as everything in the form of money or goods which may be the property of the state in connection with the exercise of such rights and obligations.[12]
4. Holding Company means A Company that usually confines its activities to owning stock in, and supervising management of, other Companies. A holding company usually owns a controlling interest in the companies whose stock it holds. In order for corporation to gain the benefits of tax consolidation, including tax free dividend and the ability to share operating losses, the holding company must own 80% or more of the voting stock of the corporation.[13]
5. State-Owned Enterprises (SOEs) means a business entity wholly or part of its capital is owned by the state through direct participation derived from separated state assets.[14]

E. Theoritical Review

a. Definition of Legal Entity

[11] Herry Campbell Black M.A. *Black's Law Dictionary*. West Publishing Co., 1968, p. 1580

[12] See Law No. 17 of 2003 on State Financial Article 1 number 1

[13] Herry Campbell Black M.A., *Op. Cit*., p. 731

[14] See Law No. 19 of 2003 on State Owned Company Article 1 paragraph 1

In the society of law, society is not the only legal subject (supporter of rights and obligations), but there are other legal subjects that are often called "legal entities" (*rechtperson*).[15]

In law, the term 'person' includes personal beings, namely humans (*natuurlijk persoon*) and legal entities (moral persona, legal person, legal entity, *rechtspersoon*). Both are legal subjects, so that both are persons with legal rights and obligations. In other words, they have legal rights and obligations.[16]

As with any subject of human law, the legal entity may also have rights and obligations, and may also establish legal relationships (*rechtsbetrekking/rechtsverhounding*) either between legal entities with one legal entity or another with a legal entity with man (*natuurlijkperson*). Therefore, legal entities may enter into agreements of sale, purchase, lease and all kinds of deeds in the field of property.[17]

The following are some of the meanings of legal entities proposed by experts:[18]

a. According to E. Utrecht, a legal entity (*rechtpersoon*), which is a body that according to the law has the power (authority) to be a supporter of rights, it is further explained that legal entities are

[15] H. Riduan Syahrani, *Seluk-Beluk dan Asas-Asas Hukum Perdata,* P.T. Alumni, Bandung, 2013, p. 51

[16] Satrio, *Hukum Pribadi, Bagian I Persoon Alamiah*, P.T. Citra Aditya Bakti, Bandung, 1999, p. 13

[17] *Ibid*.

[18] Chidir Ali, *Badan Hukum*, Bandung: Alumni, 1999, p.18-19

any rights supporters who are soulless or who are more appropriate than humans.

b. According to R. Subekti, a legal entity in principle is a body or association that can have rights and carry out actions such as a human being, as well as own a property, can be sued or sued before a judge.

c. R. Rochmat Soemitro argues, a legal entity (*rechtpersoon*) is a body that can have assets, rights and obligations such as individuals.

Thus, this legal entity is a supporter of rights and obligations that are soul-less or dead as opposed to the supporters of rights and obligations that have a life which is human. And as the subject of law that is soul-less, the legal entity is impossible and cannot be involved in the family field such as marriage, childbirth and so on.[19]

The existence of a legal entity (*rechtpersoon*) besides a single person (*naturlijkpersoon*) is a reality that arises as a legal necessity in the interaction of society. For, humans in addition to having individual interests, also have common interests and common goals that must be fought together. Therefore, they gathered to unite themselves by forming an organization and choosing its administrators to represent them. They also incorporate their own property into common property, and establish internal rules that only apply to those members of the organization. In the

[19] H. Riduan Syahrani, *Op.cit*

intercourse of law, all persons having a common interest incorporated in the unity of cooperation are deemed necessary as a new entity, which has rights and obligations of its members and can act law itself.[20]

b. Theories of Legal Entities

In the study of jurisprudence, the separate legal personality of corporation is based upon theories, which are concentrated upon the philosophical explanation of the existence of personality in beings other than human individuals.[21] There are many theories, which attempt to explain the nature of corporate personality, but none of them is said to be predominantly accepted.[22] It is claimed that while each theory contains elements of truth, none can by itself sufficiently interpret the phenomenon of juristic person. The following is put forward 5 kinds of theories are often quoted by our jurists.[23]

1. The Fiction Theory of Von Savigny

This theory is supported by many famous jurists such as Von Savigny, Coke, Blackstone and Salmond .[24] Under this theory, the legal personality of entities other than human beings is the result of a

[20] *Ibid*., p. 52

[21] Halyani Hassan, et.al, *'The Myth of Corporate Personality': A comparative Legal Analysis of the Doctrine of Corporate Personality of Malaysian and Islamic Laws* in Wolff, *The Nature of Legal Persons*, Australian Journal of Basic and Applied Sciences, 6(11), p. 192

[22] Frederick Hallis, *Corporate Personality: A Study in Jurisprudence*, London: Oxford University Press; H. Milford, 1930

[23] H. Riduan Syahrani, *Op.cit*, p. 52-54

[24] John Dewey, *Historic Background of Corporate Legal Personality*, The Yale Law Journal, 35:655, 1925

fiction. Hence, not being a human being, corporation cannot be a 'real person' and cannot have any personality of its own.[25]

Savigny sees the legal entity as an artificially-created being that is capable of owning property but that lacks free will. He regarded corporations as exclusive creations of law having no existence apart from their individual members who form the corporate group and whose acts are attributed to the corporate entity.

This led Savigny to the conclusion that a "person" is any entity capable of exercising obligations and rights. Because legal entities are a legal fiction and lack free will, they cannot be a subject of law. According to this line of thought, an ordinary human being is a "person" only when he or she has the free will to acquire rights and obligations, and becomes a subject of law.

Hans Kelsen mentions that, based on the fiction theory, a "subject of law is that which is the object of a legal obligation or subjective right" (the latter term is understood as the legal authority to demand the performance of an obligation, though it is not a thing but rather a form of being).[26]

2. Theory of Aimed Wealth (*Doel Vermogents Theorie*)

According to this theory, only humans can be subject to law. However, this theory says there is wealth (*vermogen*) which is not a

[25] Halyani Hassan, et.al, *Op.cit*, p. 192

[26] Elvia Arcelia Quintana Adriano, "Natural Persons, Juridical Persons, and Legal Personhood*", Mexican Law Review Volume 8 Number 1*, 2015, p. 105-106

person's wealth, but the wealth is bound to a certain purpose. Wealth that no one has and which is bound to this particular purpose is named the legal entity. This theory is taught by A. Brinz, and is followed by Van der Hayden.

3. The Organ Theory of Otto Van Gierke

   Legal body according to this theory is not abstract (fiction) and not wealth (rights) that are not subject, but the legal entity is a real organization, which incarnate seriously in the association of law, which can form their own willingness with the tools that exist to him (the board, its members) like ordinary people, who have the senses and so on.

4. Propriete Collective Theory

   This theory is taught by Planiol and Molengraaff. According to this theory the right and the obligation of legal entity are the rights and obligations of the members together. The wealth of legal entities is shared with all of its members. The people who gather are a unity and form a person called a legal entity. Therefore, the legal entity is a juridical construction only. Star Busmann and Kranenburg are followers of this teaching.

5. Theory of Juridical Reality (*Jurudische Realiteitsleere*)

   It is said that a legal entity is a concrete, real, though not palpable, not fiction, but a juridical reality. The theory proposed by the

Majers emphasizes that it should be in the equation of legal entities with limited human beings to the field of law alone.

Although theories of legal entities differ in the understanding of the nature of legal entities, they agree that legal entities may participate in social intercourse in society, albeit with some exceptions.

c. Legal Entity Requirements

There are a number of conditions that must be fulfilled by a body/association/business entity to be regarded as a legal entity (*rechtperson*) according to the doctrine of these terms as follows:[27]

1. The Existence of Separate Property

This property is obtained from members and from a separation done by a person/person/government for a particular purpose. The existence of these assets is intended as a means of achieving the objectives of the relevant legal entity. This property, although derived from the entry of its members, but is separated from the property belonging to its members. The personal conduct of its members does not bind the property, on the contrary, the act of a legal body represented by its governing body does not bind the wealth of its members.

2. Have A Specific Purpose

This particular purpose may be an objective purpose or commercial purpose which is a separate purpose of a legal entity. So, it

[27] H. Riduan Syahrani, *Op. Cit.*, p. 57-59

is not a purpose for the benefit of one or several of its members. The effort to achieve that goal is done by a legal entity by the person represented. The goal to be achieved is usually formulated clearly and firmly in the basis of the legal entity concerned.

3. Have Its Own Interests

In achieving its objectives the legal entity has its own interests protected by law. These interests are subjective rights as a result of legal events. Therefore, the legal entity has its own interests, and can prosecute and defend it against others in its legal association. The self-interest of this body of law must be stable, meaning it is not tied at a short time, but for a long period of time.

4. There is An Organized Organization

Legal entity is a juridical construction. Therefore, as a subject of law besides human beings, legal entities can only be able to do legal affairs with their intermediaries. How the governing body of the legal entity comprises the person acting as the legal body, how the organs are selected, the diagnosis, and so on, are governed by the basic articles and other rules or decisions of a member's meeting that are none other than the division of duties. As such, legal entities have an organization.

d. State Owned Enterprises as A Legal Entity

Based on the juridical definition of SOEs as contained in the Law of SOEs, there are several criteria for a company to be called a SOEs, namely:[28]

1. Is a business entity or company;
2. Owning capital wholly or majority owned by the state. The minimum capital ownership by the state must be 51%;
3. The state directly invests in the capital of the SOEs;
4. The state's participation comes from separated state assets.

In addition to these characteristics, in more detail a company as a subject the independent law has some inherent substantive characteristics:[29] 1) the limitation of liability, basically the founders or shareholders or members of a corporation are not personally liable for any loss or debt of the corporation.; 2) perpetual succession, as an independent legal entity which bears its own rights and obligations, the change of membership to the ownership of a corporation has no implication for the existence of the corporation itself.; 3) own property, all assets that are in corporate finance legally in the possession of the corporation itself is not part of the wealth of the shareholders or the managers.; 4) has contractual authority and may prosecute and be sued on its own behalf, the legal entity as a *rechtperson* by law is treated as a person so as to bear its own rights

[28] Inda Rahadiyan, "Kedudukan BUMN Persero sebagai Separate Legal Entity dalam Kaitannya dengan Pemisahan Keuangan Negara pada Permodalan BUMN", dalam Ridwan Khairandy, "Korupsi di Badan Usaha Milik Negara Khususnya Perusahaan Perseroan: Suatu Kajian Atas Makna Kekayaan Negara yang Dipisahkan dan Keuangan Negara", *Jurnal Hukum Ius Quia Iustum*, No. 4 Vol. 20, 2013 p. 628

[29] *Ibid*., p. 628-629

and obligations. It has become a legal consequence that as a legal subject the legal entity may sued or sued before the court.

F. Research Method

1. Focus of Study

This research was created to analyze the legal status of financial state in Holding SOEs.

2. Source of Data

These data sources will be consists of primary sources, secondary sources, and also tertiary sources.

The primary sources that were used to complete this research are consists of law and regulation that binding and related to this research, which are:

a. Law No. 17 of 2003 on Financial State;
b. Law No. 19 of 2003 on State Owned Enterprises (SOEs);
c. Law No. 40 of 2007 on Limited Liability Company;
d. Government Regulation No. 72 of 2016 on the amendment to Government Regulation No. 44 of 2003 regarding Procedures for Participation and Stock Capital Administration in State Owned Enterprises and Limited Companies;
e. Government Regulation No. 47 of 2017 on the Addition of the Republic of Indonesia's Capital Participation into the Share of the

State Owned Limited Liability Company (Persero) P.T. Indonesia Asahan Alumunium.

f. Government Regulation No. 6 of 2018 on the Addition of the Republic of Indonesia's Capital Participation into the Share of the State Owned Limited Liability Company (Persero) P.T. Pertamina.

g. Constitutional Court Decision Number 62/PUU-XI/2013; and

h. Constitutional Court Decision Number 48/PUU-X1/2013

The secondary sources consist of expert opinion, books, journals, articles, documents and news will covers all of the concerns regarding this research.

As for the tertiary sources are any sources which can explain primary and secondary sources such as law dictionary.

3. Data Collecting

The methods of collecting data in this research making is done through both literature studies in order to obtain legal materials and also any possible knowledge or information in a form of books, journals, news, documents and others related to SOEs, Holding SOEs, and also financial state. This data collecting will be done in order to find the source of data.

4. Method Approach

The method approach of this research will be using juridical normative approach. Normative approach will be conducted by examining secondary data only especially the legal basis regarding SOEs and Holding SOEs.

5. Data Analysis

The process of analyzing this research will be using qualitative method of analysis, namely data that have been provided will be collected and will be described in the form of information and explanations which is reviewed by experts, legal theories concerning SOEs, and researcher's arguments on status of state financial in SOEs and Holding SOEs.

G. Structure of Writing

This research will be complied systematically into 4 (four) chapter with following details:

Chapter I, is the introduction of this research that contains of background, problem formulation, research objective, definition of terms, theoretical review research method and structure of writing.

Chapter II, will contain the general overview on SOEs and the general overview of Holding Company.

Chapter III, is the results of research and discussion that describes the results of the analysis to answer the question on the problem formulation. In this chapter will discussed and analyzed on the legal status of financial state in Holding SOEs.

Chapter IV, shall be the closure which cover all of the conclusions and recommendation which will be obtained by the previous analysis that has been done in Chapter III.

CHAPTER II

GENERAL OVERVIEW ON STATE OWNED ENTERPRISES, HOLDING COMPANY, AND LIMITED LIABILITY COMPANY IN ISLAM

A. General Overview on State Owned Enterprises

1. Definition on State Owned Enterprises

State-Owned Enterprises (BUMN) regulated in Law No. 19 of 2003 concerning State-Owned Enterprises. According to the term, State Owned Enterprises (BUMN) is a state-owned company. As is known above, a company is said to be a state-owned company because its capital comes from the country.[30]

The definition of State-Owned Enterprises based on article 1 number 1 of Law no. 19 of 2003 on State Owned Enterprises is, "... is a business entity that all or most of its capital is owned by the state through direct participation derived from separated state assets." From this understanding, it can be seen that State-Owned Enterprises are companies because the business entity referred to is the company. As a company, State-Owned Enterprises also aims to get benefits like those of companies in general.[31]

Then, it can be seen that State-Owned Enterprises' capital derived from state property is through direct participation, which

[30] Gatot Supramono, *BUMN Ditijau dari Segi Hukum Perdata,* P.T. Rineka Cipta, Jakarta, 2016, p. 20

[31] *Ibid*.

shows that the state includes its capital directly into State-Owned Enterprises without interfering with other parties (outside the government). The included assets must be in the form of State-Owned Enterprises capital participation. The capital is derived from state assets which are separated, meaning that they are separated from the state financial system, so that the management is should not be controlled based on the State Budget (APBN) system. In line with its position as a company, the management of State-Owned Enterprises includes its finances based on the principles of a healthy company.[32]

Based on the definition of State-Owned Enterprises stated above, State-Owned Enterprises itself has the following elements:[33]

1. Business Entity

   According to the Dutch government when reading *Memorie van Toelichting* (explanation) Plans for Amendment to the *Wetboek van Koophandel* Act before the parliament, the company is the whole act carried out continuously, openly in a certain position, and to seek profit for itself.

   According to Molengraaf, the company is an entire act carried out continuously, acting out to earn income, by way of trading goods or entering into a trade agreement. Polak believes

[32] *Ibid*.

[33] Ridwan Khairandy, *Pokok-Pokok Hukum Dagang Indonesia,* FH UII Press, Yogyakarta, 2013, p. 160-162

that there is only a company if there is a need to estimate the estimated profit and loss and everything is recorded in the books.

The development of the understanding of the company can be found in Law no. 3 of 1992 on Compulsory Registration of Companies, and Law no. 8 of 1997 concerning Company Documents. According to Article 1 letter b of Law no. 3 of 1992 on Compulsory Registration of Companies, the company is any form of business that is permanent and continuously established, works and domiciled in the territory of the Republic of Indonesia for the purpose of obtaining profits. Article 1 point 2 of Law no. 8 of 1997 on Company Documents defines a Company as a form of business that carries out activities continuously and continuously with the aim of obtaining profits and or profits that are either held by individuals or business entities domiciled in the territory of the Republic of Indonesia.

If the meaning of the company refers to activities that ultimately seek profit, then the business entity is a business organization or organization that established to manage or carry out activities that intend to seek these benefits. So, State-Owned Enterprises is a business organization that aims to manage business and seeking profits.

This is different with Temasek which is wholly owned by the Minister for Finance, Singapore, that was formed in 1974 as a

limited holding company to commercially manage the state's investments in GLCs (Government-Linked Companies) and GLREITs (Government-Linked Real Estate Investment Trusts) (Temasek Holdings Ltd, 2013). Singapore GLCs and GLREITs are owned and managed differently from other State-Owned Enterprises around the world. Temasek acts as a commercial investment company, promoting sound corporate governance in its portfolio companies.[34]

2. All or Part of Its Capital is Owned by the State

A business entity can be categorized as a State-Owned Enterprises, if the capital of the business entity is entirely (100%) owned by the State or the majority of its capital is owned by the State. If the capital is not entirely controlled by the State, then in order to remain categorized as a State-Owned Enterprises, the state must have a minimum of 51% of the capital. If the participation of the State capital of the Republic of Indonesia in a business entity is less than 51%, it cannot be referred to as a State-Owned Enterprises.

3. Direct Participation

Considering that there is direct participation here, the State is involved in taking the risk of profit and loss of the company. According to the elucidation of Article paragraph (3), separation of

[34] Isabel Sim, Steen Thomson, and Gerard Yeong, *The State as Shareholder: The Case of Singapore,* at https://bschool.nus.edu.sg/Portals/0/docs/FinalReport_SOE_1July2014.pdf, p. 9, accessed on October 29th 2018 at 13:43

State assets to be used as State capital participation to State Owned Enterprises can only be done by means of direct state participation in State Owned Enterprises, so that each investment must be determined by government regulation (PP).

For example, PT Garuda Indonesia (Tbk) is a State Owned Enterprises because part of the company's capital comes from direct investment capital in the Republic of Indonesia, but PT Garuda Maintenance Facilities Aero Asia cannot be categorized as an State Owned Enterprises, because its investment capital comes from PT Garuda Indonesia (Persero) Tbk. The company is a subsidiary of PT Garuda Indonesia (Persero) Tbk.

4. Equity Capital Comes from Separated State Assets

The wealth that is separated here is the separation of State assets from the State Budget (APBN) to be used as State capital participation in State Owned Enterprises to be used as State Owned Enterprises capital. After the guidance and management are no longer based on the State Budget (APBN) system, but the guidance and management of the principles of a healthy company.

With this separation, then once the State enters into the company, it becomes the wealth of the business entity. The participation of state capital in the framework of establishment or participation in State Owned Enterprises according to Article 4 jo

Explanation 4 paragraph (2) letter b Law No. 19 of 2003 on State Owned Enterprises, sourced from:

1) State Budget (APBN);
2) Included in the State Budget which includes APBN projects managed by State Owned Enterprises and / or State debts to State Owned Enterprises that are used as capital investments;
3) Reserve capitalization, is the addition of paid-in capital originating from reserves;
4) Other sources, including the benefits of asset revaluation.

This separation is a characteristic of legal entities. The concept of a company as a legal entity whose wealth is separate from its shareholders or members is a characteristic that is considered important for the status of the corporation as a legal entity that distinguishes it from other forms of company. The nature of the limited liability in a nutshell is the inclusion of the principle that shareholders are not personally responsible for the company's obligations.

As a consequence of the separation of wealth, then once the State has entered into participation in State Owned Enterprises, the wealth has become the property of State Owned Enterprises, not the wealth of the State as the founder of the State Owned Enterprises.

2. Establishment of State Owned Enterprises

Based on Law no. 19 of 2003 on State Owned Enterprises, State Owned Enterprises themselves are only grouped into 2 corporate bodies, namely State-Owned Limited Liability Company (PERSERO) and Public Company (PERUM). The establishment of those corporate bodies has a slight difference mechanism. The establishment of State-Owned Limited Liability Company has the mechanism listed below, which is:[35]

1. Minister's proposal

   The establishment of State-Owned Limited Liability Company comes from the proposal of the minister appointed or authorized to represent the government as the state as the shareholder in State-Owned Limited Liability Company. The proposal before being submitted to the president, carried out a joint assessment with the technical minister (the minister who has the authority to regulate the sector policy where the conducts of State Owned Enterprises business activities) and the finance minister. The assessment results are used as material for consideration for the president to issue Government Regulation (PP).

2. Stipulated by Government Regulation

[35] Gatot Supramono, *Op.cit*, p. 42-50

If the president can accept a ministerial proposal representing the government as the shareholder, then the president must issue a Government Regulation as the implementing regulation for the establishment of State Owned Enterprises, because in accordance with Article 5 Paragraph 1 of Government Regulation No. 5 of 2005 regarding State Capital Investment of the Republic of Indonesia for the Establishment of the State-Owned Limited Liability Company in Housing Secondary Financing Fields, the establishment of State-Owned Enterprises was determined by Government Regulation. As for the contents of the Government Regulation on the establishment of State-Owned Limited Liability Company, at least it contains the following:

a) Determination of the establishment of Limited Liability Company.
b) The intent and purpose of establishing Limited Liability Company.
c) Determination of the amount of participation of state assets which is separated in the framework of establishing Limited Liability Company.

3. Deed of Establishment

Even though there is already a Government Regulation concerning the establishment of State-Owned Enterprises, but

since State-Owned Limited Liability Company enforces the Law on Limited Liability Companies, the minister who represents the government as the shareholder is obliged to make the deed of establishment of State-Owned Limited Liability Company. The deed of establishment was made based on the terms in the form of an authentic deed. The deed of establishment must be made with a notarial deed, this relates to several issues including the form of deed, proof and trust.

Therefore, if the minister who represents the government as the shareholder is not with other parties or the private sector in establishing State-Owned Limited Liability Company, the minister himself comes to the notary to make a certificate of incorporation of State-Owned Limited Liability Company. For the establishment of such State-Owned Limited Liability Company, it is exempted from Article 7 Paragraph 7 of Law no. 40 of 2007 on Company Law, because State-Owned Limited Liability Company does not have to be established with 2 founders. And in accordance with Law no. 19 of 2003 on State Owned Enterprises, its capital can be obtained entirely from the state so that State-Owned Limited Liability Company can be established by the state alone.

In making a notarial deed, it must be guided by the provisions of Article 38 of the notary position. In that article it

has been determined that each notarial deed consists of three parts, namely: the head of deed, deed body, and deed of deed.

The contents of the deed of establishment are based on the provisions of Article 8 Paragraph 1 on Company Law, basically containing only 2 things, namely:

a. Articles of Association
b. Other information relating to the establishment of the company, such as the identity of the founder, management and supervisor and capital issues.

4. Endorsement

In order to obtain legal status, it is necessary to ratify the deed from the minister of law and human rights in accordance with Article 7 paragraph 4 of the Law No. 40 of 2007 regarding Company Law. The ratification is a legal obligation because the founder is obliged to submit a validation application within the time specified by law. Article 10 paragraph 9 of the Company Law explicitly states that companies that have not obtained legal status are disbanded due to law.

Requests for endorsement must be completed with information about supporting documents as contained in the regulation of the Minister of Law and Human Rights No. M/01. HT. 01. 10 of 2007. If all requirements have been fulfilled in

full, the minister of law and human rights issues a decision on the legalization of a corporate legal entity which is signed electronically (Article 10 Paragraph 6 of the Company Law).

5. List of Companies

The company register is a register or records of a limited liability company throughout Indonesia that has a legal entity, which can be arranged based on the company name in alphabetical order (letters) or based on the date the company becomes a legal entity. Before the birth of Law No. 40 of 2007 on Company Law a list of unknown companies so that companies that obtained legal status before the Company Law were enacted, no list was made.

The organization of the company register is carried out by the minister of law and human rights with a legal basis Article 29 Paragraph 1 of the Law No. 40 of 2007 regarding Company Law. After the minister of law and human rights gave a deed or establishment which resulted in the company obtaining legal status, the implementation of the company register was only carried out. The founder of the company does not need to submit a registration to the minister, the registration is carried out automatically which is the responsibility of the minister of law and human rights. This company list is made for the benefit of the community. The information presented

therein is not static, but every time there is a change or development in a company there is always a change in the data in the company list. The organization of the company register is open to the public, this means that the public can see the company directly listed in the company list.

6. Announcement in additional state news

Every legal entity in the form of a company, cooperative or foundation must announce in addition to the news of the Republic of Indonesia. The country's additional news is the state media to announce the establishment of a civil law body and the amendment of its articles of association. The publication in the additional news of this country is an official announcement delivered by the government with the aim that the community knows.

The announcement into the additional news of the Republic of Indonesia has been handled by the Minister of Law and Human Rights in accordance with Article 30 Paragraph 1 of the Company Law and what is announced is the deed of establishment of the company along with the ministerial decree. The time to make an announcement in additional state news has been determined in Article 30 paragraph 2 of the Company Law where the time is limited by no later than 14 days after the Minister of Law and Human Rights issues his

decision. He arranged the announcement time to provide legal certainty to the public that the company was truly a legal entity and knew who was responsible for the company.

7. Name of State-Owned Limited Liability Company (PERSERO)

   Basically the name of the company is free, but in Law No. 26 of 1996, which is still valid since there is no limitation on the implementation of Law no. 40 of 2007 of Company Law, especially those that regulate the name of the company that should not be used, namely if the name:

   a. Same or similar to the name of the company whose application for approval has been received earlier by the minister of justice (now the minister of law and human rights).
   b. Same or similar to a well-known brand as referred to in Law No. 19 of 1992 and its amendments (now Law No. 15 of 2001 concerning brands), unless there is permission from the owner of the famous brand.
   c. Can give the impression that there is a link between the company and a government institution, an institution that is formed based on legislation, or an international institution unless there is a license that is in partnership.
   d. The company name only consists of numbers or series of numbers, for example PT. 3 or PT. 69, numbers or

numbers are not words so they cannot be classified as names.

e. The company name only consists of letters that form words, for example PT. A, PT. SS, or PT. ABS. Letters or series of letters like that are not a series of words, because they cannot be classified as names.
f. Names that indicate the purpose and objectives of the company, unless there are other additions.

If a company is viewed in terms of its shareholders, the company can be divided into two types, namely a public company and a closed company. The difference affects the writing of his name and the public will know the position of the company as a public company or a closed company. In writing the name of the company in accordance with the provisions of Article 16 Paragraph 2 of the Company Law, the name of the company must be preceded by the phrase "limited liability company" or abbreviated as "PT". For writing the name of a public company, the end of the company name is added with the word abbreviation "Tbk".

While the establishment of Public Company (PERUM) according to article 35 paragraph (1) of Law no. 19 of 2003 on State Owned Enterprises proposed by the minister to the president is accompanied by a basis of consideration after being reviewed together with the technical minister and finance minister.

Elucidation of article 35 paragraph (1) on Law of State Owned Enterprises states that the establishment of public companies must meet the criteria, including:[36]

a. The business sector or activities are related to the interests of many people;
b. Founded not only to pursue profit (cost effectiveness / cost recovery);
c. Based on the assessment, it meets the economic requirements required for a business entity (independent).

Proposing the establishment of public companies to the president by the minister, can be carried out at the initiative of the minister and can also be at the initiative of the technical minister and / or the finance minister as long as they meet the above criteria.[37]

Unlike the establishment of State-Owned Limited Liability Company (PERSERO), the establishment of the company does not require a civil process. The establishment of Public Companies through the mechanism of public law only, namely through government regulations (PP). The government regulation on the establishment of the Public Company referred to according to the

[36] Ridwan Khairandy, *Pokok-Pokok Hukum Dagang, Op.cit*, p. 181
[37] *Ibid*.

explanation of article 35 paragraph (2) Law of State Owned Enterprises must contain:[38]

a. Establishment of public company;
b. Determination of the amount of State assets that are separated;
c. Articles of Association; and
d. Appointment of the minister as the representative of the government as the owner of capital.

Furthermore related to the articles of association Public Company, article 41 paragraph (1) of Law of State Owned Enterprises stipulates that the articles of association Public Company are stipulated in government regulations in its establishment. Elucidation of article 41 paragraph (1) Law of State Owned Enterprises explains that the government concerning the establishment of Public Companies, in addition to determining the decision to invest in state capital in the Public Company and articles of association concerned. The articles of association include:[39]

a. Name and domicile of public company;
b. Purpose and objectives and business activities Public Company;
c. Period of establishment of the company;

[38] *Ibid*, p. 181-182
[39] *Ibid*, p. 182.

d. The composition and number of members of the board of directors and the number of members of the supervisory board; and

e. Determination of the method of board of directors 'meetings, supervisory board meetings, directors' meetings and / or supervisory boards with ministers and technical ministers.

In connection with the articles of association, the company obtained legal status according to the provisions of article 35 paragraph (2) Law of State Owned Enterprises since the government regulation on the establishment of the company was signed by the president.[40]

3. Organs of State Owned Enterprises

State-Owned Limited Liability Company and Public Company have different organ. Organ of Limited Liability Company consists of:[41]

a. General Meeting of Shareholders (GMS);

b. Directors; and

c. Commissioner

[40] *Ibid*.
[41] *Ibid*, p. 175

These three organs have the same function, position and responsibility as the organs in a Company. In addition to being subject to the general regulation contained in the Company Law, it must also comply with the provisions contained in the Law of State Owned Enterprises.[42]

In connection with the special provisions concerning the GMS regulated in Article 14 of the Law no. 19 of 2003 on State Owned Enterprises. Article 14 paragraph (1) of the State Owned Enterprises' Law stipulates that in the event that all shares are owned by the State, the Minister acts as GMS. Then in the case of State-Owned Limited Liability Company, where the shares are not entirely owned by the State, the Minister acts as a shareholder. The Minister here is the Minister appointed and/or authorized to represent the government as the State shareholder in the State-Owned Limited Liability Company.[43]

Elucidation of Article 14 paragraph (1) Law of State Owned Enterprises explains that for a State-Owned Limited Liability Company whose entire capital (100%) is owned by the State, the Minister appointed to represent the State as a shareholder in any written decision relating to the State-Owned Limited Liability Company is a GMS decision. Then for State-Owned Limited Liability Company and companies whose shares are owned by the State less than 100% (one

[42] *Ibid*, p. 176
[43] *Ibid*.

hundred percent), the Minister is domiciled as a shareholder and the decision is taken together with other shareholders.[44]

Then Article 14 paragraph (2) Law of State Owned Enterprises determines that the Minister can provide power with substitution rights to individuals or legal entities to represent him in the GMS. In connection with the explanation of Article 14 paragraph (2) Law of State Owned Enterprises explained that what is meant by an individual is someone who holds a position under the Minister who is technically in charge of assisting the Minister as a shareholder in the relevant State-Owned Limited Liability Company. If deemed necessary it is not possible that the power of attorney can also be given to a legal entity in accordance with the laws and regulations.[45]

Furthermore Article 25 Law of State Owned Enterprises violates members of the board of directors to assume dual positions as:[46]

a. Members of the board of directors in BUMN, BUMD, private enterprises and other positions that can cause conflict of interest
b. Structural and functional positions at central and regional government agencies/institutions; and/or
c. Other positions in accordance with the provisions of the legislation.

[44] *Ibid*.
[45] *Ibid*.
[46] *Ibid*, p. 178

The third organ in the State-Owned Limited Liability Company is a Commissioner of the Company. The regulation of state commissioners in Law of State Owned Enterprises mostly only repeats the Law of State Owned Enterprises provisions. Appointment and dismissal of commissioners according to Article 16 of the Law of State Owned Enterprises is carried out by the GMS, in other words the appointment and dismissal of the commissioners is determined by the minister. In the position as GMS, the appointment and dismissal of the commissioner is enough to be done by a ministerial decree, because it has the same legal force as the decision taken legally at the GMS.[47]

Article 33 Law of State Owned Enterprises prohibits commissioners from holding dual positions as:[48]

a. Members of the board of directors of BUMN, BUMD, privately owned companies, and other positions that can cause conflicts of interest; and / or
b. Other positions in accordance with the provisions of the legislation.

While based on Article 37 Law No. 19 of 2003 on State Owned Enterprises, the organ of public company consists of:[49]

1) Minister

[47] *Ibid*.
[48] *Ibid*, p. 178
[49] *Ibid*, p. 182-189

The Minister here is the minister appointed and / or authorized to represent the government as the owner of capital in the company. The Minister is an organ that holds the highest authority in a company that has all authority not given to the board of directors or the supervisory board.[50]

The Minister according to article 39 Law of State Owned Enterprises is not responsible for any consequences of legal actions which are made publicly and is not responsible for the loss of Public Company exceeds the State's assets which are separated into Public Company, except if the minister:

a. Both directly and indirectly in bad faith make use of the court solely for personal gain
b. Engaged in unlawful acts committed by public companies; or
c. Directly or indirectly against the law using public wealth.

Article 40 Law of State Owned Enterprises determines that regarding the transfer procedure, the imposition of fixed assets, as well as the receipt of medium / long-term loans and lending in any form and method, and

[50] See explanation of Article 37 of Law No. 19 of 203 on State Owned Enterprises

no longer collect and write off accounts receivable and inventory by the public is regulated by decision minister.

2) Directors

The Board of Directors Public Companies is the organ responsible for managing the company for the interests and purposes of the company and representing the companies inside and outside the court. Arrangements regarding the Board of Directors in Law of State Owned Enterprises are regulated in articles 44 to 53. Directors under article 44 Law of State Owned Enterprises are appointed and dismissed by the Minister in accordance with the mechanism and provisions of the law. The appointment of members of the board of directors is carried out through the fit and proper test mechanism. Then candidates for directors who pass the fit-and-proper test must sign a management contract before being appointed as a member of the board of directors.[51]

The term of office of the member of the board of directors is set for 5 (five) years. Members of the board of directors can be reappointed for 1 (one) term. The Minister also at any time based on a ministerial decree, can dismiss

[51] Ridwan Kahirandy, *Pokok-Pokok Hukum Dagang Indonesia, Op. cit*., p. 184-185

directors. The dismissal must include the reason for the termination.[52]

Article 53 Law of State Owned Enterprises makes several restrictions on members of the board of directors to assume multiple positions as follows:

a. Members of the board of directors in BUMN, BUMD, private business entities and other positions that can cause conflict of interest
b. Structural and functional positions at central and regional government agencies / institutions; and / or
c. Other positions are in accordance with the provisions in the regulation on the establishment of public relations and statutory provisions.

Article 55 Law of State Owned Enterprises relates to the arrangement with the obligations and responsibilities of directors if the company experiences bankruptcy. The Board of Directors can only submit an application to the commercial court so that the company is declared bankrupt based on the approval of the minister.

In the event that bankruptcy occurs because of an error or negligence of the board of directors and public wealth is not sufficient to cover losses due to bankruptcy,

[52] See Article 45 of Law No. 19 of 2003 on State Owned Enterprises

each member of the board of directors is jointly and severally liable for the loss. Members of the board of directors who can prove that bankruptcy is not due to their fault or negligence are not jointly responsible for the loss.

3) Supervisory Board

The supervisory board is the organ that is responsible for supervising and providing advice to the directors in carrying out the management activities.[53] In accordance with the provisions of article 56 Law of State Owned Enterprises members of the supervisory board are appointed and dismissed by the minister. Members of the supervisory board can consist of elements of technical ministers, finance ministers, ministers and officials of departments / non-departmental institutions whose activities are directly related to the public.

The supervisory board is an individual who is capable of carrying out legal actions and has never been declared bankrupt by a member of the board of directors or commissioner or a supervisory board that is found guilty of causing a company or company to be declared bankrupt or a person who has never been convicted of a criminal act that is detrimental to the State's finances. In addition,

[53] Ridwan Khairandy, *Pokok-Pokok Hukum Dagang, Op. cit.,* p. 187

members of the supervisory board are appointed based on considerations of integrity, dedication, understanding the company's management issues related to one of the management functions, having adequate knowledge in the business sector, and can provide sufficient time to carry out their duties. The supervisory board consists of more than one member, one of the members of the supervisory board is appointed as chairman of the supervisory board.[54]

The term of office of the supervisory board member is for 5 (five) years and can be reappointed for 1 (one) term of office. The appointment of members of the supervisory board does not coincide with the appointment of members of the board of directors, except the appointment for the first time at the time of establishment. Members of the advisory council according to article 58 of Law of Enterprises at any time can be dismissed based on a ministerial decree stating the reasons.

Based on the articles of association or ministerial decree, the supervisory board can take action to manage the company in certain circumstances for a certain period of time

[54] *Ibid.*, p. 188

4. Dissolution of State Owned Enterprises

The procedure for dissolving State Owned Enterprises in principle is carried out by government regulation (PP). As instructed in article 64 paragraph (1) Law of State Owned Enterprises. Such procedures are because they are closely related to the capital of State-Owned Enterprises derived from the State's wealth. In the explanation of the article explains the reason, because the establishment of State Owned Enterprises is carried out by government regulation (PP) which states the amount of State capital participation in the establishment of the State Owned Enterprises referred to, the dissolution of State Owned Enterprises must also be done by Government Regulation (PP). Paying attention to this, it is seen that there is a synchronization between the procedure of establishment and the dissolution of State Owned Enterprises using Government Regulation (PP).

In article 142 paragraph (1) of the Company Law, there are 6 reasons for the dissolution of State-Owned Limited Liability Company which are alternative, namely:

a. Based on the GMS decision
b. The time period of the establishment ends
c. Based on court decisions
d. After the bankruptcy of the bankruptcy of the bankrupt company is not enough to pay bankruptcy fees
e. Bankruptcy assets are in a state of insolvency

f. The company's business license was revoked

The dissolution of the company was carried out based on the same reasons as the dissolution of State-Owned Limited Liability Company, while the dissolution of the company was stipulated in Article 83 of Government Regulation No. 45 of 2005, namely:

a. Government regulations are stipulated
b. The time period expires
c. Determination of the court
d. Revocation of bankruptcy decisions because the bankruptcy property is not enough to pay bankruptcy fees
e. Bankruptcy assets under insolvency

As is well known above, every company that disbanded including State Owned Enterprises must be followed by liquidation on the grounds that it should not harm the community. The definition of liquidation in the Indonesian dictionary, is the process of dissolving the company as a legal entity which includes the payment of the obligations of the creditors and the distribution of the remaining assets to the shareholders (Persero). Liquidation is the process of resolving the debts of the company by selling the existing assets and if there is still remaining, the balance is left to the capital owners or shareholders.

Since the time of the dissolution of the company, the company's directors are no longer authorized to conduct legal actions on behalf of the company because from the moment the liquidation

process begins, those who are authorized to take care of and bear responsibility for the company are liquidators. All third parties with an interest in the company being disbanded can only relate to the liquidator.

With the dissolution of Limited Liability Company, it did not result in the immediate loss of its legal status. In accordance with Article 143 paragraph (1) of the Company Law, the dissolution of the company does not result in the company losing its legal status until the liquidation and liability of the liquidator is accepted by the GMS or court. While for public companies are regulated in Law of State Owned Enterprises and Government Regulation no. 45 of 2005 did not explicitly regulate such matters. Although it can be interpreted in Article 93 paragraph (3) Government Regulation no. 45 of 2005, that by registering in the company register and announcing in addition to the State news the results of the liquidation process have been approved by the minister as the owner of the capital or court, the legal entity has only officially disbanded.

B. General Overview on Holding Company

1. Definition of Holding Company

In the laws and regulations in Indonesia, no one specifically regulates the holding company or parent company or the parent company. Law of Limited Liability Company, both of Law no. 1 of

1995 and Law no. 40 of 2007 of Limited Liability Company, does not provide legal recognition to group companies as separate legal entities. However, Law no. 1 of 1995 or Law no. 40 of 2007 has provided legitimacy for the emergence of institutional reality of group companies through the legitimacy of a company to take legal actions to own shares in another company or take over shares which causes the transfer of control of another company so that it has implications for the birth of the parent company and its subsidiaries.[55]

Based on Pocket Edition's Black's Law Dictionary, what is meant by holding company is:

"A company formed to control other companies, usually confining its role to owning stock and supervising management."

Holding company or also called Parent Company is a central company which has the purpose of owning shares in one or more companies which of course in other companies, to arrange one or more in number at the other company. Usually, a holding company has a lot of companies engaged in very different business fields. At least the process of forming a parent company can be done with three procedures, namely residual procedures, full procedures and programmed procedures.[56]

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[55] Sulistiowati, *Aspek Hukum dan Realita BIsnis Perusahaan Grup Indonesia*, Penerbit Erlangga, Jakarta, 2010, p. 23-24

[56] Emmy Pangaribuan Simanjuntak, *Seri Hukum Dagang, Perusahaan Kelompok (Group Company/Concern)*, Universitas Gajah Mada, Yogyakarta, 1997, p.7

In the English language, holding is an equivalent of parent and corporate and in Persian language it could be considered equivalent to comprehensive companies or cooperatives, sometimes corporation, group, comprehensive company, parent and/or original, equivalent to central holding company, sometimes headquarter, original company, parent company, investment company, controlling company, holder company, owner company. Several definitions could be mentioned for holdings: A holding company is a company that has preferred stocks or major stocks of some other companies in a sense that has at least one representative member in board of directors of those companies, and it has vote, and thereby it could control and manage the companies, and gain benefits coming from variety of businesses.[57]

Holding Company is a form of development that arises in limited liability companies in Indonesia. However, corporate law in Indonesia has not regulated juridically regarding holding companies. Therefore there is no official understanding of the holding company. However, there are several terms that are interpreted to be the same as holding companies such as group companies, holding companies, or parent companies. When referring to the terminology used in the

[57] Seyedeh Roudabeh Hosseini, et.al, "Holding Companies' Strategies and their Distinction from Large Organizations, Investment, Trust and Merger", *European Online Journal of Natural and Social Sciences*, Vol.2, No.3 Special Issue on Accounting and Management, 2013, p. 2929

Public Utility Holding Company Act in the United States, the definition of holding company is:[58]

"A corporation formed for the purpose of controlling other corporations by the majority of the voting capital stock. In common usage, the term is applied to any corporation which does not in fact control other corporations commonly referred to as subsidies."[59]

Meanwhile, Ray August stated that:

"A holding company is a company owned by a parent company or several parent companies whose job is to supervise, coordinate and control the business activities of its subsidiaries. A similar understanding was also expressed by Garner, namely a holding company is a company formed to control other companies, usually in limiting its role in controlling shares and managing managerial."[60]

Such as the definition given, a holding company is a company that aims to own shares in one or more of the other companies,[61] or in other words, its main activity is to carry out investment activities in subsidiaries and subsequently conduct supervision of management activities in children companies.

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[58] Sulistiowati, *Op.cit*, p. 24

[59] William E. Mosher and Finla G. Crawford, *Public Utility Regulation*, Harper and Brothers, New York, 1933, p. 322

[60] Ryan August, *International Business Law: Text, Cases, and Readings*, Prentice Hall, Boston, 2012, p. 192

[61] Munir Fuady, *Hukum Perusahaan dalam Paradigma Bisnis*, P.T. Citra Aditya Bakti, Bandung, 2002, p. 83

Analysis of various differences in juridical understanding of the holding company or group companies shows that the relationship between parent and subsidiary in the construction of group companies has the following three characteristics:[62]

1. Group companies are parent and subsidiaries which are independent legal entities that are closely related.
2. The fact that the parent controls the subsidiaries from the reality of the group company business.
3. Group companies as economic entities.

A company is said to be in control of another company if the company is owned by more than half of the total nominal value of shares issued by another company, or if the company has the authority to determine the composition of the Directors of another company.[63] Since the holding company in Indonesia is in the form of a Limited Liability Company, the holding company in Indonesia is subject to the rules of the Limited Liability Company Law.

In order to utilize the principle of limited liability or limited liability, a company could establish a "Subsidiary Company" or Subsidiary to run a "Parent Company" business (Parent company). Thus, in accordance with the principle of separation and distinction known as the separate entity, the assets of the Parent Company with

[62] Sulistiowati, *Op.cit*, p. 23
[63] Stephen W. Mayson, Derek French, and Christopher Ryan, *Company Law*, Blackstone Press limited, London, p. 28

the Subsidiary Company are "isolated" against potential losses that will be experienced by one of them.[64]

In America, there are also those who regulate and define Parent Company or Holding Company, Subsidiary and Affiliate. The Parent or Holding Company is the creation of a company that is specifically prepared to hold other shares of the Company for investment purposes without either or with "control" (without or with actual control).[65]

It is stated in Sections 736 and 736 A 1989 British Act as well as definitions in America, almost the same as the definition stated in the Elucidation of Article 29 of Law No. 1 of 1995 concerning Limited Liability Companies ("UUPT 1995"). This explanation says, what is meant by "subsidiary" is a company that has a special relationship with other companies that can occur because of:[66]

a. more than 50% (fifty percent) of its shares are owned by its parent company;
b. more than 50% (fifty percent) of the votes in the GMS are controlled by the parent company; and or
c. control over the running of the company, appointment and dismissal of the Board of Directors and Commissioners are strongly influenced by the parent company.

[64] M. Yahya Harahap, S.H, *Hukum Perseroan Terbatas*, Sinar Grafika, Jakarta, 2009, p. 49-50

[65] *Ibid*, p. 51

[66] *Ibid*, p.52

Thus, what was stated in the Elucidation of Article 29 of the 1995 Company Law is still considered relevant as a basis for understanding and implementing the Parent or Holding Company and Subsidiary Companies.

Based on the description above, we can conclude that basically a holding company is a company that holds control over another company. The Parent Company in this case has the role of providing capital for the Subsidiary Company and playing a role in establishing the Subsidiary Company.

However, from the description above we can also see that the one that gives more function and role is the Subsidiary Company, which is usually a Subsidiary Company that runs a business from the Parent Company, and with the existence of a Subsidiary Company, the Parent Company can avoid potential losses. In addition, also with the existence of a Subsidiary Company, if something happens to a business run by a Subsidiary Company, the Parent Company is only responsible to the extent of its shares in the Subsidiary Company, because both are separate entities.

2. Requirements Procedures of A Holding Company's Establishment in Indonesia

Establishment of a holding company in Indonesia basically does not have a definite rule, because there is no stipulation regarding the law on holding companies in Indonesia to date. Because the holding company form in Indonesia is generally in the form of a Limited Liability Company, the terms and conditions of the holding company establishment are subject to the rules in Law Number 40 of 2007 concerning Limited Liability Companies. In establishing a Limited Liability Company, the requirements contained in Article 7 of the Limited Liability Company law must be fulfilled, namely:[67]

1. The Company is established by 2 (two) people or more with a notarial deed made in Indonesian.
2. Each founder of the Company must take part in the shares when the Company is established.
3. Provisions as referred to in paragraph (2), do not apply in the framework of merger.
4. The Company obtains legal status at the date of the issuance of the ministerial decree concerning the legalization of the Company's legal entity.
5. After the Company has obtained legal entity status and the shareholders become less than 2 (two) people, within a period

[67] See Law no. 40 of 2007 on Limited Liability Company

of no later than 6 (six) months from the time the relevant shareholders are required to transfer part of their shares to another person or the Company issues new shares to others.

6. In the event that the period as referred to in paragraph 5 has been exceeded, the permanent shareholders are less than two (two) persons, the shareholders are personally responsible for all the commitments and losses of the Company, and at the request of the parties concerned the district court may dissolve the Company.
7. Provisions that require the Company to be established by 2 (two) or more people as referred to in paragraph (1), and the provisions in paragraphs (5) and paragraph (6) do not apply to:
    a. Limited Liability Company whose shares are owned by the state or;
    b. The company that manages the stock exchange, clearing house, and guarantees, storage institutions and settlements and institutions as stipulated in the Capital Market Law

Based on the contents of the above article it can be concluded that to establish a holding company in the form of a limited liability company must have two or more shareholders, unless the holding company is owned by the state or institutions as stipulated in the Capital Market Law. Companies that are established must have purposes and objectives and business activities that are not in conflict

with the provisions of legislation, public order and / or decency as stipulated in the Limited Liability Company Law.

Also, the process of forming a holding company can be carried out with 3 (three) procedures, namely:[68]

a. Residual Procedure

In this case, the original company is divided according to each business sector. The broken-down company has become an independent company, while the rest (residue) of the original company is converted into a holding company, which also holds shares in the fraction company and other companies if any.

b. Full procedure

This full procedure should be carried out if previously there was not too much company solving / independence, but each company with the same ownership / relationship was scattered, without concentrating in a holding company. In this case, the holding company is not the rest of the original company as in the residual process, but the company is full and independent. Independent companies that are prospective holding companies can be:

a. A new company is formed, or
b. Taken over from an existing company but still in the same ownership or relationship, or

[68] Munir Fuady, *Op.cit*, p. 84-88

c. Acquisition of other companies that have already existed, but with different ownership and not related to each other.

c. Programmed procedure

Sometimes, business people have been aware of the importance of a holding company from the start. So that the start of business start has occurred to form a holding company. Therefore, the first company established in its group is a holding company. Then for each business carried out, other companies will be formed or acquired, where holding companies as shareholders are usually together with other parties as business partners. Thus, the number of new companies as subsidiaries can continue to grow in number in line with the business development of the business group concerned.

While in the UK, based on Sections 736 and 736 A, 1989 Act, there are three ways to establish a subsidiary with the following references:[69]

a. One Company (A) has majority voting rights (hold a majority of voting rights) in another Company (B), and it is called Company A holding "voting control" of Company B.
b. If a Company (A) is a shareholder in another Company (B), and the Company (A) may designate and dismiss members of the Company's Board of Directors (B), in this case the

[69] M. Yahya Harahap, S.H, *Op.cit*, p. 50-51

Company (A) as a Parent Company and the Company (B) as a Subsidiary Company where the Company (A) as the parent Company "controls the Directors" (director control) of the Company (B).

c. If a Company A, is a shareholder of another Company (B) and the Company (A) controls alone or based on an agreement with the shareholders who have majority voting rights to the Company (B), then in this case the Company (A) is called controlling the Company (B) based on agreement (contract control).

3. Legal Relations between Holding Company and Subsidiary Company

The parent company and subsidiaries are two separate and separate legal entities that have economic relations. To get a clearer picture, the relationship between the parent and the subsidiary will be discussed by the sub-chapter below:

a. The link between the Holding Company and its subsidiaries

A company's ownership of shares in another company results in a linkage between the parent company and its subsidiaries so that the parent company can use voting rights in the RUPS of the subsidiary, appoint directors and / or commissioners of the subsidiaries, or transfer control of subsidiaries to other

companies through contract control. The link between parent and subsidiary in the construction of group companies is caused by the following:

1. Ownership of a holding company for shares of a subsidiary

   Parent ownership of a significant number of shares of a subsidiary gives the parent company the authority to act as a central leader who controls the subsidiaries as a management entity. One of the functions of share ownership of a parent in a subsidiary is *zeggenschapsfunctie*. *Zeggenshapsfunctie* shares ownership in subsidiaries gives voting rights to the parent company to control subsidiaries through various existing control mechanisms such as general meeting of shareholders to support the function of the construction of group companies as economic entities.

2. General Meeting of Shareholders

   Parent companies have the authority to control subsidiaries through the subsidiary GMS mechanism. In the RUPS of subsidiaries, the parent company can establish strategic things that can support the achievement of the group's corporate goals as an economic entity, among others through the determination of the company's long-term goals in the form of a five-year business plan known as a strategic plan. In this strategic plan, the parent company's board of directors

establishes the company's basic policies which consist of the company's vision, mission, culture and strategic objectives. The basic policy of the parent company was followed by all subsidiaries in preparing their respective term plans.

3. Placement of directors and/or board of commissioners of subsidiaries

   Through the ownership of the shares of a subsidiary, the parent company has the authority to place the directors and / or the board of commissioners of the parent company to concurrently be the directors and / or the board of commissioners of the parent company to concurrently become directors or board of commissioners of the subsidiary. Placement of the parent company in subsidiaries is an indirect form of control over the operational activities of the subsidiary. With the control function, the parent company can know the development of the business activities of each subsidiary.

4. Linkages through the Joint Rights Agreement

   The relationship between the parent and its subsidiaries can also occur due to the voice rights agreement made between the founding shareholders, who agreed that the appointment of directors and commissaries was determined by one of the founding shareholders. Such agreements occur in group companies which are state-owned enterprises, which are often

referred to as red and white shares and are referred to as series A shares.

5. Linkages through contracts

The Company can submit control over management to the company through a Company Management Agreement. The relationship between the parent and subsidiaries in the construction of the company does not eliminate juridical recognition of the status of the legal entity of the parent and its subsidiaries as independent legal subjects. The parent and subsidiary relationship gives the parent company the authority to act as a central leader that controls the subsidiary in supporting the company's objectives as an economic entity.

b. Independence of the Parent Legal Entity and Subsidiaries

A holding company which is a legal entity (legal entity) that is independent and separate from other legal entities, so children are also generally, which also means that they have an independent position. As a legal entity, the children are their own rights and responsibilities and also have their own wealth, which is juridically separated from the assets of their shareholders.

For companies and children who are independent legal entities, the law applies which is the basis of companies that are limited to legalization of legal entities, legal status as independent legal subjects or separate legal entities and limited liability

companies. Juridical independence of subsidiaries for corporate care. Mentally, the control of the company does not revoke the juridical independence of the legal entity status of the subsidiary. Based on the principle of independence of the legal entity, then in principle, legally, the company holding its position as a company does not have the authority to achieve management and policies of its subsidiaries.

According to legal theory (the conventional one), the company holds the subsidiary's business which is only possible in the following cases:

a. Through directors and commissioners appointed by holding companies as shareholders, insofar as they do not conflict with the articles of association of the company.
b. Through contractual relationships. Also to the extent not contrary to the company's articles of association

c. Legal Responsibilities of Holding Company and Subsidiaries in Group Company

Legal construction between the holding company and its subsidiaries in the Company Law that uses legal principles regarding the independence of the parent legal entity and its subsidiaries to act as independent legal subjects and have the right to conduct their own legal actions. Based on these legal principles, there are implications:

a. The parent company is not responsible for legal actions committed by the subsidiary.
b. The application of the principle of limited liability (the principle of limited liability) that protects the parent company as a shareholder of a subsidiary to not be responsible for exceeding the investment value of the inability of a subsidiary to settle legal responsibilities with third parties.

The principle of limited liability (the principle of limited liability) to the parent company as a shareholder of the subsidiary according to the provisions of Article 3 paragraph 1 of Act Number 40 of 2007 concerning Limited Liability Companies which states that the shareholders of the company are not responsible for losses of the Company in excess of it has. But the parent company will be responsible for the legal issues of the subsidiary in matters:

a. The Parent Company has entered into an agreement entered into by a subsidiary with a third party subsidiary
b. Parent The company acts as a corporate guarantee for the subsidiary agreement with creditors
c. Parent companies commit unlawful acts that result in losses to third parties from subsidiaries.

In principle, the parent company may be subject to legal responsibility as a result of the dominance of the parent company

in managing subsidiaries that carry out the parent company's instructions, but our company law still maintains juridical recognition of the status of the parent and subsidiaries as independent legal subjects. Company law provides protection to the parent company as a shareholder of a subsidiary with the application of the principle of limited liability for the inability of a subsidiary to settle all legal responsibilities to third parties. The relationship between the parent company and its subsidiaries in the construction of the group company has caused the holding company to have a dual role as a shareholder of the subsidiary and the central leader of the group company. The position of the parent company as a subsidiary's shareholder causes the parent company not only to be responsible for the value of the shares considering the dual role of the parent company. This responsibility is directed to the expansion of the legal responsibility of the parent company as a shareholder as well as the central leadership of the group company by applying the Piercing the corporate veil principle and the equitable balance principle between the rights and obligations of the parent company so that the parent company has an obligation to be responsible for all legal consequences emerged from the relationship.

C. Limited Liability Company in Islam

In khilafah, the company will operate in an economic scope that has been outlined. Islam has regulated that every utility that is needed by society, in the sense that the absence of these utilities will make people search farther and deeper to get them, will be categorized as public goods. This means that the goods will be owned by the public and the income generated will be used for the benefit of the whole community. This is derived from the hadith of the Prophet which reads:

"Muslims are united in three (3) things: water, pasture, and fire."[70]

A company (*syarikah*) is a contract where people work together and distribute profits to themselves. In Islam, a contract must be an offer and acceptance between people who cooperate on something. Therefore, there will always be two or more parties in a company formation.[71]

Limited liability companies (*syirkah qubro al-muhasamah*) itself is a type of business partnership that appears and is developed in the west (western European countries) and syirkah or its own company, in sharia terms is a transaction between two or more people, where they agree to do financial work and bring profit.[72]

Shirkah law itself is permissible (*hubah/halal*) as we can eat, drink, and so on as far as there is nothing to forbid it (forbidden if it is stated in the Qur'an or *Sunnah*). This is based on the silence (*Taqrir*) of the Prophet

[70] Adrian Sutedi, *Pasar Modal Syariah Sarana Investasi Keuangan Berdasarkan Prinsip Syariah,* Jakarta, Sinar Grafika, 2011, p. 178

[71] *Loc.Cit.*

[72] *Ibid*., p. 179

Muhammad on *Shirkah* which was carried out by friends at that time. In Islamic law itself, the silence of the Prophet Muhammad means recognition and being allowed (not prohibited, but also not required).[73]

The pillars of syirkah according to the jumhur of the ulama are three: 1) *shighat / akad* (*ijab* and *kabul*); 2) a party who is mindful; and 3) business. In addition, the legal requirements and whether or not *syirkah* are determined by something that is transacted, which is suitable for being biased and permissible (*halal*) transacted.[74]

According to An Nabhani, companies that are allowed can be classified into 5 types, namely:[75]

a. *Inan* Company (Equal Company) / *Sirkah Inan*

The company is equal (*inan*), this is a company that places both parties as investors in business and works with this investment money as well. Both parties will have the right to sell and buy, and run the company. Therefore, all partners are equal in terms of the arrangements they make.

In this company, the two parties (the founder of company) both issued their assets and merged them into one (as company assets), and jointly managed the company. The ability to do this company is based on the *as-sunnah* and friend's *ijma* because, from the time of the Prophet Muhammad to the time of the companions, many did it and the he lets it.

[73] *Ibid.*, p. 180
[74] *Loc.Cit.*
[75] *Ibid.*, p. 185-190

b. *Abdan* Company (Entity Company)

In this company, two parties or people work together with the skills they have, for example as a consultant or doctor. Even so, they also use their money, but the skills they have are the reason for them to cooperate in one company.

This company is a company between two or more people with their respective bodies, but the assets of the company are not from them but from other parties. The founders of the *abdan* company does not have to have the same skill. It can be said that this is a kind of company that formed by the parties above, with the aim of implementing a contract or project from another party with capital that come from the party contracting the company.

This *syirkah* is allowed based on the *hadith* narrated by Abu Dawud and Al-Atsram with the *sanad* from Ubaidah from his father, Abdullah bin Mas'ud who said, "I, Ammar bin Yasir, and Saad bin Waqash did *shirkah* on what we got in the *ba'dar* war, then As'ad brought two prisoners of war, while Ammar and I did not bring anything." Their actions were left by the Prophet Muhammad.

c. *Mudharabah* Company (Corporate and Capital Company)

Mudharabah (*Qirad*) is a company formed by funders (*shahibul mal*) and management (*Mudarib*), in other words the *mudharabah* company is formed by the melting of assets and

bodies. The profit from the *mudharabah* business is divided by agreement, while the business loss (the company's liability) is borne by *shahibul mal*.

Legitimate or the formation of a *mudharabah* company occurs if *Shahibul Mal* has deposited assets to *Mudarib*. *Shahibul Mal* is not allowed to work in managing the company with *Mudarib*. Similarly, the *mudarib* party is not permitted to conduct certain business activities or transactions without the permission of the *shahibul mal*.

The profits from the business will be divided in accordance with the agreement, and when there is a loss not due to management errors (negligence), the loss is borne by the investor. This is because the law of the contract of *wakalah* stipulates that the law of the person who becomes a representative cannot bear the loss, as narrated by Ali r.a who said, "The levy depends on wealth. While profits depend on what they agree on together. "(Abdurrazak in the book *Al-Jami'i*).

d. *Wujuh* Company

Wujuh Company has a similiar form with *mudharabah*, but the capital provided by passive investors is its credibility in the business world and based on that position the company trades. This investor can be a wealthy trader, which means that the debt will always be paid by the company as long as they are supported

by the rich person. *Wujuh* company is a derivative of the *Mudharabah* company.

This company (*syirkah*) can occur because of the position, professionalism, or trust of other parties to buy on credit and then sell it in cash. *Syirkah wujuh* is allowed according to *syara* 'because it basically includes *syirkah mudharabah* or *syirkah abdan* which is also permissible.

e. *Mufawadhah* Company (Negotiation Company)

The *mufawadhah* (*syirkah*) company is a combination of several types of *syirkah*, both *inan, abdan, mudharabah*, and *wujuh*. For example, a person gives his capital to two engineers to hold a company so that his capital will be managed with their assets, with the aim to build several houses for sale. Then the two agreed to involve their respective assets. Then they will get the goods without having to pay in cash, because both of them get the trust of the traders. So, the company of the two engineers together with their bodies is the *abdan* company. Then, from the assets they are releasing, they are called the *inan* company. While the capital they get from other parties to be managed shows the *mudharabah* company. While the management of the goods they get from traders is a company of *wujuh*.

CHAPTER III

LEGAL STATUS OF STATE FINANCIAL IN HOLDING STATE OWNED ENTERPRISES

In Government Regulation No. 72 of 2016, there is a provision whereby the state assets in the form of state-owned shares as referred to in Article 2A paragraph (2) letter d being used as state capital participation in other State-Owned Enterprises so that the majority of shares are owned by other State-Owned Enterprises, the State-Owned Enterprises become state-owned subsidiaries with the mandatory that state will hold shares with privileges stipulated in the articles of association.[76]

The similar issues is also appear in the Government Regulation No. 47 of 2017 on the Addition of the Republic of Indonesia's Capital Participation into the Share of the State-Owned Limited liability Company (Persero) PT. Indonesia Asahan Alumunium Article 3 stated that, "With the transfer of series B shares, the state exercises control over the Company (Persero) PT Aneka Tambang Tbk, PT. Timah Tbk (Persero), and the Company (Persero) PT Bukit Asam Tbk through the ownership of Series A shares in multiple colors with the authority set forth Articles of Association."[77] which declare that the state has control over the PT.

[76] See Article 2A paragraph (2) of Government Regulation No. 72 of 2003 on the Amendment to Government Regulation No. 44 of 2003 Regarding Procedures for Participation and Stock Capital Administration in State Owned Enterprises and Limited Companies

[77] Government Regulation No. 47 of 2017 on the Addition of the Republic of Indonesia's Capital Participation into the Share of the State Owned Limited liability Company (Persero) PT. Indonesia Asahan Alumunium

Aneka Tambang Tbk, PT. Timah Tbk, and also PT. Bukit Asm Tbk through the ownership of their shares from PT. Indonesia Asahan Alumunium.

This has the same condition with Government Regulation No. 6 of 2018 on the Addition of the Republic of Indonesia's Capital Participation into the State Owned Limited Liability Company PT. Pertamina Article 3 which stated that, "with the transfer of Series B shares, the state exercises control over the State-Owned Limited Liability Company (Persero) PT. Perusahaan Gas Negara Tbk through the ownership of Series A shares in multiple colors with the authority stipulated in the Articles of Association."[78]

While later in the Government Regulation No. 47 of 2017 on the Addition of the Republic of Indonesia's Capital Participation into the Share of the State Owned Limited liability Company (Persero) PT. Indonesia Asahan Alumunium Article 4 letter a, they stated that, "Status of PT. Aneka Tambang Tbk (Persero), PT. Timah Tbk, and PT. Bukit Asam Tbk (Persero), the Company is transformed into a limited liability company which complies fully with Law Number 40 of 2007 concerning Limited Liability Companies"[79]

This also has the same condition with Government Regulation No. 6 of 2018 on the Addition of the Republic of Indonesia's Capital Participation into the State Owned Limited Liability Company PT. Pertamina Article 4 that stated, "Status of the Company (Persero) PT Perusahaan Gas Negara Tbk has changed

[78] See Government Regulation No. 6 of 2018 on the Addition of the Republic of Indonesia's Capital Participation into the State Owned Limited Liability Company PT. Pertamina

[79] *Op.Cit*

into a limited liability company which fully complies with Law Number 40 of 2007 concerning Limited Liability Companies;"[80]

State Equity Participation derived from state assets in the form of state-owned shares in State-Owned Enterprises to other State-Owned Enterprises is done without through State Budget's (APBN) mechanism which abolished the aspect of the institutional role of the DPR for the reason 2A paragraph (1) Government Regulation No. 72 of 2016 states "State Capital Participation originating from state assets in the form of state-owned shares in State-Owned Enterprises or Limited Liability Company as referred to in article 2 paragraph (2) letters d to State-Owned Enterprises or other Limited Liability Companies, carried out by the Central Government without going through the State Budget's (APBN) mechanism."[81]

Apparently, this provision is also contradictory to Law 17 of 2003 concerning State Finances which stating that state assets that still included in the state finance scope still have to pass the supervision of the government. Changes in state assets to state-owned assets and Company cannot be directly carried out by the Government because they must be discussed with the DPR (Commission VI and Commission XI) as stipulated in Law No. 17 of 2007 concerning State Finance as what explained above.

[80] *Op.Cit*

[81] See Article 2A paragraph (1) of See Government Regulation No. 72 of 2003 on the Amendment to Government Regulation No. 44 of 2003 Regarding Procedures for Participation and Stock Capital Administration in State Owned Enterprises and Limited Companies

The addition of state-owned stock clauses to State-Owned Enterprises/Company as one of the sources of state capital participation originating from the State Budget in article 2 paragraph (2) letter d of Government Regulation No. 72 of 2016 causes an overlapping of authority that should be reviewed in Article 4 paragraph (6) only focuses on state capital originating from the APBN where the mechanism must go through the DPR's approval. Therefore, Government Regulation (PP) number 72 of 2016 which states that the establishment of a holding does not require a process in the APBN or does not require the approval of the DPR, then Government Regulation no. 72 of 2016 is contrary to higher rules.

However, the concept of a company as a legal entity whose assets are separate from its shareholders is a characteristic that is considered important for the status of the corporation as a legal entity that distinguishes it from other forms of company. The limited nature of responsibility is a statement of principle that shareholders are not personally responsible for the company's obligations as legal entities whose assets are separate from their shareholders. The principle of the "continuity of existence" emphasizes the separation of corporate wealth from its owner. The legal entity itself is not affected by the death or bankruptcy of shareholders. Legal entities are also not affected by changes in the ownership structure of the company. As a result, the company's shares are traded freely.[82]

[82] Erik P.M Vermuellen, *The Evolution of Legal Business Forms in Europe and the United States: Venture Capital, Joint Venture, and Partnership Structures*, Deventer, Kluwer Law International, 2002, p. 189

To be more detailed, every legal entity that can be said to be responsible (*rechts-bevoegheid*) legally, must have four main elements, namely:[83]

1. Property that is separate from the wealth of other legal subjects; as for the example, the total all assets at PT. Antam Tbk in September 2018 has amounted to 32.8 billions which is based on the principle of the legal entity, regardless of who invested the shares in it, all assets have become the property of PT. Antam Tbk.
2. Having certain ideal goals that do not conflict with laws and regulations; which in PT. Antam Tbk, the company has current goals which to focus on increasing shareholder value. This is done through decreasing costs as the business grows to create sustainable profits. The company's strategy is to focus on nickel, gold and bauxite core commodities through increasing production output to increase revenue and reduce unit costs. PT. Antam tbk plans to maintain growth through reliable expansion projects, strategic alliances, improving reserve quality, and increasing value through developing downstream businesses and will also maintain the company's financial strength. Through as much cash as possible, the company ensures that it will have sufficient funds to fulfill its obligations, fund growth, and pay dividends. To reduce costs, companies must operate more efficiently

[83] Jimly Asshiddiqie, *Perkembangan dan Konsolidasi Lembaga Negara Pasca Reformasi*, Setjen dan Kepaniteraan MKRI, Cetakan Kedua, Jakarta, 2006, p 71

and productively and increase capacity to take advantage of economies of scale.[84]

3. Has its own interests in legal traffic; this means that as a legal entity, a company should have their own interest that does not influenced by other parties whether from the outside or in the inside of the company.
4. There are regular management organizations according to applicable laws and regulations and their own internal regulations, which is as their own legal entity, a company should have their own regulation without any intervention from people outside of the company itself.

In addition to these characteristics, in more detail a company as a subject of independent law has several inherent substantive characteristics, namely:[85]

a. Limited responsibility, where basically the founders or shareholders or members of a corporation are not personally responsible for corporate losses or debts. In this context, if the corporation is a Limited Liability Company, the responsibility of the shareholders is limited to the shares that the shareholders own in the company.
b. Perpetual succession, which as an independent legal entity that carries its own rights and obligations, changes in membership in the ownership of a corporation do not have implications for the existence of the corporation itself. In the context of a Limited Liability Company itself, shareholders

[84] http://www.antam.com/index.php?option=com_content&task=view&id=32&Itemid=38, December 28th, 2018, 11.32 pm.

[85] Ridwan Khairandy, *"Korupsi di Badan Usaha Milik Negara Khususnya Perusahaan Perseroan: Suatu Kajian Atas Makna Kekayaan Negara yang Dipisahkan dan Keuangan Negara"*, Jurnal Hukum No. 1 Vol. 16 Januari 2009, p. 74-75

have the right to transfer their shares to third parties, especially for open limited liability company that have listings on the Exchange.

c. Owning its own assets, whereby all assets that are in corporate finance are legally in the ownership of the corporation itself and are not part of the wealth of the shareholders or their administrators.

d. Having contractual authority and being able to prosecute and be prosecuted in its own name, which legal entity as legal subject (legal person) is treated as a person so that he can carry his own rights and obligations. It has become a juridical consequence that the legal subject the law can sue or be sued before the court.

Because a legal entity is a legal subject, it is an independent or free from the founder, member, or investor of the entity. This body can carry out business activities in its own name like humans. Businesses run, assets controlled, contracts made, all on behalf of the agency itself. This body is like a human being who has legal obligations such as paying taxes and applying for permission to do business on his own behalf.[86]

It means that, the company as a legal entity has the concept of separation between ownership and control, a concept of separation between ownership of a company and control of a company. In other words, then by law the management of a Limited Liability Company must be carried out independently, professionally

[86] Robert W. Hamilton, *The Law of Corporation*, St. Paul: Minn West Publishing Co., 1996, p. 1

and apart from the interference of its shareholders, including the controlling shareholders.[87]

If we refer to the Article 1 number 1 of Law Number 19 of 2003 about State-Owned Enterprise, which has the phrase of 'wholly or part of its capital is owned by the state through direct participation derived from separated state assets gives consequences that Holding State-Owned Enterprises does not included as State-Owned Enterprises too. When looking at the definition of 'direct capital participation', it means that the one that can be considered as State-Owned Enterprises itself is only the Parent Company. So, the subsidiary of the parent company is not included in the category of State Owned Enterprises because direct investment in the parent company occurs while in the subsidiary there is indirect capital participation, so the subsidiary is not a State-Owned Enterprises. This condition makes Holding State-Owned Enterprises should refer to Law No. 40 of 2007 regarding Limited Liability Company.

Based on the Law of Limited Liability Companies as well as the theory and legal doctrine of the company, it is clear that State Owned Limited Liability Company is an independent legal entity. Likewise with State Owned Entities subsidiaries. Because of its position as an independent legal entity, the management of State-Owned Enterprises must be based on good corporate governance principles without intervention or interference from any party, including the Government.[88]

[87] Inda Rahadiyan, *Op.cit*, p. 638
[88] *Ibid*., p. 639

Eventhough in the Government Regulation no. 72 of 2016, article 2A paragraph (3) and (4) stated that, the participation of state capital in State Owned Enterprise changes into the wealth of State Owned Enterprise or Company, they still stated before in the same article at paragraph (2) that state will hold shares with privileges. Also, in the article 2A paragraph (7) explains that state-owned holding gets the same treatment as state-owned enterprises even though State Owned Enterprise's subsidiaries are not State Owned Enterprises itself. This is clearly violate the separate legal entity theory that lets the company to run their own business without another party's intervention.

However, the thing that is forgotten is that if it is associated with the status of state money that is separated wherever it is placed or flows, both the State Finance Law and also Constitutional Court Decision Number 62/PUU-XI/2013 and Number 48/PUU-X1/2013 adheres to the source theory.

In the Constitutional Court Decision Number 62/PUU-XI/2013 has been stated, which is:[89]

> The question is whether the state wealth that has been separated, which then becomes the business capital of the BUMN and BUMD is to remain as state finances and thus the BPK has the authority to examine it. Another question is whether the system and mechanism of article 23 of the 1945 Constitution generally applies, even though the BUMN and BUMD are business entities, thus the separated state assets are transformed into no longer state finances, which constitutionally are no longer authorized by the BPK to examine management, but the internal audit is authorized;
>
> Whereas according to the Court, the separation of state assets in question from a transaction perspective is not a transaction that transfers a right, so the legal consequences do not result in the transfer of rights from the state to BUMN, BUMD, or other similar names. Thus the separated

[89] See Constitutional Court Decision No. 62/PUU-IX/2013, p. 231

state wealth still remains the country's wealth. Related to the authority of the BPK to examine, according to the court, because it still remains as state finances and BUMN or BUMD still belongs to the state and, as considered above, is also an extension of the state there is no reason that the BPK is not authorized to examine it. However, so that BUMN and BUMD can run in accordance with the principles of Good Corporate Governance, internal supervisors, in addition to the supervisory board, they are still relevant.

And also, in Constitutional Court Decision Number 48/PUU-X1/2013 that stated:[90]

> Regarding state finances, in addition to being constitutionally regulated in article 23 of the 1945 Constitution mentioned above, it is also regulated in article 23c of the 1945 Constitution which states, "Other matters concerning state finance are regulated by law". Based on these provisions, there are "other matters concerning state finances" which are constitutionally governed to be "regulated by law". Thus, in addition to constitutionally known management mechanisms as stipulated in article 23, it is also known as the management mechanism referred to in article 23C which is ordered to be regulated by law. The broad understanding of the state, so that in the perspective of state financial management are grouped into sub-sectors of fiscal management, monetary management sub-sector, and the separated sub-sector of management of wealth [vide konsiderans (consider) letters b and c and general explanation of number 3 Law 17/2003]. In accordance with the management perspective, in particular the separated sub-sector of state wealth management applies the provisions of legislation concerning the mechanism of state financial management by legal entities that manage in the field of education as well as managing business for production branches which are important for the state that has a livelihood many people [vide article 31, article 32, article 33 of the 1945 Constitution];
>
> Based on this description, PT BHMNs, state-owned enterprises (BUMN), or other names, or more specifically those that carry out constitutional mandate article 31, article 32, and article 33 of the 1945 Constitution are an extension of the state in carrying out some functions of the state to achieve national goals, namely to educate the life of the nation, or to advance public welfare. Therefore, from the perspective of legal entity capital, or other similar names, which performs part of the function of the state finance which becomes part of its capital or wholly derived

[90] See Constitutional Court Decision No. 48/PUU-XI/2013, p. 226

from state finances. From this perspective and the function of the legal entity in question it cannot be fully regarded as a private legal entity.

This means that as long as the state money comes from the State Budget (APBN/D) wherever the country's money flows are, the hands of law enforcement officers cannot be shackled to keep an eye on the use of state money originating from public money. In addition, the principle that "the State includes all" (all encompassing) becomes the paradigm of Article 33 of the 1945 Constitution of the Republic of Indonesia continues to ensure that all forms of private activities framed in a treaty law may not reduce or eliminate the duty and responsibility of the state to secure wealth country. Thus, contractual relations that are now rife as a cover for the involvement of state-owned subsidiaries to avoid the reach of anti-corruption law enforcement will clash with the principle of public legal preference and the principle of all encompassing. It is not permissible for all forms of private activities to be used as arenas of conspiracy to break the control of state control over the flow of state money which is now rampantly managed by various State Owned Enterprises subsidiaries.[91]

If we refer to what have explained above, it has been said that the subsidiary of the parent company is not included in the category of State Owned Enterprises because of the direct investment in the parent company occurs while in the subsidiary there is an indirect capital participation. And thus, this condition

[91] W. Riawan Tjandra, "*Anak Perusahaan BUMN dan Penegakan Hukum Anti Korupsi*", at https://law.uii.ac.id/wp-content/uploads/2017/05/Wirawan-Tjandra-Aspek-Hukum-Administrasi-Negara-dalam-Pembentukan-Holding-BUMN.pdf, accessed on November 18th, 2018 at 18:09

make Holding State-Owned Enterprises should refer to Law No. 40 of 2007 on Limited Liability Company which supported the separate legal entity theory.

The independence of the Limited Liability Company, which is also the independence of the Company as a separate legal entity, provides an understanding that "state capital participation" in the State Owned Limited Liability Company is the property of the Company, they have the rights to own its own assets which are separate from the assets of its management including the personal assets of its shareholders, and so it is no longer the state's wealth.

State-Owned Limited Liabilty Company has its own separate rights and obligations (separate) from its founders. With the status of Holding State-Owned Enterprises as limited liability company as a legal entity of its own, then from then on the law treats the owner or shareholders and management or directors, separate from the limited liability company itself. Which means that the shareholders have no interest in the company's assets.

By the statement above, both the State Finance Law and also Constitutional Court Decision Number 62/PUU-XI/2013 and Number 48/PUU-X1/2013 are contradict with Holding State-Owned Enterprises' nature as a Legal entity which has a limited responsibility, where basically the founders or shareholders or members of a corporation are not personally responsible for corporate losses or debts. In this context, if the corporation is a Limited Liability Company, the responsibility of the shareholders is limited to the shares it owns in the company which in this case is the State. Also, based on Law no. 40 of 2007 on Limited Liability Company, Company's shareholders are not personally

responsible for the agreements made on behalf of the Company and are not responsible for the Company's losses exceeding the shares held.[92]

[92] See Law no. 40 of 2007 on Limited Liability Company article 3 (1)

CHAPTER IV

CONCLUSION AND RECOMMENDATION

A. Conclusion

Based on the description from the previous chapters, the conclusion that can be drawn from this thesis is:

The subsidiary of State-Owned Enterprises is not included in the category of State-Owned Enterprises because direct investment in the parent company occurs while in the subsidiary there is indirect capital participation, so the subsidiary is not a State-Owned Enterprises. This condition make Holding State-Owned Enterprises should refer to Law No. 40 of 2007 on Limited Liability Company which supported the Separate Legal Entity theory. The subsidiaries of State-Owned Enterprises as the legal entity resulted that the management of subsidiaries of State-Owned Enterprises should be done without the intervention or interference from any party, including the Government or the State itself as the shareholder.

The State Finance Law, Government Regulation No. 72 of 2016 and also both of Constitutional Court Decision No. 62/PUU-XI/2013 and No. 48/PUU-X1/2013 are contradict with Holding State-Owned Enterprises nature as a Legal entity which has a limited responsibility, where basically the founders or shareholders or members of a corporation are not personally responsible for corporate losses or debts. In this context,

if the corporation is a Limited Liability Company, the responsibility of the shareholders is limited to the shares it owns in the company which in this case is the State.

B. Recommendation

Related to the conclusion above, these are things that can be considered from this thesis, namely:

The government should consider Holding State-Owned Enterprises as a separate legal entity that manage their own management. There should be a Law that regulate about Holding State-Owned Enterprises and not only a government regulation and a revision towards Law of State-Owned Entities to be more precise with the meaning of State-Owned Enterprises. There should also be a revision towards Law of State Finance about the position of State wealth to make it clear about its position in Holding State-Owned Enterprises because it is contradictory with the legal entity theory that should be applied for Holding State-Owned Enterprises as a legal entity.

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