

APPLICATION OF THE BUSINESS JUDGMENT RULE DOCTRINE RELATED TO LEGAL PROTECTION EFFORTS FOR BOARD OF DIRECTORS DUE TO THE EXISTENCE OF STATE FINANCIAL LOSSES IN THE MANAGEMENT OF REGIONAL OWNED ENTERPRISES

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Abstract: The granting of authority to regional governments is also accompanied by the handover and transfer of financing. The most important source of financing is local revenue (PAD). PAD is regional income sourced from regional taxes, regional user fees, separated regional wealth management results, and other legitimate regional original income, which aims to provide flexibility to regions in exploring funding in the implementation of regional autonomy as an embodiment of the principle of centralization. . It cannot be denied that the continuity and success of a BUMD company will greatly depend on the quality of the Board of Directors in driving the wheels of the company. Directors are required to be able to advance the company so that it always grows and is able to compete with competitors, so that it can survive, excel and have quality. This goal can only be achieved if the Board of Directors is able to issue appropriate policies and dare to take business risks. In accordance with the idiom "high risk high return", high risk will bring high returns. For this reason, in order to encourage Directors to dare to take business risks for the benefit of the Company, legal umbrellas such as the business judgment rule doctrine have a very essential role.

Keywords: *Business Judgment Rules, Directors, BUMD.*

Introduction

The Second and Fourth Paragraphs of the Preamble to the 1945 Constitution of the Republic of Indonesia (UUD 1945), mandate that one of the goals of the state is to realize prosperity and general welfare for the Indonesian people. The 1945 Constitution also gives regional governments the authority to regulate and manage government affairs themselves according to the principles of autonomy and assistance duties to accelerate the realization of community welfare through improving services, empowerment and community participation. The granting of authority to regional governments is also accompanied by the handover and transfer of financing. The most important source of financing is local revenue (PAD). PAD is regional income sourced from regional taxes, regional user fees, separated regional wealth management results, and other legitimate regional original income, which aims to provide flexibility for regions in exploring funding in the implementation of regional autonomy as an embodiment of the principle of centralization. (Rudy Badrudin, 2011).

Juridically, based on the provisions of Article 285 of Law Number 23 of 2014 concerning Regional Government (UUPD), regional income sources consist of:

1. local original income, including:
 - a. local tax;

- b. regional levies;
 - c. results of management of separated regional assets; And
 - d. other legitimate regional original income.
2. transfer income, and
 3. other legitimate regional income.

What is meant by transfer income includes; first, Central Government transfers consisting of balancing funds, special autonomy funds, special funds and village funds. Second, inter-regional transfers consisting of revenue sharing and financial assistance. Regional governments have the function and responsibility to improve people's welfare by implementing development in all fields. PAD sources are regional financial sources extracted in the area concerned, which can be sourced from regional taxes and regional levies (Yuliati, 2000). So that PAD can become the largest financial source for the implementation of regional autonomy (Chabib Soleh dan Heru Rocmansjah, 2010).

Literature Review

1. *Business Judgment rule*

In practice, it often happens that company directors, who in fact have the duty and authority to carry out the management of the company, are actually caught in legal problems as a result of the decisions or policies they make. This incident illustrates how a decision taken by the board of directors as a company organ is very crucial. Then, if it turns out that their decision actually brings losses to the company, it is not uncommon for directors to be sued personally by law enforcement officials, both in the criminal and civil realms.

In fact, in the business world, no one wants losses. However, sometimes things that happen in the field are so dynamic and difficult to predict, that business ideas and decisions that were originally believed to bring profits actually show the opposite results. Business judgment rule is a concept where the company's directors cannot be held legally responsible for the decisions they make even though the decisions cause losses to the company, as long as the decisions are made in good faith, with the right goals and methods, on a rational basis and with caution. - caution.

The business judgment rule doctrine originates from countries adhering to the common law system which was born and rooted in the doctrine of fiduciary duty or the responsibility of company directors. The business judgment rule arises as a result of the implementation of fiduciary duties by a director, namely the principle of duty of skill and care, so all errors that arise after implementing this principle, have the consequence that the directors are exempt from personal responsibility if an error occurs in their decision.

Method

A study cannot be said to be research if it does not have a research method (Koto, 2021). The research method is a process of collecting and analyzing data that is carried out systematically, to achieve certain goals. Data collection and analysis is carried out naturally, both quantitatively and qualitatively, experimentally and non-experimentally, interactively and non-interactively (Koto, 2020). The research method used is normative juridical research, namely legal research conducted by examining literature or secondary data (Koto, 2022). In qualitative research, the process of obtaining data is in accordance with the research objectives or problems, studied in depth and with a holistic approach (Rahimah & Koto, 2022).

Result and Discussion

1. Role and Function of Regional Owned Enterprises

Establishment of BUMD in order to support regional development and improve the welfare of people in the region. Purwadi said that the establishment of BUMDs had a role in realizing regional prosperity by contributing to PAD revenues in the form of dividends or taxes. One of the challenges of increasing PAD can be answered by increasing the role/contribution of BUMD. At a macro level, the role of regional companies (BUMD) in the regional economy can be measured through their added value contribution to gross regional domestic income and their ability to absorb labor. (IR. Purwadi, 2002).

Rustian Kamaludin stated that BUMDs have various functions and roles assigned to them, including: (Rustian Kamaludin, 2001).

- a. Implementing government policies in the field of economics and regional development;
- b. Generating funds for regional development financing;
- c. Encouraging community participation in the business sector;
- d. Fulfilling the need for goods and services for the public interest; And
- e. Become a pioneer in activities and businesses that are less popular with the private sector.

Looking at the role and function, BUMD was established with the aim of participating in implementing regional development in particular and national economic development in general to meet the needs of the people towards a just and prosperous society. Juridically, the aim of establishing BUMD based on the provisions of Article 7 of Government Regulation Number 54 of 2017 concerning Regional Owned Enterprises (PPBUMD), is to:

- a. provide benefits for regional economic development;
- b. carry out public benefits in the form of providing quality goods and/or services for the fulfillment of people's livelihoods in accordance with the conditions, characteristics and potential of the area concerned based on good corporate governance; And
- c. obtain profits and/or benefits.

Based on Article 1 number 40 of the UUPD, it is emphasized that BUMD is a business entity whose capital is wholly or largely owned by the region. If it is related to Article 7 paragraph (7) letter a of Law Number 40 of 2007 concerning Limited Liability Companies (UUPT), the BUMD must be established in the form of a Persero. This provision is reaffirmed in Article 339 paragraph (2) of the UUPD, that after being established by regional regulations, the formation of a legal entity is carried out based on the provisions of laws and regulations regarding limited liability companies (PT), so that in establishing BUMDs they must refer to the PT UU.

Based on the PT UUPT, a company consists of three organs, namely the GMS, Directors and Commissioners. The position of Directors in managing the company is an important and strategic position. The Board of Directors is the PT organ that manages the company. Therefore, the Board of Directors has demands and expectations that they carry out their duties professionally and based on good faith and responsibility.

BUMD is ideally one source of revenue from a regional government. BUMD is an embodiment of the role of regional government in regional economic development. However, in its development BUMD has actually become one of the regional financial problems.

2. Obstacles for Regional Owned Enterprises in Carrying Out Their Roles and Functions

According to Purwadi, there are at least 11 (eleven) general problems that occur in BUMDs, so that BUMDs have not been able to contribute optimally to supporting the increase in PAD and the regional economy, namely:

- a. High bureaucratic interference;
- b. Outdated condition of machines and equipment;
- c. Weak capital capacity;
- d. The large number of company assets that are unproductive (idle capacity), such as land and buildings which cause relatively high overhead;
- e. Employee skills are generally still low;
- f. Lack of clarity on the legal basis used, not in accordance with current conditions;
- g. The marketing system implemented by BUMD is relatively weak;
- h. There is competition from private parties who produce similar goods;
- i. Lack of functioning of the Supervisory Body;
- j. Regional companies generally have an unfavorable debt equity ratio position, so the financial risk of the company is relatively high;
- k. The burden of having to deposit a portion of profits;
- l. Still maintaining loss-making BUMDs; And
- m. The existence of BUMD whose establishment is forced, even though it is not economically feasible to establish (not feasible), for reasons related to the need for public services so that the business is inefficient (losses).

In principle, the progress and decline of a BUMD depends on the Board of Directors as the manager of the company. For this reason, a Director must run the Company as mandated by Article 92 paragraphs (1) and (2) of the Company Law, that a Director carries out the management of the company for the interests of the company and in accordance with the aims and objectives of the company. In addition, the Board of Directors has the authority to carry out the management of the company in accordance with policies deemed appropriate, within the limits specified in the Company Law and/or the company's articles of association. However, in practice, if a BUMD suffers a loss, the loss is borne by the Directors, and the Directors must even be held criminally responsible on the grounds that the Directors are causing harm to state finances. However, referring to the provisions of Article 97 paragraph (5) of the Company Law, members of the Board of Directors cannot be held responsible for the company's losses, if they can prove:

- a. The loss was not due to his fault or negligence;
- b. Has carried out management in good faith and prudence for the benefit and in accordance with the aims and objectives of the Company;
- c. Have no conflict of interest, either directly or indirectly, regarding management actions that result in losses; And
- d. Have taken action to prevent the occurrence or subsequent loss.

Referring to Article 97 paragraph (5) of the Company Law, members of the Board of Directors cannot be held responsible for the company's losses, if they can prove that; (a) the company's loss was not due to its fault or negligence; (b) has carried out management in good

faith, prudence and full responsibility for the interests of the company and in accordance with the aims and objectives of the company; (c) has no conflict of interest, either directly or indirectly, regarding the management actions carried out; and (d) have taken action to prevent bankruptcy.

The concept of Article 97 paragraph (5) of the Company Law is in accordance with the business judgment rule doctrine where Directors can be protected and free from legal action. The business judgment rule is a concept where the Directors of a company cannot be held legally responsible for the decisions they make even if the decision causes losses to the company, as long as the decision is made in good faith, with the right aim and method, on a rational basis and with prudence. be careful.

In addition, the function of the business judgment rule doctrine can be a guide and direction for the Board of Directors not to be careless in making business decisions. Considering that every decision that is made will have a crucial impact on the company, a Director in making decisions must be based on the norms contained in the business judgment rule doctrine, including upholding the principle of prudence, acting in good faith and only focusing on the interests of the company. , subject to the provisions of the articles of association and statutory regulations (Eri Hertawan, 2022).

If every Director can be held personally responsible for any company losses that arise without being provided with a defense, it is possible that no Director will have the courage to take business decisions. As a result, it will hamper the company's growth and make it stagnant. The wider impact is the obstruction of regional economic movements. In Indonesia, unfortunately there is no uniform understanding for law enforcers regarding the application of the business judgment rule doctrine. Even though Article 97 paragraph (5) of the PT Law has provided conditions for implementing the business judgment rule, it does not explain the benchmarks for fulfilling each provision. In this case, of course the law will be determined from the facts revealed at trial.

3. Case Example

There are several examples of researchers presenting the lack of uniformity in law enforcement regarding the application of the business judgment rule doctrine. First, the case that occurred in Supreme Court Decision No. 417 K/PID.SUS/2014 regarding the leasing of Boeing 737 aircraft carried out between PT A and B. At that time, PT A's aim in leasing aircraft was to expand by increasing the aircraft fleet and replacing old aircraft with new fleets. In a trial held by the Jakarta Corruption Court, an expert basically stated that the director of PT A could not be blamed because the aircraft provider was the one who defaulted. Then, the Directors' actions in changing the aircraft type did not violate the rules because in the Budget Work Plan (RKA) which was approved by the General Meeting of Shareholders (GMS), there was a provision that the director had the authority to change the aircraft type without having to report to the shareholders. Apart from that, regarding the security deposit paid by PT A to B, according to experts, this action is normal in the aviation business. Because the security deposit actually guarantees that PT A as the lessee will receive the aircraft from B. With various considerations, experts emphasize that this aircraft rental case is not appropriate to be brought into the criminal realm.

This case example shows that in principle the director of PT A has carried out all the procedures applicable in leasing Boeing 737 aircraft and is in accordance with the principles of good corporate governance. However, the verdict stated that the Defendant (Director) was legally and convincingly proven guilty of committing a criminal act of corruption together. Second, the case of the Tanjung Pinang District Court Decision, regarding Case Number

16/Pdt.G/2021/PN Tpg. Where R is the Director of PT. Bintan Inti Sukses/PT BIS (BUMD Bintan Regency) in 2015-2018, collaborated with third parties in an effort to develop PT's business. BIS, in the form of:

- a. business collaboration with CV Multi Coco Organik in the context of marketing coconut fiber (cocopeat), where this collaboration is outlined in the Deed of Cooperation Agreement No. 7, January 27 2016, as amended by Deed of Agreement No. 8, January 6 2017, made before Notary Muhammad Nazar, SH in Tanjung Pinang, with the business collaboration PT. BIS provides financial capital to CV. Multi Coco Organic amounting to IDR 1,500,000,000 (one billion five hundred million rupiah).
- b. business collaboration with CV Safina Air Cond Services as outlined in the Deed of Cooperation Agreement Number: 178/L/2016, March 1 2016, which was made before Notary Muhammad Nazar, S.H., Notary in Tanjungpinag. In this agreement, CV Safina Air Cond Services carries out air conditioning project work, procurement and installation of air conditioning and ventilation at the Cassia Condotel Bintan project. For capital participation in financing this project, PT. BIS handed over Rp. 700,000,000,- (seven hundred million rupiah) to CV Safina Air Cond Services.
- c. business collaboration with PT. Chantika is engaged in water transportation work from Sekupang, Batam to the Sambu Island Fuel Oil Terminal (TBBM). This cooperation agreement is stated in Deed of Agreement No. 6 Dated June 10 2017 made before Notary Muhammad Nazar, S.H., in Tanjung Pinang. In this business agreement, PT. BIS includes capital of IDR 210,000,000 (two hundred and ten million rupiah).
- d. Cooperation in Purchasing and Marketing of Ranjungan Crab Meat (Meat) with Al Baik Group (Mr. Muhammad Zulkamirullah), which is stated in the Deed of Financing Cooperation Agreement, Notarial Deed of Muhammad Nazar, S.H., Number 4, September 9 2017. In this business agreement, PT . BIS provides a capital loan of Rp. 1,500,000,000,- (one billion five hundred million rupiah).

Collaboration carried out by the Director of PT. BIS with third parties is a form of responsibility of the Board of Directors to run the company in the interests of the company and in accordance with the aims and objectives of the company, with a sense of responsibility and good faith in carrying out the duties of managing the company for the interests and business of the company. In this case the Director of PT. BIS (BUMD Bintan Regency), has carried out the aims and objectives of the company as stated in Article 3 of Amendment Deed Number 18 dated 23 August 2007, where the aims and objectives of establishing this company are to carry out business in the fields of development, general trade, industry, mining. , agriculture, tourism and services. And its implementation is outlined in the Company's Work Plan and Budget (RKAP) for 2016 and 2017 which was presented at the General Meeting of Shareholders. However, the Directors of PT BIS (BUMD Bintan Regency) are still being blamed for compensating for losses and undergoing criminal penalties due to being deemed detrimental to state finances.

Conclusion

It cannot be denied that the continuity and success of a BUMD company will greatly depend on the quality of the Board of Directors in driving the wheels of the company. Directors are required to be able to advance the company so that it always grows and is able to compete with competitors, so that it can survive, excel and have quality. This goal can only be achieved if the Board of Directors is able to issue appropriate policies and dare to take business risks. In

accordance with the idiom "high risk high return", high risk will bring high returns. For this reason, in order to encourage Directors to dare to take business risks for the benefit of the Company, legal umbrellas such as the business judgment rule doctrine have a very essential role.

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