

**LEGAL CONSEQUENCES OF REDUCED INDEPENDENCE OF
SUBSIDIARIES BY PARENT CONTROL IN
HOLDING COMPANY
(STUDY ON PLANTATION SOE HOLDING)**

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ABSTRACT

PT Perkebunan Nusantara III (Persero) is the holding company for PT Perkebunan Nusantara I, II, IV to XIV in the Perkebunan BUMN Holding structure. In order to accelerate the operations of the Plantation BUMN Holding, the parent company exercises control by issuing a set of policy norms to be applied to subsidiaries. However, in practice, apart from issuing policy provisions, the parent company is also directly involved in the operations of the subsidiary down to the most technical matters, so that the subsidiary as a separate legal entity that is separate from its owner (Shareholders) has lost its independence in managing the operations of the subsidiary as it should be. implemented by the Subsidiary's Directors. The most crucial problem that arises in this research is whether the legal consequences for the parent company's control cause the subsidiary to lose its independence. The theories used in this research are the theory of Corporate Legal Entity and Piercing the Corporate Veil. The results of this research conclude that juridically, the legal status of the parent company and subsidiary companies is that they are independent legal entities and each has the right to carry out its own legal actions. However, in business reality it cannot be denied that subsidiary operations are completely under the control of the parent holding company. In this case the subsidiary has become the alter ego for the Shareholders (PTPN III). Thus referring to the doctrine of piercing the corporate veil, Shareholders (PTPN III) have the potential to be held responsible for personal assets (PTPN III) if losses occur to the company and third parties.

Keywords: Parent Company, Subsidiaries, Piercing The Corporate Veil.

A. Introduction

Currently BUMN (state owned enterprises) are quite dominant business actors in Indonesia. The public's needs for electricity, oil and gas fuel, clean water, telecommunications and food are still largely handled by BUMN.¹ Even though its average operational performance is worrying, its role in the economy is still very large. In terms of income, BUMN contributes to state revenues, both tax and non-tax revenues. Meanwhile, from the expenditure side, if BUMN has low performance, it will ultimately result in a burden on state expenditure.² For this reason, in order to improve the operational performance of BUMN, the Government

¹ Toto Pranoto, *Holding Company BUMN, Konsep, Implementasi, dan Bechmarking*, (Jakarta : Lembaga Management Fakultas Ekonomi dan Bisnis Universitas Indonesia, 2017), hal. 1

² Jhon F Sipayung, Bismar Nasution, Mahmul Siregar, *Tinjauan Yuridis Holdingisasi BUMN dalam rangka Peningkatan Kinerja menurut Perspektif Hukum Perusahaan*, Transparency, Jurnal Hukum Ekonomi, Voume 1, nomor 1, Feb-Mei 2013, hal 6.

through the Ministry of BUMN is making breakthrough efforts to make the management of BUMN more efficient by forming a Holding Company, one of which is the BUMN Plantation sector.

Based on Government Regulation number 72 of 2014 concerning Additional Capital Participation of the Republic of Indonesia into the Share Capital of the Company (Persero) PT Perkebunan Nusantara III, the government has transferred 90% of its shares in PT Perkebunan Nusantara I, II, IV to XIV to PTPN III. Through this PP, the government has appointed PTPN III as the holding company for the Plantation BUMN which oversees PT Perkebunan Nusantara I, II, IV to XIV (subsidiaries). The formation of the BUMN Plantation holding was carried out in order to strengthen the capital structure and as an effort to break the bureaucratic chain so that the management of subsidiaries under BUMN becomes more efficient.

In Indonesia, there are currently no statutory regulations that specifically regulate holding companies. This means that there are no statutory regulations that regulate the legal relationship between the parent company and its subsidiaries.³ Sulistiowati explained that the concept of a group company (holding) is not within the realm of law. The existence of a group company refers to the business reality of combining companies under the control of the parent company.⁴

In the United States, groups of companies or group companies first appeared following the liberalization of state company law which gave companies the authority to acquire and own other companies for the first time. This process began in New Jersey in 1889.⁵ In group companies, investor Shareholders own the parent company (and the venture capital or private equity firm), and the parent company owns shares in the subsidiaries. The entire corporate group, both parent and subsidiary, is in reality one business enterprise, operating under the control of the parent entity and having a high degree of economic integration.⁶

According to Zainal Asikin, the meaning related to parent companies and subsidiaries is contained in a business group. A business group generally has a parent company which is a holding company, namely a company whose goal is to control the shares or management of the

³ Bismar Nasution, *Penentuan Kategori Holding Company termasuk dalam Kondisi Piercing the Corporate Veil*, Disampaikan dalam Workshop "Holding Company BUMN diselenggarakan oleh Indonesia Training Institute & Consulting Services (Intrinsics), Bandung 15 November 2019, hal. 1

⁴ Sulistiowati, *Aspek Hukum dan Realitas Bisnis Perusahaan Group di Indonesia*, (Jakarta : Erlanga,2010) hal. 20

⁵ Phillip Blumberg, *Limited Liability and Corporate Groups*, University of Connecticut School of Law, USA,1986, hal. 605

⁶ Kurt A. Strasser, Phillip Blumberg, *Legal Form of Economic Substance of Enterprise Group : Implication for Legal Policy*, The Journal Accounting, Economics and Law, Vol. 1, 2011, hal. 8

company it owns/controls.⁷ However, in the juridical context related to company operations, each subsidiary and parent holding company (BUMN) has company organs, each function of which is regulated in the PT Law and the BUMN Law.

That related to subsidiary operations are basically carried out and subject to the PT Law. In this case, the Directors of the holding subsidiary have full authority in carrying out the company's operations. However, in practice, the Board of Directors of the parent holding company are the most dominant in determining the operations of the subsidiary. This can be seen from the parent company's authority to determine the direction and policies of subsidiaries without going through a GMS, as well as the appointment and placement of SEVPs by the Board of Directors of the parent holding company (PTPN III) to be assigned to subsidiaries (PTPN I, II, IV to XIV).

This practice of controlling through direct intervention of course violates the provisions of company management as regulated in the PT Law. Because basically those who have the authority to manage subsidiaries are the Directors of each subsidiary holding company. Control that is too determinative has caused subsidiaries to lose their independence as separate legal entities. The intervention carried out by the parent company as shareholder in the subsidiary holding company is a concrete manifestation that there are no managerial differences between the parent holding company and the subsidiary in carrying out its business processes. So this kind of thing has the potential to cause legal problems in the future.

Based on the background described above, it is deemed necessary to carry out research entitled the legal consequences of reducing the independence of subsidiaries due to parent control in holding companies (study at PT Perkebunan Nusantara III (Persero)).

B. Research Methods

A research cannot be said to be research if it does not have a research method.⁸ Research methods are one of the factors of a problem that will be discussed.⁹ The study was carried out using secondary data which was analyzed qualitatively using the Desk Research Method. The literature materials used in writing this research are several references originating from the results of research, studies and reviews of several papers which are then summarized into a work of scientific writing.

C. Analysis And Discussion

⁷ Zainal Asikin dan Wira P Suhartana, *Pengantar Hukum Perusahaan*, (Jakarta : Prenada Media Group, 2016), hal. 154

⁸ Ismail Koto, "Perlindungan Hukum Terhadap Korban Tindak Pidana Terorisme", *Proceeding Seminar Nasional Kewirausahaan*, 2.1, (2021): 1052-1059.

⁹ Ida Hanifah, Ismail Koto, "Problema Hukum Seputar Tunjangan Hari Raya Di Masa Pandemi COVID-19", *Jurnal Yuridis* 8.1, (2021): 23-42.

1. Control of the Plantation BUMN Holding Company (PTPN III) over Subsidiaries

In view of Law no. 40 of 2007 concerning Limited Liability Companies, the existence of a holding company such as PTPN III does not have a clear juridical meaning. However, the explicit function of a holding company is as a forum for business entities to exercise control over subsidiaries so that they run according to the wishes of the parent holding company or controlling shareholder.

The formation or development of a group company or holding company cannot be separated from the business realities that occur when business management through group company construction is considered to provide more economic benefits compared to a single company.¹⁰ By adopting the group company construction, both in national and multinational companies, it shows that this business organization has the flexibility to be applied to various existing situations.¹¹ In practice, a holding company can only be implemented if a company carries out a takeover (acquisition) of a legal entity, which then results from the acquisition resulting in a transfer of control over the company.¹²

According to Abdul Ghani (Main Director of PTPN III) in the 2020 period, PTPN III has experienced a transformation period from previously being a strategic holding to an operational holding.¹³ What is meant by strategic holding is that the parent holding company only takes over majority shares in a company, which is then not involved in operations. This is different from operational holding which means that the parent holding company will also be involved in carrying out operations and controlling the subsidiary.

PTPN III (Persero), which is currently a group company or as the holding company for BUMN Perkebunan, has the composition 100% shares wholly owned by the Republic of Indonesia/Ministry of BUMN. Apart from running its business as a stand alone, the business of the holding company BUMN Perkebunan also includes subsidiaries (PT Perkebunan Nusantara I, II, IV to XIV) which operate in the fields of palm oil, rubber, sugar cane, tea, coffee, tobacco and cocoa, as well as downstream products.

Furthermore, the form of organizational structure prepared to support the operating holding, PTPN III has divided the duties and functions of the composition of the Board of Directors in Jakarta and in Medan. The Board of Directors in Jakarta consists of the President

¹⁰ Sulistiowati, *Aspek Hukum dan Realitas Bisnis Perusahaan Grup di Indonesia*, (Jakarta : Erlangga, 2010), hal. 63

¹¹ *Ibid*, hal. 64

¹² Lihat Pasal 125 Undang Undang nomor 40 Tahun 2007 tentang Perseroan Terbatas.

¹³ <https://www.wartaekonomi.co.id/read289420/erick-rombak-komisaris-grup-ptpn>, diakses pada tanggal 19 Maret 2021.

Director, Deputy President Director, Finance Director, HR Director, General Director, Marketing Director, Production and Development Director, each of whom is tasked with carrying out operating holding functions that manage all subsidiaries. Meanwhile, operations in Medan (stand alone) are carried out by the Managing Director who is assisted by and supervises the Senior Executive Vice President (SEVP) Business Support, SEVP Operations I and SEVP Operations II.

PTPN III as the parent company holding BUMN Perkebunan which manages PTPN I, II, IV to XIV, is reforming its subsidiaries by simplifying the organizational structure. In this case, PTPN III carried out an overhaul of the structure and composition of directors in PTPN I, II, IV to XIV subsidiaries to make them more effective and efficient in terms of control and decision making.

PTPN III in its capacity as the holding company for BUMN Perkebunan has issued Decree number: DSDM/PTPN/2429/2019 dated 16 December 2019 regarding Standardization of the Organizational Structure of the PTPN Group Directors' Office. Through the decision letter above, the parent company conveyed changes to the subsidiary's organizational structure where the number of directors was narrowed to 3 directors consisting of the Main Director, Operations Director and Commercial Director. Furthermore, PTPN III again downsized the number of directors in all PTPN I, II, IV to XIV subsidiaries from 3 directors to 1 director. PTPN III also appointed and placed a Senior Executive Vice President (SEVP) to assist the subsidiary's directors.

In order to strengthen the integration process so that the holding company runs effectively and efficiently, PTPN III as the parent company of the BUMN Plantation holding company has prepared standard norms related to human resource management, norms related to fertilization and harvest systems, procurement of goods and services jointly and centrally, to preparation of corporate interaction guidelines between PTPN III and the company's subsidiaries and grandchildren. Through the establishment of standard norms, all subsidiaries have an obligation to implement these policies.

In the context of supervision, the parent subsidiary company can assign an Internal Supervisory Unit team from the parent company to carry out direct supervision of the subsidiary company. Supervision is also carried out by the parent company's Commissioner who also goes directly to the subsidiary company.

2. The Position of Subsidiaries in Holding Plantation SOEs is No Longer As Independent Companies Based on the PT Law

The position and legal relationship between parent and subsidiary companies in the PT Law is not regulated expressly. However, the position of the two entities based on Article 7 paragraph (4) of the PT Law can be said to be an independent legal entity after each (parent and subsidiary) has obtained legalization from the government. By holding the status of a legal entity, the parent and subsidiary companies legally have the independence to carry out their activities.

In the operational context of subsidiaries, PTPN III control patterns occur in the most technical matters. The control pattern carried out by PTPN III is generally carried out through the issuance of standard operational norms in the field of personnel, time management and harvest techniques, procurement of goods and services, appointment of employees (SEVP), determination of the organizational structure of subsidiaries, and direct involvement at work locations. subsidiaries to provide work instructions and supervision.

3. Legal consequences of reducing the independence of subsidiaries due to the control of PTPN III (Persero) as the parent company in the structure holding BUMN Plantation

Under certain conditions, it is still possible for Shareholders to be responsible for legal actions carried out by the company based on court decisions. Although the judiciary has universally accepted the principle of the corporation as a separate legal entity, an entity separated from the interests of membership and management, the courts in exceptional cases have lifted the corporate veil.¹⁴ The court can lift the veil or barrier on the basis of unlawful acts committed by Shareholders or parent companies against subsidiaries and third parties. A number of other reasons that can apply piercing the corporate veil to the parent company, one of which is the level of control of the subsidiary by the parent company, either direct instruction or nomination of its board, and the existence of economic integration between the two entities.¹⁵

According to Bismar Nasution, in certain circumstances the veil separating Shareholders and the company can be lifted in accordance with the doctrine of piercing the corporate veil. The doctrine of piercing the corporate veil, also known as the alter ego doctrine, teaches that shareholders or parent companies are responsible up to personal assets for the company's obligations as a result of the company being influenced by shareholders.¹⁶ This can

¹⁴ Stephen Griffin, *Company Law, Fundamental Principles, Third Edition*, (UK : Pearson Education, 2000) hal. 10

¹⁵ Helen Anderson, *Challenging the Limited Liability of Parent Companies : A Reform Agenda for Piercing the Corporate Veil*, Australian Accounting Review No. 16, vol. 22, 2012, hal. 133

¹⁶ Bismar Nasution, *Memperkuat Holding Company BUMN*, Media Indonesia, Jumat 23 April 2021, hal.3

happen if the Shareholder becomes an alter ego, where the Shareholder becomes part of the company and considers it their own, or if the parent company's control over the subsidiary has caused the subsidiary to lose its independence to carry out legal actions.

The application of piercing the corporate veil to Shareholders based on Article 3 paragraph (2) of the PT Law requires that the elements of an unlawful act be fulfilled. However, whether the unlawful act in question only covers violations of the PT Law or not, this still requires a more comprehensive legal review and interpretation. Apart from that, to state that a Shareholder's actions fall into the category of being subject to piercing the corporate veil must be stated by a court or judge.

As is known, legal interpretation is the heart of law. Legal interpretation is an open activity carried out since the law was in written form. And then the adage of reading the law emerged, namely interpreting the law.¹⁷ Legal interpretation (interpretation) is a method of finding law in cases where regulations exist but are not clear to apply in the event. On the contrary, it can also happen that judges have to examine and try cases for which there are no specific regulations. Here the judge faces a legal void or incompleteness that must be filled and completed.¹⁸ Because a judge cannot refuse to examine a case on the pretext that there is no law. Judges must find the law to fill the gaps by using analogical thinking methods, legal narrowing methods and a contrario methods.¹⁹ Therefore, the application of piercing the corporate veil in a case will really depend on the judge's knowledge of the law.

In the operational reality of group companies or holding companies, the company's operational mechanisms should be carried out in accordance with the duties and authority of each company organ. The mechanism for running companies, both parent and subsidiary companies in a group company or holding company structure, is in fact not in accordance with the operational principles of legal entities regulated in the PT Law. Many parent companies are found to control subsidiaries down to the most technical matters, so that subsidiaries can no longer operate independently.

The parent's control over the subsidiary in business reality has clearly annulled the subsidiary's authority as an independent legal entity. The existence of Directors and Commissioners in subsidiaries seems to be only formal in order to fulfill the requirements for the existence of corporate organs in subsidiaries.

¹⁷ Muhammad Ilham Hermawan, *Hermeneutik Hukum*, (Bandung : Refika, 2018), hal.121

¹⁸ Arif Hidayat, *Penemuan Hukum melalui Penafsiran Hakim dalam Putusan Pengadilan*, Jurnal Pandecta, Volume 8, nomor 2, Juli 2013, hal 155

¹⁹ *Ibid.*,

Control functions also occur in terms of supervision where the Commissioner of PTPN III also carries out supervision by visiting operational locations of subsidiaries (PTPN I, II, IV to XIV). Even the Internal Audit Unit (SPI), which is within the parent company's structure, also carries out supervisory audits of all subsidiaries. This increasingly indicates that the parent holding company BUMN Perkebunan has exercised complete control over its subsidiaries.

In connection with the above, the actions of the Board of Directors of the parent company (Shareholders) who have taken over the authority of the Directors of the subsidiary company in carrying out the management of the subsidiary company, this can be seen as an action that violates the principles of company law and violates public order in the context of company management. . In this case, the Board of Directors of the parent company has violated the principles of Good Corporate Governance (GCG), which require that when managing a company they must pay attention to a set of principles and rules on how a company can be managed well. So, if in the future the parent company's actions have caused losses to subsidiaries or third parties (workers and creditors), then referring to Article 1365 of the Civil Code, the injured party can exercise their right to file a lawsuit on the basis of an unlawful act carried out by the parent company.²⁰

This is also in line with the meaning of the expansion of unlawful acts explained by Rosa Agustina, that an act can be qualified as an unlawful act if it fulfills 4 conditions, namely²¹ contrary to the legal obligations of the perpetrator, contrary to the subjective rights of other people, contrary to morality, contrary to propriety, thoroughness and prudence.

According to Miriam Darus Badruzaman, the conditions that must exist to determine an act as an unlawful act are ²² there must be an act (both positive and negative), the act must be against the law, there is a loss, there is a causal relationship between the loss and the act against the law and there is a mistake.

According to Paul Scholten, an act can still be said to be a valid act according to law, if the act is the implementation of a duty/fulfillment of one's work or service (Taaks or ambtvervulling).²³ Thus, carrying out tasks outside of authority is an unlawful act. Apart from that, the fact that the parent has control over the subsidiary, where the function of shareholders tends to take over the role of the subsidiary's directors in managing the subsidiary, this further

²⁰ Lihat Pasal 1365 bahwa tiap perbuatan melanggar hukum, yang membawa kerugian kepada orang lain, mewajibkan orang yang karena salahnya menerbitkan kerugian itu, mengganti kerugian tersebut.

²¹ Rosa Agustina, *Perbuatan Melawan Hukum*, (Jakarta: Program Pascasarjana FHUI, 2003), hal. 117

²² Miriam Darus Badruzaman, *Hukum Perikatan dalam KUHPerdara Buku Ketiga : Yurisprudensi, Doktrin, serta Penjelasan*, (Bandung : Penerbit Citra Aditya, 2015) hal. 146 - 147

²³ Chidir Ali, *Badan Hukum*, (Bandung : Alumni, 2014), hal.

proves that in fact the position of the subsidiary is one unit and is under the control of the parent company. Therefore, regarding the emergence of legal problems caused by subsidiaries due to carrying out instructions and controls that exceed the limits of the parent company's authority, by referring to the doctrine of piercing the corporate veil, the parent company can also be charged with legal responsibility.

Furthermore, regarding the relationship between the parent company and the subsidiary which in fact has given rise to a pattern of subordinate employment relationships, by referring to the provisions of Article 1367 of the Civil Code,²⁴ The parent company also has the potential to be liable for any losses caused by the subsidiary.

D. Conclusion

The control of the BUMN Perkebunan holding company over its subsidiaries is carried out by simplifying the subsidiary's organizational structure from 3 directors to 1 director and assisted by a Senior Executive Vice President who is appointed and placed by the holding company of the Perkebunan BUMN. Apart from that, the holding company, BUMN Perkebunan, established and enforced standard operational work norms which applied to all subsidiaries. Norm standards include human resource management, norms related to fertilization and harvest systems, joint procurement of goods and services, to the preparation of corporate interaction guidelines between PTPN III and the company's subsidiaries and grandchildren. In order to effectively control the operations of subsidiaries, the parent holding company, through the Board of Directors or SPI, carries out direct supervision and monitoring of the production area and factory.

Juridically, the legal status of the holding company of the BUMN Perkebunan holding company (PTPN III) and its subsidiaries (PTPN I, II, IV to XIV) is that they are independent legal entities and each has the right to carry out its own legal actions. However, in business reality it cannot be denied that subsidiary operations are completely under the control of the parent holding company. The actions of the parent company holding BUMN Perkebunan which has created and enforced standard norms down to the most technical matters, as well as the actions of appointing and placing employees by Shareholders to be placed in subsidiaries are a form of intervention and control over subsidiaries. Because the intervention carried out by the parent company has touched the heart of the company's operational management, such as

²⁴ Lihat Pasal 1367 KUH Perdata bahwa seseorang tidak hanya bertanggung jawab untuk kerugian yang disebabkan karena perbuatannya sendiri, tetapi juga terhadap perbuatan orang yang menjadi tanggungannya atau barang-barang yang berada dalam pengawasannya

harvesting techniques and the appointment of company employees (SEVP), this action has resulted in a reduction in the independence of the subsidiary.

In fact, the parent holding company BUMN Perkebunan which is also a shareholder in the subsidiary holding company (PTPN I, II, IV to XIV) has exercised control and is involved in the operational management of the subsidiary company. In this case the subsidiary has become the alter ego for the Shareholders (PTPN III). Thus referring to the doctrine of piercing the corporate veil, Shareholders (PTPN III) have the potential to be held responsible for personal assets (PTPN III) if losses occur to the company and third parties.

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