CONTROL AND LIABILITIES OF REGIONAL GOVERNMENT OF RIAU PROVINCE AS THE SHAREHOLDER OF PROVINCIALLY-OWNED ENTERPRISE BANK IN PEKANBARU CITY BASED ON LAW NUMBER 40 OF 2007 ON LIMITED LIABILITY COMPANIES

Irriansyah, Irfansyah, Rezmia Febrina

Fakultas Hukum Lancang Kuning

iriansyah@unilak.ac.id

Abstrak

Apa saja kewajiban Pemerintah Daerah Provinsi Riau sebagai pemegang saham pada Bank BUMD berdasarkan ketentuan Undang-Undang Nomor 40 Tahun 2007 tentang Perseroan Terbatas? Bagaimana Pengendalian oleh Pemerintah Daerah Provinsi Riau sebagai pemegang saham pada Bank BUMD menurut ketentuan Undang-Undang Nomor 40 Tahun 2007 tentang Perseroan Terbatas? Tujuan penelitian ini adalah untuk menjelaskan dan menganalisis kewajiban Pemerintah Daerah Provinsi Riau sebagai pemegang saham pada bank BUMD dan menjelaskan Pengendalian oleh Pemerintah Daerah Provinsi Riau sebagai Pemegang Saham pada bank BUMD menurut ketentuan Undang-Undang Nomor 40 Tahun 2007 tentang Perseroan Terbatas. Jenis penelitian ini adalah penelitian hukum sosiologis. Dari hasil penelitian ini, kewajiban pemegang saham terbatas pada modal (saham) yang ditanamkan atau dimiliki atau dengan kata lain pemegang saham tidak bertanggung jawab secara pribadi atas perjanjian yang dibuat atas nama perseroan dan tidak bertanggung jawab atas kerugian perseroan yang melebihi saham yang dimilikinya. dimiliki, pemegang saham bertanggung jawab secara pribadi atas kerugian perseroan terbatas, jika persyaratan perseroan terbatas sebagai badan hukum belum atau tidak terpenuhi, itikad buruk untuk memanfaatkan perseroan semata-mata untuk kepentingan pribadi dan, pemegang saham terlibat dalam perbuatan melawan hukum yang menggunakan kekayaan perseroan yang mengakibatkan perseroan tidak dapat melunasi utang perseroan, perseroan terbatas bank BUMD adalah perseroan terbatas yang ditutup sebagian. Saham Bank dapat dimiliki oleh banyak pihak, dalam hal ini pemerintah provinsi dan pemerintah kabupaten/kota dalam provinsi. Dengan kesimpulan bahwa pemegang saham tidak bertanggung jawab secara pribadi atas tindakan yang dilakukan atas nama perseroan dan tidak bertanggung jawab atas kerugian perseroan melebihi saham yang dimilikinya.

Kata kunci: Pemegang Saham; Kontrol; Tanggung jawab; Bank BUMD

Abstract

What are the liabilities of regional government of Riau Province as shareholders in provincially-owned enterprise Bank based on provisions of Law Number 40 of 2007 on Limited Liability Companies? How is Control by regional government of Riau province as a shareholder in a provincially-owned enterprise Bank according to provisions of Law Number 40 of 2007 concerning Limited Liability Companies? Purpose of this study is to explain and analyze the liabilities of regional government of Riau province as shareholders in provincially-owned enterprise bank and to explain Control by the Regional Government of Riau Province as Shareholders in provincially-owned enterprise bank according to provisions of Law Number 40 of 2007 on Limited Liability Companies. Type of this research is sociological legal research. From results of this study, liabilities of shareholders is limited to the capital (shares) invested or owned or in other words, shareholders are not personally responsible for agreements made on behalf of company and are not responsible for the company's losses in excess of shares they owned, shareholders are personally responsible for the losses of a limited liability company, if requirements of limited liability company as a legal entity have not been or are not fulfilled, bad faith to take advantage of company solely for personal interests and, shareholders are involved in unlawful acts using the company's assets which resulted in company can't pay off company's debt, limited liability company of provincially-owned enterprise bank is a limited liability company which is partially closed. Shares in the Bank can be owned by many parties, in this case provincial government and regency/city governments within the province. With the conclusion that the shareholder is not personally responsible for the action made on behalf of company and is not responsible for the company's losses in excess of the shares owned,.

Keyword: Shareholders; Control; Responsibilities; provincially-owned enterprise Bank

INTRODUCTION

If status of a limited liability company (hereinafter referred to as LLC/company) has been determined as a legal entity by Minister of Law and Human Rights, since then the law has imposed a separate owner or shareholder from the LLC itself known as "separate legal personality*"* which is an individual who stands alone. This is as stipulated in Article 9 paragraph (1) of Law Number 40 of 2007 on Limited Liability Companies, thus shareholders do not have an interest in assets of LLC, so the shareholders are not personally responsible for legal acts committed on behalf of LLC[1]. Limited liability acts as "defensive asset partitioning" which is different from "affirmative asset partitioning" in legal personality. This is a consequence of the company's status as a separate legal entity from its owners and managers. Limitation of

[1] Ridwan Khairandy, Perseroan Terbatas Sebagai Badan Hukum, *Jurnal Hukum Bisnis*, Vol 26, No 3, 2007, hal. 32

liability imposes responsibility on the shareholders only to the extent of the amount of shares they have invested to the company. In article 3 paragraph (1) of Law on LLC regulates, that:

> "The company's shareholders are not personally liable for agreements made on behalf of the Company, and are not liable for the Company's losses in excess of their prospective shareholding"

Emergence of limited liability principle is closely related to the company's status as a legal entity. Before a company becomes a legal entity, according to Article 39 of Commercial code, each management is personally responsible for the whole. This also applies to shareholders, as regulated in Article 3 paragraph (2), if requirements for the Company as a legal entity have not been or are not fulfilled, then provision on the liability of shareholders which limited to amount of shares the invested is applicable[2] :

> "*…Limited Liability Company protects its owners (called "members") from personal liability for the debts and obligations of the organization."*
>
> *"Owners (called "members") protected from "personal" liability for debts of the businessMembers can participate in management and still gain personal liability protection"*

In general, capital participation is an effort to own a new or existing company by making a capital injection. This capital injection is also made by regional government of Riau province to provincially-owned enterprise (hereinafter referred to as POE) banks in order to increase regional revenue sources.

In connection with background above, formulations of the problem in the study are: What are the liabilities of regional government of Riau Province as shareholders in provincially-owned enterprise Bank based on provisions of Law Number 40 of 2007 on Limited Liability Companies and How is Control by regional government of Riau province as a shareholder in a provincially-owned enterprise Bank according to provisions of Law Number 40 of 2007 concerning Limited Liability Companies

Capital is the most common securities offered in a public offering, and therefore is the instrument most commonly known and traded on the capital market (stock exchange). Share is a component and form of capital participation in a business in the form of a Limited Liability Company, and for discussion of share subjects, it will have to refer to LLC Law/Company Law. In Company Law, the legislators do not make any formulation

[2] Zarman Hadi, 2011, Karakterisitik Tanggung Jawab Pribadi Pemegang Saham, Komisaris, dan Direksi dalam Perseroan Terbatas, UB Press, hlm 31

regarding what shares are. But by looking at its nature, the shares can be formulated as form of participation (Halmud M. Balfas, 2006). Share is considered as the form of participation of a certain person or party in the capital of a LLC. Share is a participation, means inflow of capital from shareholders into a business entity in the form of a LLC. Elucidation of Article 27 paragraph 1 of Company Law which states that "in general, the payment for shares is in the form of money. However, it is possible to pay up shares in other forms, either in the form of tangible objects or intangible objects that can be valued in money". From the explanation of Article 27, it seems clear that shares are proof of participation in the form of capital injection into a LLC.[3]

Shares (stock) can be defined as a sign of the participation or ownership of a person or entity in a company or LLC.[4] According to Tjiptono Darmadji and Hendy M. Fakhruddin, shares are in the form of a sheet of paper which states that the owner of the paper is the owner of the company that issues the paper. The portion of ownership is determined by how much investment is invested or injected to a company (Tjiptono Darmadji and Hendy M. Fakhruddin, 2011). This provision is regulated in Law Number 5 of 1962 on Regional Companies, Law Number 13 of 1962 on Regional Development Banks, Law Number 5 of 1974 on Fundamentals of Administration in Regions, Law Number 25 of 2000 on National Development Program, Law Number 17 of 2003 on State Finances, Law Number 1 of 2004 on State Treasury, Law Number 32 of 2004 on Regional Government, Law Number 25 of 2008 on City Formation.

Law Number 40 of 2007 on LLC Article 31 paragraph 1. For commercial banks, it still has to have a minimum capital, which is stipulated in Bank Indonesia Regulation Number 10/15/PBI /2008 dated on 24 September 2008 concerning Bank Minimum Capital Requirements. General (state gazette of the republic of Indonesia of 2008 Number 135; Supplement to the state gazette of the Republic of Indonesia Number 4895). Where the Bank in accordance with these provisions must provide core capital of at least 5 percent of the RWA (Risk-Weighted Assets).

According to Salim HS and Budi Sutrisno, the existence of an institution that coordinates investment or equity investment in Indonesia has a very strategic role because this institution will determine the level of investment invested by investors, both foreign and domestic investors. The better the service provided to investors, the more investors will be interested in investing in Indonesia. So far, there are complaints from investors that said the services provided by the authorized institutions are very

[3] Halmud M. Balfas, 2009,*Hukum Pasar Modal Indonesia*, Jakarta, hal 56

[4] Tri Suhendra Arbani, Penggunaan dan Batas Diskresi Dalam Pengelolaan Keuangan Daerah Di Indonesia. *Widya Pranata Hukum: Jurnal Kajian Dan Penelitian Hukum* 1.2 (2019), hal. 176-187.

convoluted, long bureaucratic, and require large costs. This is due to the existence of two institutions that coordinate investment in Indonesia, i.e. BKPM (Investment Coordinating Board) and BKPMD (Regional Investment Coordinating Board). Each of these institutions has different performance (Salim HS and Budi Sutrisno, 2007). [5]

Furthermore, Mudrajad Kuncoro said that the implementation of regional aut[6]onomy has brought a new climate to all districts and cities in Indonesia. Regions are given more responsibility for managing all local resources in their respective regions (Mudrajad Kuncoro, 2004).

In making capital participation in a City-Governed Bank, of course, it must follow the general requirements for capital participation, which are regulated in Bank Indonesia Regulation No. 5/10 / PBI / 2003 where capital participation is investment of bank funds in the form of shares in a company engaged in the financial sector, including investment in the form of convertible bonds with equity options or certain types of transactions that result in banks owning or will own shares in that said companies. The results of this investment, of course, must also be in accordance with the amount of capital invested and can be felt by the City community. This is in accordance with Article 41 paragraph (1) of Law Number 1 of 2004 on State Treasury, which states that the government may make long-term investments to obtain economic, social and / or other benefits.

According to Sutan Remy Syahdeni, LLC is a legal entity that is different and separate from the shareholders of the LLC. Therefore, in carrying out its legal function, the company does not act in the name of shareholders but acts for and on behalf of itself. /Shareholders are not involved in an agreement made by company with other parties. Therefore, shareholders are also not entitled to force other parties to carry out the obligations stipulated in the agreement. As a consequence, the third party cannot demand or sue the company for legal obligations of the company's shareholders. On the other hand, they are also not entitled to demand third parties for the obligations that must be paid to the company. Thus, the shareholders and company are separate parties. Shareholders cannot be forced to pay off the company's debts, even though they are the owners.[7]

[5] Salim HS dan Budi Sutrisno, 2007, *Hukum Investasi di Indonesia*, Raja Grafindo Persada, Mataram., hal 54

[6] Mudrajad Kuncoro, 2008, *Otonomi dan Pembangunan Daerah*, Erlangga Jakarta, hal. 54

[7] Sutan Remy Syahdeni 2007, *Tanggung Jawab Pribadi Direksi dan Komisaris*, jurnal Hukum Bisnis, Vol. 14, hal.22

Type of this type of research is sociological legal research, carried out by means of an empirical approach by examining the formulation of the problem to be investigated as well as providing an overview and analysis on the Control and liabilities of the Regional Government of Riau Province as Shareholders in POE bank in Pekanbaru City based on Law Number 40 of the Year 2007 on Limited Liability Companies.

The purpose of this study is to explain and analyze the liabilities of regional government of Riau province as shareholders in POE bank based on the provisions of Law Number 40 of 2007 on Limited Liability Companies and to explain the Control by the Regional Government of Riau province as shareholders in POE Banks based on provisions of Law Number 40 of 2007 on Limited Liability Companies.

METHOD

Type of this type of research is sociological legal research, carried out by means of an empirical approach by examining the formulation of the problem to be investigated as well as providing an overview and analysis on the Control and liabilities of the Regional Government of Riau Province as Shareholders in POE bank in Pekanbaru City based on Law Number 40 of the Year 2007 on Limited Liability Companies.

RESULT AND DISCUSSION

In Company Law Number 40 of 2007, Liabilities of shareholders in principle is limited to the capital (shares) they invested or owned or in other words that the shareholders are not personally responsible for the agreements made on behalf of the company and are not responsible for the company's losses in excess of shares owned.

Shareholders are personally responsible for the losses of company, if the requirements of company as a legal entity have not been or are not fulfilled, bad faith to take advantage of company solely for personal interests and, shareholders are involved in unlawful acts using the company's assets which resulted in company can’t pay off its debt,

Limited Liability Company of provincially-owned enterprise bank is a limited liability company which is partially closed. Shares in the Bank can be owned by many parties, in this case provincial government and regency/city governments within the province, but cannot be owned by public in general.

A. Discussion

The definition of a Limited Liability Company is a partnership to run a certain company by using an authorized capital which is divided into a certain number or seros,

each containing a certain amount as well as a nominal amount, as stipulated in the notary deed of establishment of a limited liability company, which its approval has to be requested to The Minister of Justice, meanwhile, to become a member, it is required to fully deposit the nominal amount of a share or more.

Articles of Association (hereinafter abbreviated as AA) is part of the deed of establishment of LLC. As part of the deed of establishment, AA contains rules in the company that determine the rights and obligations of the parties in AA. Both the company itself, the shareholders, the Board of Commissioners and the Management (Directors) of the company. This is reinforced by the provision of Article 18 of company Law no. 40 of 2007, which states that "the company must have a purpose and objective as well as business activity which are stated in the articles of association of the Company and in accordance with the provisions of legislations."

Based on interviews conducted with the Head of BPPMD Riau regarding the Regional Government as shareholders in POE bank, he explained that it is true that Riau Province is one of the shareholders in Riau Kepri bank. And as a shareholder, Riau government has rights and obligations in this matter as much as the amount of share its owned. (Result of interview with Head of BKPMD Pekanbaru on Monday, 17 April 2017, 14.30 WIB at BKPMD Pekanbaru office). Shareholders through the General Meeting of Shareholders (hereinafter abbreviated as GMS) are the company's organ which has the highest authority in the company that conducts the highest management of the company. Article 1 point 4 of Company Law Number 40 of 2007 explains that "GMS is the organ of the Company that has authority not given to the Board of Directors or the Board of Commissioners, within limits as stipulated in this Law, and/or the articles of association." But it's given by the law authority doesn't mean that GMS can perform tasks and authorities given by law to board of Directors and Commissioners.

Shareholders can act through GMS mechanism, so that in this case, the shareholders have also tended to become the fourth organ of the company besides the Director, the Board of Commissioners and the GMS. As the highest organ of the company and has the power to determine the direction and goals of the company, the GMS has all the powers that are not given to the Board of Directors and Board of Commissioners of company. The GMS has the right to obtain all kinds of information needed relating to the interests and to run the company. This authority is an exclusive authority that cannot be transferred to other organs.

Based on Article 1 of company Law, it is clear that company is a capital alliance of the founders of companyPT. As the founder of a company and also a shareholder of a company who has contributed initial capital to carry out business activities, it is only

proper that any decisions concerning the original objectives of the founders in establishing a company are in their hands through GMS. Another reason for placing shareholders as the main organs of a company is that other company's organs, i.e. Board of Directors and the Board of Commissioners are appointed and dismissed by shareholders through GMS.

Company Law Number 40 of 2007, Article 1 paragraph (4) describes the description of position of GMS in a limited liability company as follows: ' The General Meeting of Shareholders, hereinafter referred to as GMS, means the organ of the Company that has authority not given to the Board of Directors or the Board of Commissioners, within limits as stipulated in this Law, and/or the articles of association'. From the meaning of Article 1 paragraph (4), it is clear that it is through the GMS that the shareholders as owners (*eigenaar*) of the company perform a control over the management of the Board of Directors as well as the assets of company and management policies carried out by the management of the company.

In general, according to Article 1 point 4, GMS as an organ of the company, has the authority not given to the Board of Directors or the Board of Commissioners, but within the limits specified in this Law and / or the Articles of Association of company. Then the authority of the GMS is reiterated in Article 75 paragraph (1) which reads: " GMS has the authority which is not conferred to the Board of Directors and the Board of Commissioners, with due observance to the limitation as stipulated herein and/or the articles of association."

The GMS is often referred to as the highest organ in the company. However, basically the three organs of the company have an equal position in accordance with the separation of power as regulated in the Law and Articles of Association. Thus, it cannot be said that the GMS is higher than the Board of Directors and the Board of Commissioners. Each organ has a position and authority in accordance with the functions and responsibilities they have. Company Law Number 40 of 2007, in contrast to the provisions of Law Number 1 of 1995, where in the Company Law Number 1 of 1995, it is explained that GMS is the organ of the company which holds the highest power in the company which holds all the powers that are not given to the directors and commissioners. Whereas in Company Law Number 40 of 2007, the provisions regarding GMS as the highest power in a limited liability company were removed, so it stays equal with other organs of the company.

If status of a company has been determined as a legal entity by Minister of Law and Human Rights,[8] since then the law has imposed separation of owner or shareholder from the company itself, known as a 'separate legal personality'. This is regulated in Article 9 paragraph (1) of company Law Number 40 of 2007, thus, shareholders have no interest in the assets of the company, and the shareholders are not personally responsible for the legal acts committed on behalf of the company.

A company has a "corporate personality", which different from the person who created the company, even though the person who runs the company or the shareholders keep changing, the company still has its own identity regardless of any change in management members or shareholders. Company is a business entity and the amount of company capital is stated in the Articles of Association (AA). The company's assets are separated from the personal assets of the company owners so that they have their own assets. Each person can own more than one share which is proof of ownership of the company. Shareholders have amount of liability as much as shares they own. If the company's debt exceeds the company's assets, then the excess debt is not the responsibility of the shareholders. If the company makes a profit, then the profits will be distributed according to the stipulated conditions. Shareholders will receive a share of the profits called dividends, the amount of which depends on the size of the profits obtained by the company.

According to company law, there is separation and difference between the company and its owners or shareholders. Separation and difference have occurred since the company received a ratification from the Minister of Law and Human Rights as outlined in Article 9 paragraph (1) of Company Law Number 40 of 2007.

Apart from the things described above, one of the greatest benefits that shareholders receive and enjoy is limited liability. This advantage is provided by law as affirmed by Article 3 paragraph (1) of company Law Number 40 of 2007, which are:

1. Company shareholders are not personally liable for agreement made on behalf of the company nor losses suffer by the company
2. Risks borne by shareholders just as much as shares they invested
3. Therefore, in the principle, shareholders are not personally or individually liable for company’s debt

[8] Tri Suhendra Arbani, Analisis Yuridis Cabang Pemerintahan Keempat Dalam Struktur Ketatanegaraan Di Indonesia. *Wacana Hukum* 24.1 (2019), hal. 19-37.

This principle is emphasized again in the explanation of Article 3 paragraph (1) of Company Law Number 40 of 2007, that shareholders are only responsible for the amount of shares they own and do not include their personal assets. The principles of sparate entity and corporate entity that give birth to shareholder limited liability, have several consequences, including:.

1. Company as legal entity is a legal unit with separate authority and capacity from the shareholders to control assets, make an agreement, sue and to be sued, and continue its existence even though its shareholders change and its board of directors is terminated or replaced.
2. Assets, rights, and interests, also liabilities of company are separated from shareholders.
3. Furthermore, shareholders according to the law in accordance with provisions from Article 1 Paragraph 1 of Company law Number 40 of 2007 have immunity from obligations and liabilities of company, because between shareholders and company, there are differences and separation of legal personality

In addition to the 1995 Company Law and the 2007 Company Law, the Indonesian Commercial Code also describes the limited liability of shareholders as regulated in Article 40 paragraph (2) which reads; "Shareholders responsiblity shall not exceed number of share."

From the results of interviews conducted by the researcher with the head of Riau Kepri Bank regarding the responsibilities of the company management, it was obtained that the company was fully responsible for managing the company. In certain circumstances and events, the principle of separation of company from shareholders, casuistically needs to be removed by penetrating the corporate veil over the shield of limited liability. The legal consequence of exposing the protective veil is commonly known as piercing the corporate veil. In other words, the principle of limited shareholder responsibility does not apply absolutely (results of interview with the head of Riau Kepri Bank, on Wednesday, 26 April 2017, at 10.30 at Riau Kepri Bank Pekanbaru office).

Based on the results of interviews with banking observers regarding the liabilities of shareholders and duties and responsibilities of the company, it is described in article 3 paragraph (2) letter a of Company Law Number 40 of 2007 which states that shareholders are personally responsible if the company's requirements as a legal entity have not been or are not fulfilled, it is similar with Article 3 paragraph (2) letter a of

company Law Number 1 of 1995 and also same with Article 39 of Commercial Code which states: "Before registration and notification as intended in the aforementioned article takes place, the management shall be personally fully liable to third parties in respect of their actions." (Result of interview with a banking observer on Friday, 29 April 2017, at 14.00 at the observer's office in Pekanbaru).

In Commercial Code, there is no provision that said the shareholder is personally liable, if there is only one shareholder. However, the Supreme Court of the Republic of Indonesia in 1973 (prior to the issuance of Law Number 1 of 1995) had the same opinion as the Jakarta High Court, so that the shareholder's personal assets could be confiscated for payment of debts made by the company.

1. That said shareholder either directly or indirectly with bad faith uses company solely for their personal gain. This bad faith occurs, if there are indications like these, which are:
   a. Deceiving creditors
   b. Thin capital, which is a company lacks of capital or in under capitalization condition
   c. Looting which is transferring assets of company to shareholders
   d. Circumventing a statute
   e. Avoiding an existing obligation
2. The shareholders are involved in illegal acts committed by the company, if the shareholders are involved or conspired with company to commit an illegal act, which results in losses to other party
3. The shareholders concerned either directly or indirectly used company's asset which resulted company did not have enough to pay its debt.

Provisions of Article 3 paragraph (2) of Company Law Number 40 of 2007 on Limited Liability Companies, there is no single provision which states which parties are actually protected by the application of the piercing the corporate viel principle. However, by looking at the provisions stated in Article 3 paragraph (2) of Company Law Number 40 of 2007, it can be seen that protection is given to the creditors of company. As a comparison with the provisions of the Company Law above, Common Law jurisprudence concludes that there are three general doctrines for the possibility of violating the principle of limited liability to enable Piercing The Corporate Veil, they are:

1. Instrumentality doctrine which approach refers to these 3 following factors:
   a. There is a control over the company, so it will not have an independent existence
   b. The control affects the act of neglecting obligations
   c. Because of neglecting acts, there will be a loss suffers
2. Alter Ego doctrine which argues that piercing the corporate veil can be implemented if there is one of this conditions:
   a. Shareholders interest bets the interest of company and
   b. Hard to tell difference or recognize personal entity of shareholders with entity of company concerned
3. Identity doctrine which submits matter of unity and separation of company asset in evidence in court

The purpose of allowing the elimination of the limited liability of a company as concluded from the explanation of Article 3 paragraph (2) is for a company is established not solely as a tool used to fulfill the personal goals of Shareholders, so that there is a mix of personal assets of Shareholders and company asset.

CONCLUSION

From the results of this study, several conclusions can be drawn, including the following:

In Company Law Number 40 of 2007, Liabilities of shareholders in its principal is limited to their capital (shares) invested or owned, in other words, shareholders are not personally responsible over an agreement made on behalf of the company and not responsible for the loss suffered by the company in excess of the shares owned.

Shareholders are personally responsible for company losses, only if the requirements of company as a legal entity have not or been or are not fulfilled, bad faith to use company solely for their personal interest, and shareholders involved in act against the law which cause the company not be able pay off its debt.

Limited Liability Company of provincially-owned enterprise Bank is a partially closed Limited Liability Company, shares of the bank can be owned by many party, in this case is owned by provincial government and district/city government within the province, but the shares can not be owned by the public in general

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