
| RESEARCH ARTICLE

Legal Aspects of Giving Subsidies from Government to the People Due to Oil Fuel Increase: A Case Study in Indonesia

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| ABSTRACT

Indonesia has made several increases in the price of fuel oil (BBM), most recently with the decision of the Ministry of Energy and Mineral Resources (ESDM) No. 218 K /MG .01/MEM.M/2022 September 3, 2022, set the price of fuel. The announcement of the increase was not made by PT Pertamina (Persero) (Pertamina), a legal entity that manages oil and gas, so the formal juridical announcement made by the Ministry of Energy and Mineral Resources is not in line with the principle of the authority of the board of directors to manage the company and also the principle of independence of a limited liability company as a legal separatist entity because the Ministry of Energy and Mineral Resources has interfered in the management of Pertamina. Furthermore, the Government provides subsidies to people affected by the increase in the price of fuel oil (BBM). This is also not in line with the legal principles of limited liability companies mentioned above because the subsidy should have been given to Pertamina, who was "forced" to lower oil and gas prices which resulted in the company losing money. The subsidy is given to Pertamina in the amount of the difference between the basic price and the price determined by the government. Therefore, it is appropriate to raise a legal problem: What is the legal aspect of providing subsidies from the government to the people due to the increase in fuel oil? This research uses normative legal research, so what is produced from this research is what provisions should be.

| KEYWORDS

Law, Subsidies, Oil Fuel

| ARTICLE INFORMATION

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1. Introduction

The Republic of Indonesia can be classified as a welfare state; this is because the purpose of establishing the Republic of Indonesia is for the welfare of the people. The purpose of the Republic of Indonesia is stated in the fourth paragraph of the 1945 Constitution, namely, to improve public welfare. This means that all state efforts carried out through the government are to improve the welfare of all Indonesian people physically and mentally. Furthermore, Article 33 paragraph (3) of the 1945 Constitution (UUD 1945) states, "Earth, water and natural resources contained therein are controlled by the state and used for the greatest prosperity of the people". Paragraph (2) of article 33 states that production branches that are important to the state and which affect the livelihood of the people are controlled by the state.

Oil and natural gas are the contents of the earth; Indonesia belongs to the Indonesian people and must be managed by companies that are oriented to the welfare of the Indonesian people. Pertamina, as an oil and gas management company, is in the form of a profit-oriented limited liability company. Based on the dictum of Law no. 22 of 2001 concerning Oil and Gas (UU Migas) stated that "Oil and Natural Gas are non-renewable strategic natural resources controlled by the state and are vital commodities that control the livelihood of many people and have an important role in the national economy so that their management must provide maximum prosperity and welfare of the people.

The meaning of "controlled by the state" means that the state is not the owner of oil and gas, but this provision gives the state the authority and power to regulate the allocation and use, and management of oil and gas that is oriented toward improving people's welfare. The functions of the state include determining the distribution and price of oil and gas fuel so that it can be affordable to the community and for the welfare of all Indonesian people. The state, with the aforementioned authority, has established a business entity that manages oil and gas, namely Pertamina Company, since 1957 until now. Furthermore, on April 11, 2018, the Government formed an oil and gas holding¹ through PT Pertamina (Persero) (Pertamina) as the holding company and PT Perusahaan Gas Negara (PGN)² as a subsidiary. With the joining of PGN, Pertamina currently has 22 subsidiaries³ directly outside of the company's grandchildren.

Pertamina is a State-Owned Enterprise (BUMN)⁴ in the form of a Limited Liability Company. Therefore, Pertamina is also subject to Law no. 40 of 2007 concerning Limited Liability Companies (UUPT). In the Company Law, there is the principle of company independence which is independent of the individuals who are in the company⁵, including company organs⁶. The principle of independence of a limited liability company is that the company is an association of its members, and the company and its members are separated. In addition, in the Company Law, there is also a legal doctrine of Fiduciary duty, namely that a limited liability company is the cause for the existence (*raison d'être*) of the Board of Directors and has a fiduciary relationship that gives birth to "fiduciary duties" for the Board of Directors.⁷ A limited liability company is a form of a profit-oriented business. Therefore, Pertamina is also demanded by shareholders to earn profits. The Board of Directors, as the management of the company, must be professional to achieve the company's goals and efforts to gain profits. The purpose, business, and objective of establishing a Pertamina business entity is oil and gas, which is a natural wealth controlled by the state and must be utilized, including the distribution and price of oil and gas. Pertamina, as a limited liability company, is obliged to make a profit, while as an oil and gas manager, which is the need of many people, it is obligatory to provide the lowest possible price for the sake of improving the welfare of the people.

The government has tried to ease the burden on society caused by the increase in oil prices by providing subsidies for four or five months, even though the burden on society due to the increase in oil prices lasts forever. In addition, the manager of BBM is Pertamina, which is a company in the form of a Limited Liability Company which is an independent, profit-oriented legal entity. So there are legal problems, namely: What are the legal aspects of providing subsidies from the government to the people due to the increase in fuel oil?

2. Research Method

This research uses normative legal research, which is a *process of finding the rule of law, legal principles, and legal doctrines in order to answer the legal issues faced*⁸. The legal issues in this study are: What are the legal aspects of providing subsidies from the government to the people due to the increase in fuel oil? This research aims to find legal norms that should be established by reviewing existing legal norms. This legal research pays attention to the process of finding legal rules, legal principles, and legal doctrines regarding the existence of PT Pertamina as an independent business entity as a separatist legal entity associated with the provision of subsidies to the community due to the increase in the price of fuel oil (BBM) set by the Ministry of Energy and Mineral Resources.

This study also wants to examine normative postulates, namely legal norms (postulates) contained in laws and regulations as legal facts and relevant legal facts. In the end, legal research was carried out to reveal the legal problems mentioned above, the result of which was to provide a thesis about what should be done.

¹Sebagai tindak lanjut PP No. 6 tahun 2018 tentang Penambahan Penyertaan Modal Negara RI ke dalam Modal Perusahaan Perseroan (Persero) PT Pertamina, pada tanggal 11 April 2018 Menteri BUMN Ibu Rini M Soemarno telah menandatangani Akta pengalihan saham Seri B milik Negara pada PT Perusahaan Gas Negara, Tbk (PGN) sebesar 56.96% kepada PT Pertamina. Dengan demikian PGN telah menjadi salah satu dari 22 anak perusahaan Pertamina.

²PT Perusahaan Gas Negara (PGN) will later be synergized with PT Pertagas which has become a subsidiary of PT Pertamina.

³<http://www.pertamina.com.id>

⁴Berdasarkan UU No. 19 tahun 2003 tentang Badan Usaha Milik Negara jo PP No. 45 tahun 2001 tentang Persero, pengertian Badan Usaha Milik Negara adalah perusahaan yang sahamnya 51 atau lebih dimiliki oleh Negara dan PT Pertamina (Persero) sahamnya sebesar 99 % dimiliki oleh Negara.

⁵Rudhi Prasetya, *Kedudukan Mandiri Perseroan Terbatas, Disertai Dengan Ulasan Menurut Undang-undang No. 1 tahun 1995*, (Bandung: PT. Citra Aditya Bakti, 2001), hlm., 9.

⁶Pasal 1 angka 2 UPT Organ Perseroan Terbatas adalah Rapat Umum Pemegang Saham, Direksi dan Dewan Komisaris

⁷Fred B.G. Tumbuan, *Tugas dan Tanggung Jawab Direksi Perseroan Terbatas*, Materi Pendidikan Singkat Hukum Bisnis, (Jakarta : Unika AtmaJaya, 2000), hlm., 3.

⁸Piter Mahmud Marzuki, *Penelitian hukum*, (Jakarta : Kencana, 2007), hlm., 35.

3. Results and Discussion

The Republic of Indonesia has decided to divert part of the subsidy from fuel (BBM) for more targeted assistance. The government's efforts to protect the public from rising world oil prices through fuel subsidies and fuel compensation in 2022 in the State Revenue and Expenditure Budget (APBN) have tripled. From Rp152.5 trillion to Rp502.4 trillion, and it will continue to increase. The results of the discussion resulted in the opinion that 70 percent of the subsidy was actually enjoyed by a group of people who could afford it, namely the owners of private cars. Therefore, the distribution of aid is more targeted through Direct Cash Assistance (BLT) BBM, which will be given to 20.65 million underprivileged families.

In addition, the Government has also prepared a budget for the assistance of wage subsidies given to workers with a maximum salary of IDR 3.5 million per month. Rp9.6 trillion for 16 million workers with a maximum salary of Rp3.5 million per month in the form of wage subsidy assistance provided in the amount of Rp600 thousand.

Sociologically, the provision of various subsidies above is very good, and certainly, no party will disagree. But the study of the legal aspect is different from the study of the sociological aspect. The study of legal aspects needs to pay attention to the legal system that covers the provision of these subsidies. The legal system also concerns the nature of the establishment of the Republic of Indonesia, which is stated in the fourth paragraph of the 1945 Constitution that the formation of the Republic of Indonesia is to improve public welfare. Article 33 paragraph (3) of the 1945 Constitution (UUD 1945) states, "Earth, water and natural resources contained therein are controlled by the state and used for the greatest prosperity of the people". Paragraph (2) of article 33 states that production branches that are important to the state and which affect the livelihood of the people are controlled by the state.

The legal system must also consider that the nature of the company, which concerns the livelihood of the people, is controlled by the state. In this case, the state has mandated the management of Meyak and Natural Gas to be given to PT Pertamina, a profit-oriented business entity. It is also necessary to state whether or not the granting of the management of oil and natural gas is to a limited liability company that is oriented towards profitability. Is such a grant in accordance with Article 33 of the 1945 Constitution above?

In addition, as a Limited Liability Company will be subject to Law no. 40 of 2007 concerning Limited Liability Companies (UUPT), and as a limited liability company is subject to Law no. 19 of 2003 concerning State-Owned Enterprises (BUMN). The legal doctrine of a Limited Liability Company is as a separate legal entity that stands alone. The doctrine of an independent limited liability company as a legal entity began in 1897 in England as a decision in the *Salomon v Salomon co.Ltd* case, among others, stipulates that the most important characteristic of a company is the association of its members and the separation between the company and its members.⁹ The Company is a separate entity from its shareholders and directors. This principle became known as the principle of the company as a separate legal entity¹⁰. *Limited liability* is a common principle in the modern world that shareholders in a Limited Liability Company cannot be held liable for more than their share of capital.¹¹

Article 1 point 1 UUPT states, "Limited Liability Company (Company) is a legal entity which is a capital partnership, established based on an agreement, conducting business activities with authorized capital which is entirely divided into shares, and fulfills the requirements stipulated in this law and its implementing regulations. Therefore, the aspect of separation of personal assets (separate legal personality), which implies the independence of a limited liability company, has been regulated in the UPT and is a core part of the existence of a limited liability company.

Chapter 3 Paragraph (1) UPUT states, "The shareholders of the Company are NOT personally responsible for the engagements made on behalf of the Company and are not responsible for the loss of the Company in excess of the shares owned". Shareholders' immunity becomes invalid when there is an incident regulated in Article 3 paragraph (2) of the UPT, namely (a). the requirements of the Company as a legal entity have not been or are not met; (b). the shareholder concerned either directly or indirectly in bad faith utilizes the Company for personal gain; (c). The shareholder concerned is involved in an unlawful act committed by the Company; or (d). The shareholders concerned either directly or indirectly illegally use the Company's assets, which results in the Company's assets being insufficient to pay off the Company's debts.

Chapter 1 point 4 of the Company Law states, which essentially states that "The General Meeting of Shareholders (GMS) is a company organ that has authority not given to the Board of Directors or the Board of Commissioners within limits stipulated in

⁹Munir Fuady, *Doktrin-doktrin Modern Dalam Corporate Law*, hlm.6.

¹⁰Dihimpun dari berbagai sumber.

¹¹ Thomas M. Franck (Professor of Law and Director of the Centre for International Studies, New York University), *The New Development : Can American Law and Legal Institutions Help Developmant Countries*, 1971,hlm., 23.

this Law and/or the Articles of Association. Thus, the relationship between the company's organs, namely the Board of Directors and the Board of Commissioners, is at the time of the GMS. Article 1 number 5 of the Company Law states, "The Board of Directors is a Company Organ that is authorized and fully responsible for the management of the Company for the benefit of the Company, in accordance with the purposes and objectives of the Company and represents the Company, both inside and outside the court in accordance with the provisions of the articles of association.

There are many provisions in the Company Law that regulates the independence of the Board of Directors, including Article 92 paragraph (1) of the Company Law. The Board of Directors carries out the management of the Company for the benefit of the Company and in accordance with the purposes and objectives of the Company. Paragraph (2) The Board of Directors is authorized to carry out the management as referred to in paragraph (1) in accordance with policies deemed appropriate, within the limits specified in this Law and/or the articles of association. Furthermore, Article 97 paragraph (1) states that the Board of Directors is responsible for the management of the Company as referred to in Article 92 paragraph (1). Paragraph (2) states that the management, as referred to in paragraph (1), must be carried out by each member of the Board of Directors in good faith and full of responsibility.

Limited Liability Company is the cause of existence (*raison d'etre*) for the Board of Directors. Therefore, between the Limited Liability Company and the Board of Directors, there is a fiduciary relationship that creates "fiduciary duties" for the Board of Directors.¹²The Board of Directors is the trust of the investors, namely the shareholders. However, the Board of Directors should be responsible not only to shareholders but be responsible to all stakeholders.

Based on the description above, firstly, as a business entity in the form of a Limited Liability Company, it is obligatory to comply with the principle of independence of the Limited Liability Company described above. Therefore, Pertamina, as a limited liability company, may not be intervened in any form, including in determining the price of the oil and gas it sells. Therefore, the decision of the Minister of Energy and Mineral Resources in determining the price of oil can be judged that the Ministry of Energy and Mineral Resources has interfered in the management of Pertamina and legally has violated the doctrine or principles of managing a limited liability company as an independent business entity managed by the Board of Directors which is obliged to carry out professional management based on the doctrine. Fiduciary duty law.

The announcement of the increase and decrease in fuel prices above not only violates the principle of fiduciary duty and the principle of a separatist legal entity but also violates the principle of excess of authority. Because if the state, in this case, is the shareholder of Pertamina, it should be the Ministry of SOEs as the state's representative in the Shareholders, which should declare the increase and/or decrease in oil and gas prices, even if it is carried out by the Ministry of SOEs, it is still not in line with the principles of fiduciary duty and separatist legal entity because the Shareholders have interfered with the management of the Board of Directors.

In line with this thought, the directors of Pertamina are legally authorized to announce oil and gas prices. However, as a responsibility to stakeholders, the announcement is accompanied by legal logic that the actual base price of oil and gas is in accordance with the Self Estimated Price (HPS), which has been determined based on careful calculations and can be accounted for, with losses caused by the existence of "forced" prices announced by the Ministry of Energy and Mineral Resources.

Announcements made by ESDM in determining fuel prices can be considered as violating Law Number 31 of 1999 as amended by Law Number 20 of 2001 concerning the Eradication of Corruption Crimes. Article 3 states that "Everyone who, with the aim of benefiting himself or another person or a corporation, abuses the authority, opportunities or facilities available to him because of his position or position that can harm state finances or the state economy, shall be punished, etc.". The main element in a criminal act of corruption is to benefit oneself or another party and by abusing one's authority and position and can harm the state." The announcement made by the Ministry of Energy and Mineral Resources regarding the increase and decrease in oil and gas prices can harm the state and benefit other parties.

Pertamina, as a profit-oriented company with its business commodity in the form of oil and gas, which is a commodity for the livelihood of many people, creates a tug of interest between law, politics, hope, and reality. The government certainly wants Pertamina as a source of state revenue through Oil and Gas to deal with the interests of oil and gas commodities as commodities for the livelihood of many people managed by Pertamina. Therefore, Oil and Gas should be managed by a non-profit agency,

¹²Fred B.G. Tumbuan, *Tugas dan Tanggung Jawab Direksi Perseroan Terbatas*, Materi Pendidikan Singkat Hukum Bisnis, (Jakarta : Unika AtmaJaya, 2000), hlm., 3.

whose task is to manage oil and gas as efficiently as possible and be able to sell oil and gas prices as cheaply as possible without a profit target like Pertamina currently.

The subsidies given should be given to Pertamina as the manager of oil and gas commodities, not to the public. The provision of subsidies to the public can be given as a sweetener for rising fuel prices. The provision of government subsidies to the people, as stated at the beginning of the discussion of this research, does not solve the main problem because the main problem is the price of oil and gas.

Pertamina's management is based on Good Corporate Governance (GCG), and with accuracy, it can determine the basic price or cost price of oil and gas. If the base price or basic price is known, then if the government wants to set the selling price of oil and gas, it can communicate with Pertamina's management to determine the selling price to the public. The difference between the basic price and the selling price must be subsidized by the Government to Pertamina. Therefore, Pertamina's Board of Directors can convey the increase in oil and gas prices as well as notify the government of the amount of subsidies requested by Pertamina. In this case, the Government will, of course, submit it to the State Budget Memorandum to the DPR.

Pertamina is a national energy company that is 100% (99.9%) owned by the Government of the Republic of Indonesia through the Ministry of State-Owned Enterprises (SOE) as the Proxy of Shareholders¹³. Therefore, the Government as the shareholder of Pertamina, is obliged to respect and implement the principle of independence of Pertamina as an independent entity. In the event that the Government, through the Minister of State-Owned Enterprises or other ministries, the government has violated the legal doctrine of fiduciary duty and the principle of separate legal entity. The legal consequence is that the immunity of shareholders becomes unlimited.

4. Conclusion

Pertamina is a profit-oriented company with its business commodity in the form of oil and gas, which is a commodity for the livelihood of many people, giving birth to a tug of interest between law, politics, hope, and reality. The government certainly wants Pertamina as a source of state revenue through Oil and Gas to deal with the interests of oil and gas commodities as commodities for the livelihood of many people managed by Pertamina.

The subsidies given should be given to Pertamina as the manager of Oil and Gas commodities, not to the public. The provision of subsidies to the public can be given as a sweetener for rising fuel prices. The provision of government subsidies to the people, as stated at the beginning of the discussion of this research, does not solve the main problem because the main problem is the price of oil and gas.

4.1 Suggestion

Oil and Gas are managed by a non-profit organization, whose job it is to manage oil and gas as efficiently as possible and to be able to sell oil and gas prices as low as possible without a profit target like Pertamina currently.

Pertamina's management is based on Good Corporate Governance (GCG), and with accuracy, it can determine the basic price or cost price of oil and gas. If the base price or basic price is known, then if the government wants to set the selling price of oil and gas, it can communicate with Pertamina's management to determine the selling price to the public. The difference between the basic price and the selling price must be subsidized by the Government to Pertamina. Therefore, Pertamina's Board of Directors may convey the increase in oil and gas prices as well as notify the Government of the amount of subsidies requested by Pertamina. In this case, the Government will, of course, submit it to the State Budget Memorandum to the DPR.

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