The Responsibility Of Holding Company Towards Bankruptted Subsidiaries Based On Law No. 40 Of 2007 About Limited Companies

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Abstract.

The purpose of this research is to identify and analyze the juridical liability of the holding company to its bankrupt subsidiary and the holding company's responsibility to its bankrupt subsidiary. The research method used in this research is normative qualitative. The holding company's juridical responsibility for a bankrupt subsidiary, in certain circumstances the holding company can be held accountable for its subsidiary based on the Piercing The Corporate Veil principle. The application of this principle to holding companies can occur either through legal agreements or based on certain agreements. Implementation of holding company responsibilities for bankrupt subsidiaries in the case of PT. Ometraco Corporation, Tbk. dar. PT. Ometraco Multi Artha pointed out that the Supreme Court is of the opinion that PT. Ometraco Corporation, Tbk. as the holding company is also responsible for the debt of PT. Ometraco Multi Artha as a bankrupt subsidiary based on an agreement.

Keywords*: Holding company, subsidiary and bankruptcy.*

I. INTRODUCTION

Today the development of the business world has given birth to new forms of business entities to meet the needs of the rapidly increasing economic world. One form of this development is the issuance of business entities that are tasked with or have the function of controlling other business entities. On the other hand, there are also business entities that allow themselves to be controlled by other business entities. This is known as a holding company and subsidiary company.The parent company is often also referred to as a Holding Company, Parent Company, or Controlling Company, which means [1] a company that aims to own shares in one or more other companies and/or manage one or more of these other companies [1]. Usually (though not always), a holding company has multiple companies engaged in different business lines. In Indonesia, the holding company is often also called the holding company or holding company. Meanwhile, other companies regulated by holding companies are often referred to as Subsidiaries or Subsidiaries [2]. Basically a holding company is not a legal entity or a special business entity, it's just that as a company, a holding company has its own unique characteristics, namely this company invests in subsidiary companies and then supervises management of company subsidiaries activities.

Even though it is not a requirement, in practice this holding company is always formed in the form of a limited liability company.The establishment of a holding company has now become a common business trend, both internationally and in Indonesia itself. In Indonesia, with the development of conglomerate business groups since the seventies, business control through holding companies has become a trend and a business necessity that cannot and should not be avoided [3].The formation of this holding company was actually triggered by the growing and growing size of a company, so that inevitably the company had to be broken down according to its business classification. But on the other hand, the holding company does not want to lose control over the newly formed companies. Holding companies appear to answer these problems. [1] identified the advantages of having a holding company in a business group as follows:

1) Risk independence. Each subsidiary is an independent legal entity that is legally separate from one another, so in principle any liabilities, risks and claims from third parties against a subsidiary cannot be borne by another subsidiary, even though the subsidiary is still in a business group, or owned by the same party.
2) Greater Control Rights. Sometimes a holding company can exercise greater control over a subsidiary, even if for example it has shares in a subsidiary of less than 50% (fifty percent).
3) Easier and more effective control. Holding companies can control all subsidiaries in a business group, so that the relationship is easier to monitor.
4) More efficient operations. On the initiative of the holding company, each subsidiary company can work together and help each other.
5) Ease of Sources of Capital. Because each subsidiary is bigger and more bona fide in an entity than if each is independent from one another, the possibility of obtaining funding by a subsidiary from a third party is relatively greater. In addition, holding companies and other subsidiaries in the group concerned can provide debt guarantees against the debts of other subsidiaries in the group concerned.
6) Accuracy of decisions taken. Because decisions are taken centrally by the holding company, the level of accuracy of decisions taken can be guaranteed and more prospective.

From a normative juridical point of view, from the provisions of Law no. 1 of 1995 in conjunction with Law no. 40 of 2007 concerning Limited Liability Companies (hereinafter referred to as the "Limited Liability Company Law"), actually the influence of a holding company on a subsidiary can only be exercised in 2 (two) ways, namely:

a. Holding companies with a General Meeting of Shareholders (GMS) mechanism can appoint Directors and Commissioners for subsidiaries in accordance with the criteria and conditions desired by the holding company. Not infrequently, the holding company has appointed its own people to be placed as Directors and Commissioners in its subsidiaries.
b. Holding companies can enter into contractual relationships with their subsidiaries to regulate certain matters, as long as these contractual relationships do not conflict with the articles of association of each company.

However, in daily business practices, the influence of holding companies on subsidiaries is not limited to what has been stated above. Often holding companies intervene and control subsidiaries down to the managerial and operational areas. Control up to the managerial and operational stages is possible, because the holding company holds a large number of shares, thereby fulfilling the quorum of the General Meeting of Shareholders (GMS) and/or being able to make decisions based on a majority vote to determine vital matters in a subsidiary [1]. In addition, in general, morally a subsidiary will be subject to the holding company, because it is this company that establishes the subsidiary. Control held by holding companies over subsidiaries is not always used for good purposes. There are many holding companies that form subsidiaries with the aim of only getting the maximum profit without being able to hold the holding company accountable because of the concept of limited liability of subsidiaries.In Indonesia itself, it is very unfortunate that there are no specific regulations governing holding companies. The management of holding companies and their subsidiaries is regulated centrally in the Law on Limited Liability Companies, even though, as stated above, these holding companies have their own characteristics and uniqueness which require special rules. Holding companies often take refuge in the principle of limited liability or also known as the Separate Corporate Personality doctrine [4] in carrying out their business tricks which ultimately harm their subsidiaries and creditors. Article 3 paragraph (1) of the Limited Liability Company law states that: "*The company's shareholders are not personally responsible for the engagement made on behalf of the company and are not responsible for the company's losses exceeding the shares it has taken*.

"With this principle, holding companies often sacrifice their subsidiaries for the personal interests of the holding company itself. In the event of bankruptcy, the holding company often takes refuge behind the Separate Corporate Personality doctrine so as not to be jointly and severally liable for the losses of the subsidiary, if the assets of the subsidiary are not sufficient to fulfill its obligations. This doctrine teaches that a company is a legal entity that is distinct and separate from the shareholders of that company. As a separate legal entity, the company in carrying out its legal functions does not act as the proxy of its shareholders, but acts for and on behalf of itself. Shareholders are not parties to agreements made by the company with other parties and therefore shareholders are not entitled to force other parties to impose their obligations as specified in the agreement. As a consequence, third parties cannot collect or sue for legal obligations from the company's shareholders. Shareholders are not obliged to pay the company's debts. If a company is declared bankrupt by a court, it does not carry a juridical consequence that each of its shareholders is also declared bankrupt.This doctrine teaches the independence of a limited liability company, so that if a subsidiary is declared bankrupt, then only the assets of the subsidiary and the shares of the holding company are included in bankruptcy in order to fulfill the obligations of the subsidiary. However, the enactment of the Separate Corporate Personality doctrine cannot be applied absolutely and absolutely. In general, there are certain conditions that allow shareholders to be responsible for the obligations of their company.This doctrine is known as the *Piercing the Corporate Veil* doctrine.Based on the problems mentioned above, this research is aimed at answering questions (a) what is the juridical responsibility of the holding company for bankrupt subsidiaries and (b) what is the responsibility of the holding company for bankrupt subsidiaries. The results of this research are expected to contribute to legal practitioners and observers of legal issues, business actors and public policy makers.

II. METHODS

The type of research used in this research is normative legal research. The approach method used is the statutory approach and the conceptual approach. The source of the material used is primary legal material, namely Law no. 40 of 2007 concerning Limited Liability Companies, Law no. 37 of 2004 concerning Bankruptcy and Suspension of Obligations for Payment of Debt and other laws and regulations that can support this research, namely Secondary Legal Materials and Tertiary Legal Materials. The data collection technique used is literature study. Literature study is carried out by reading, studying, taking notes and making reviews of library materials that are related to the Legal Responsibilities of the Parent Company to Bankrupt Subsidiaries.

III. RESULTS AND DISCUSSION

The responsibility of the holding company to the subsidiary

The responsibility of the holding company is inseparable from the role and position of the holding company itself as the majority shareholder in the subsidiary. In fact, as explained above, the control interest held by the holding company over its subsidiary shows the relationship between the holding company and its subsidiary which is based on majority share ownership. Therefore also, the responsibility of a holding company to a subsidiary cannot be separated from the responsibility of shareholders in a company. Juridically, the responsibility of a Holding Company as a Shareholder is determined based on Article 3 paragraph (1) of the Limited Liability Company Law which states that: "Company shareholders are not personally responsible for agreements made on behalf of the company and are not responsible for company losses exceeding the value of the company." shares that have been taken.Based on the provisions above, it can be concluded that if there is a debt or losses, the debt will only be paid in moderation from the assets available in the company. On the other hand, those who invest in the company (read: shareholders) will definitely not bear the debt loss more than the share of their assets embedded in the limited liability company. So the meaning of "limited" simultaneously implies limitations both from the point of view of the limited liability company and from the point of view of the investor. This provision also means that shareholders are released from their responsibilities if a limited liability company is declared bankrupt by a court and the proceeds from the sale of the company's assets are not sufficient to pay off the limited liability company's debts.

The provisions on limiting shareholder responsibilities as referred to in Article 3 paragraph (1) of the Limited Liability Company Law are inseparable from the Separate Legal Personality Doctrine of shareholders which teaches that between shareholders and limited liability companies are separate parties. Shareholders cannot be demanded to pay off the company's debts, even though they are the owners. This is because previously the shareholders had entered into an agreement which stated that each party had separated or released some of their personal assets to become the assets of a limited liability company separated from their personal assets. With the separation of the private assets of the shareholders and the assets of the limited liability company, the responsibilities of the shareholders are limited to the limited liability company. In other words, the shareholders are not obliged to pay off the debts of the limited liability company if the proceeds from the sale of the assets of the limited liability company are still insufficient. Likewise to fulfill the obligations of a limited liability company if the assets of the limited liability company are insufficient.However, the founders of the company can transfer responsibility for their legal actions to the company and partners (shareholders) are not personally responsible for the engagement made by the company. In the opinion of [5] the background of holding limited shareholder responsibility is by linking it to the notion of association capital which is collected from a very large number of people. Undoubtedly there will be difficulties if a shareholder has to take full responsibility up to his personal assets for actions committed by the very large number of shareholders, who even because there are so many (compare among the investors in the stock exchange) they may not know each other.

That's why the characteristics of limited liability cannot but be attached to a limited liability company in connection with the nature of the capital association of a limited liability company [5].Another opinion was put forward by [6] who said that it is logical that the responsibility of shareholders for losses suffered by third parties as a result of limited liability company activities is limited by law, namely only the nominal value of all shares that have been taken, because those who manage or managing a limited liability company on a day-to-day basis not the shareholders themselves but other people, namely the Directors. Therefore, it is very likely that the Board of Directors is the party causing the loss to other parties, since he has the right to take care of or manage the company's business on a daily basis. That is, the portion of the possibility of making mistakes in a company that results in losses to other parties is the Board of Directors is greater when compared to shareholders even though the latter party is the owner of a limited liability company, so it is only natural that the responsibility of shareholders is limited.This separate legal personality doctrine also applies to holding companies to subsidiaries in the field of bankruptcy, meaning that if a subsidiary company is filed for bankruptcy for some reason, the holding company is only responsible to the extent of the shares that have been deposited by the holding company in the subsidiary. However, in practice, not all holding companies have good goals for their subsidiaries. Often a holding company establishes a subsidiary in order to increase the profits of the holding company itself regardless of third parties who transact with the subsidiary.

In such circumstances, the subsidiary company is often used as a sacrifice for the interests of the holding company alone.[1] argues that; The term piercing the corporate veil has become a doctrine or theory which is defined as a process of imposing responsibility on the shoulders of other people or companies, for legal actions carried out by a corporate actor (legal entity), regardless of the fact that the act was actually carried out. by the perpetrator company [7]. This doctrine aims to avoid things that are unfair, especially for outsiders of the company from arbitrary or inappropriate actions taken on behalf of the company, whether arising from a transaction with a third party or arising from a misleading act or an unlawful act. . The principle of piercing the corporate veil is also applied to companies whose capital is too small while the transactions are quite large. In addition to contractual actions, the principle of piercing the corporate veil is also applied to non-contractual ones, such as if an unlawful act occurs, if a company fails to follow the formalities, or if there is an artificial separation between 2 (two) companies [7] .How is this principle applied in the Limited Liability Company Law? Prior to the Limited Liability Company Law, the principle of limited liability in a limited liability company could not be penetrated or disclosed, so that shareholders who had actually taken actions that benefited themselves personally as shareholders or resulted in the company going bankrupt could not be held personally responsible for the company's debts to others.

However, since the enactment of the Limited Liability Company Law, the principle of limited liability in a limited liability company can be disclosed or violated because there are exceptions based on the principle of piercing the corporate veil.By adhering to the principle of piercing the corporate veil in our company law, it is possible to reveal or remove the veil, veil or veil that has so far covered the company, that the responsibilities of the shareholders (including the Directors and Commissioners) may no longer be absolute in certain matters [7].

Limited Liability Company Independence and Responsibility

Talking about the independence and responsibilities of a limited liability company cannot be separated from the status of the limited liability company itself as an independent legal entity, and is a separate legal subject that has separate rights and obligations from its founders. In legal theory, the independence of this limited liability company is embodied in a doctrine known as the Separate Legal Personality Doctrine.Even though in essence economically, these companies are one economic entity, however, because juridically each legal entity is seen as an independent legal subject, a claim against a limited liability company cannot be sued against the personal assets of its people, whether the management as well as shareholders or to other limited liability companies, even if the shares are in 1 (one) shareholder's hand [5].The concept as mentioned above, in legal science is known as the Separate Legal Personality Doctrine. This doctrine teaches that a corporation is a legal entity that is distinct and separate from the shareholders of the limited liability company. As a legal entity that is separate from its shareholders, the company in carrying out its legal functions does not act as the proxy of its shareholders, but acts for and on behalf of itself.

The shareholders are not parties to the agreement entered into by the limited liability company with other parties. Therefore, shareholders also do not have the right to force other parties to carry out their obligations specified in the agreement. As a consequence, third parties cannot charge or sue the limited liability company for the legal obligations of the shareholders of the limited liability company for the legal obligations of the company's shareholders. Conversely, he also has no right to charge third parties for the obligations that must be paid to the company's shareholders [4]. According to [7] this limited liability company is inseparable from the position of the limited liability company itself as a legal entity, where the main characteristic of a legal entity is the separation between the assets of the legal entity and the private shareholders. Thus, the shareholders are not personally responsible for the engagement made on behalf of the legal entity and are also not responsible for the loss of the legal entity. On the one hand, a PT is a forum that brings together people who enter into partnerships within a PT, but on the other hand, all actions taken within the framework of cooperation within a PT are by law seen solely as the actions of the agency itself. Because of that consequence, the profits obtained are seen as the rights and assets of the agency itself. And vice versa, if a debt or loss occurs it is considered to be the burden of the PT itself which is paid from the assets of the PT solely [5].

Legal Consequences of Bankruptcy

A bankruptcy declaration decision handed down by the Panel of Judges of the Commercial Court against the Debtor has important consequences for the debtor, both materially, namely concerning the debtor's assets and morally, namely concerning the debtor's person. But keep in mind that these consequences do not only affect the debtor. The bankruptcy statement handed down to the debtor also has consequences for the creditor.

The consequences that arise for creditors and debtors for a bankruptcy statement are as follows:

1. Consequences of Bankruptcy Statements for Creditors.

   Basically the position of the creditors is the same (parity creditorum) and therefore they have the same rights over the results of the bankruptcy estate in accordance with the balance of the amount of their respective bills (principle of pari passu pro rata parte). However, this principle is excluded or does not apply to creditors who hold preference rights or are often referred to as separatist creditors. What is meant by creditors holding preference rights are creditors holding collateral rights over goods and creditors whose rights take precedence. So, the principle of creditorum parity or the principle of equal position of creditors only applies to concurrent creditors, namely competing creditors whose bills to the debtor are not guaranteed by an item or whose payment is not prioritized for payment for a certain reason determined by law. Meanwhile, creditors are separatist because of the privileges of their bills, so their position is above concurrent creditors. So for separatist creditors debt payments by debtors are carried out in advance of payments to concurrent creditors.

2. Consequences of a Bankruptcy Declaration for the Debtor.

A debtor who is declared bankrupt morally will fall into disrepute in society in general and especially for entrepreneurs in their business environment. Meanwhile, from a material perspective, a debtor who is declared bankrupt will lose the opportunity and confidence to obtain credit. The bankrupt debtor also loses his right to act freely on his assets. The debtor can no longer freely control and manage his assets. It should be noted that bankruptcy includes all of the debtor's assets at the time the bankruptcy statement was issued, along with everything that was acquired during the bankruptcy period. The debtor himself does not lose the right and ability to carry out legal actions. He can still carry out legal actions outside the area of his assets as if there had been no bankruptcy. Based on this fact, a debtor who is declared bankrupt is never placed under guardianship (curatele). Even though bankruptcy theoretically will not affect the position of the bankrupt debtor in society, in social life the bankruptcy decision will have a negative effect/impact on the bankrupt debtor himself.

3. Consequences of Bankruptcy Declaration for Reciprocal Agreements.

The bankruptcy declaration decision does not bind a reciprocal agreement held by the bankrupt debtor before bankruptcy is declared. The bankrupt debtor, with the permission of the Curator, can still continue the implementation of the reciprocal agreement for a certain period of time that has been mutually agreed upon.

Parent Company Responsibilities to Bankrupt Subsidiaries in Supreme Court Decisions

The following is an interesting case example that illustrates the responsibility of a holding company towards its subsidiaries. This case stems from a lawsuit by creditors (American Express Bank Ltd, Singapore Branch, et al) against a subsidiary, namely PT. Ometraco Multi Artha (hereinafter referred to as "OMA") contained in District Court Decision 04/Bankrupt/1998/PN.Niaga/ Jkt.Pst dated September 30, 1998 and at the same time the holding company, namely PT. Ometraco Corporation, Tbk. (hereinafter referred to as "OC"), as stated in the decision of the Commercial Court Number 05/Bankrupt/1998/PN.Niaga/Jkt.Pst dated Sept. 28, 1998.Based on decisions and considerations from both the Commercial Court and the Supreme Court, several juridical analyzes can be drawn that the Panel of Judges of the Commercial Court has seen that the legal relationship between a holding company and a subsidiary is solely based on economic considerations, namely as a management unit, the company a holding company and a subsidiary must be considered as 1 (one) legal subject, so that a bankruptcy application for a holding company (OC) must also include a subsidiary (OMA) in the same bankruptcy petition. Although this view is justified from an economic and management point of view, from a legal point of view the view of the Commercial Court is erroneous. The Supreme Court in its final decision annulled and annulled the decision of the Commercial Court. In its consideration, the Supreme Court firmly based on the Separate Legal Personality doctrine, a doctrine which teaches that a company is a legal entity that is different and separate from the shareholders of the limited liability company [8]. This doctrine is explicitly adhered to by the Limited Liability Company Law, especially in article 3 paragraph (1) it says that:

"The company's shareholders are not personally responsible for the engagement made on behalf of the company and are not responsible for the company's losses exceeding the value of the shares they have taken."

The author strongly agrees with the consideration of the Supreme Court which places holding companies and their subsidiaries as legal subjects that are truly independent, and not related to one another, so that the application submitted to the holding company does not need to include a subsidiary, and vice versa. The Supreme Court in this matter has been consistent with the views and principles espoused in the Limited Liability Company Law.

IV. CONCLUSION

Based on the descriptions and analyzes of the main issues that have been presented in the previous chapters, the writer in writing this thesis can draw the following conclusions:

1. Juridical responsibility of a holding company for a subsidiary company that is bankrupt in the field of bankruptcy, in certain circumstances a holding company can be held accountable for its subsidiary based on the Piercing The Corporate Veil principle. The application of this principle to holding companies can occur either in legal agreements or on a certain basis. The relationship between the holding company (holding company) and its subsidiary (subsidiary company). Law Number 40 of 2007 concerning Limited Liability Companies does not specifically regulate the relationship between holding companies and subsidiary companies.
2. Implementation of holding company responsibilities for bankrupt subsidiaries in the case of PT. Ometraco Corporation, Tbk. dar. PT. Ometraco Multi Artha has implemented the Separate Legal Personality Doctrine and the Piercing The Corporate Veil Doctrine correctly and properly. In considering the decision, the Supreme Court is of the opinion that PT. Ometraco Corporation, Tbk. as a holding company is also responsible for the debt of PT. Ometraco Multi Artha as a bankrupt subsidiary based on an agreement

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