

## **Contradictions In The Confidential Arrangement Of Assets Owned By BUMD In The Form Of A Regional Company**

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### **Abstract**

*This research aims to elaborate on the reasons for the contradictions in legal arrangements regarding confiscation of assets owned by regional companies and how the legal arrangements for confiscation of assets owned by regional companies should be. This research is a type of juridical-normative research. The primary legal materials used are the State Finance Law, the State Treasury Law and the Regional Government Law and PP BUMD. Coupled with Law no. 5 of 1962 concerning regional companies. The research was conducted by inventorying regulations relating to BUMD in the form of regional companies. Legal materials that have been inventoried are then analyzed using the prescription method. The results showed that the contradiction in the regulation of conflict of assets of regional companies boils down to the use of the term regional company in the State Finance Law. The conceptual reference to regional companies in Law No. 5 of 1962 is no longer in line with the form of regional companies that have been transformed into BUMD based on the Regional Government Law and PP BUMD. Thus, Article 50 of the State Treasury Law does not apply to assets that are separated and managed independently by regional companies. In addition, the regulation on configuration of assets of regional companies must begin with an amendment to the State Finance Law, followed by the State Treasury Law. Regulations on the confiscation of assets of regional companies must be carried out to provide justice for every legal entity and the wealth of private legal entities in Indonesia.*

**Keywords; Legal Contradictions; Asset Confiscation; Regional Company.**

### **Abstract**

Tujuan penelitian ini adalah untuk menguraikan kontradiksi dan alasan kontradiksi pengaturan atas sita aset BUMD berbentuk perseroan daerah dan bagaimana seharusnya pengaturan sita aset perseroan daerah. Penelitian ini dilakukan menggunakan metode penelitian yuridis-normatif. Data diperoleh dengan metode inventarisir peraturan perundang-undangan yang berkaitan dengan kepailitan dan perseroan daerah. Pendekatan yang digunakan dalam penelitian ini adalah pendekatan undang-undang (statuta aproach), dan pendekatan historis. Hasil penelitian menunjukkan bahwa terjadinya kontradiksi pengaturan mengenai sita aset perseroan daerah berasal dari pemahaman yang dapat ditemui pada istilah perusahaan daerah yang digunakan dalam UU Keuangan Negara sebagai undang-undang yang dirujuk oleh UU Perbendaharaan Negara. Adapun pengaturan mengenai sita aset perseroan daerah seharusnya berpedoman pada prinsip jure gestionis, dimana negara/daerah tidak lagi menggunakan prinsip publik, melainkan beralih kepada status perdata dengan keterlibatannya dalam kegiatan keperdataan.

**Keywords: Kontradiksi Pengaturan; Sita Aset; Perseroan Daerah**

### **INTRODUCTION**

Based on article 127 paragraph 1 PP no. 54 of 2017 concerning BUMD. There are provisions regarding the subordination of BUMDs to Law no. 37 of 2003 concerning Bankruptcy and PKPU. BUMD's compliance with this law has implications for regional assets that are separated from BUMD to be confiscated. In particular, the object of this research study is BUMD in the form of a regional company.

Regional companies are one type of BUMD regulated in the Regional Government Law number 23 of 2014 and specifically in PP BUMD number 54 of 2017. From the provisions of these laws and regulations, it has been specifically stated regarding the subordination of regional companies to the provisions of private legal entities that regulated in the Limited Liability Company Law as well as the Bankruptcy Law and PKPU.

However, in the event of bankruptcy, that has implications for the confiscation of regional company assets. It is important to pay attention to the provisions regulated in article 50 of the State Treasury Law and the State Finance Law and its derivatives, namely Regional Finance Regulation number 12 of 2019. Because these provisions state that any party is prohibited from confiscating state assets. The assets separated from regional companies, as regulated in article 2 (g) of the State Finance Law, are part of the state's financial balance.

As for Government Regulation no. 12 of 2019 concerning Regional Finance, Article 2 letter (e), states the following; "Regional assets managed by themselves or by other parties in the form of money, securities, receivables, goods and other rights that can be valued in money, including separated regional assets"

The existence of these provisions also serves as a reference to see and understand the legal status of state/regional assets that are separated in regional companies. If wealth is separated from regional wealth, if it still has the status of regional wealth, it is automatically subject to article 50 of the State Treasury Law. Meanwhile, the provisions regarding the subordination of regional companies to the Limited Liability Company Law mean that regional assets included in regional companies have been transformed from previously being regional assets to regional company assets that are managed independently and separately from regional assets. Meanwhile, the regional government's involvement in assets separated from regional companies is involvement as a shareholder.

Regulations regarding the bankruptcy of regional companies, as contained in the PP BUMD, state that the bankruptcy of BUMDs, including regional companies, is subject to Law no. 37 of 2004 concerning Bankruptcy and PKPU. Meanwhile, assets separated from regional assets to regional companies are the domain of state finance, as regulated in the State Finance Law, article 2 (g). As the domain of state assets, article 50 of the State Treasury Law applies.

Research conducted by Loura Hardjaloka regarding the disparity and inaccuracy of judges in deciding cases of BUMN which cannot be bankrupted, except

by the Minister of Finance. As quoted by Loura from Hartini. There are two different views regarding state finances which are included as capital in establishing a company. The first view is that state assets attached to companies (BUMN/BUMD) can be confiscated. Meanwhile, the second opinion states that state assets included in BUMN/BUMD in the form of companies cannot be confiscated with reference to article 50 of the State Treasury Law.<sup>1</sup>

Nurul Efridha, in her research results, shows that the legal status of regional assets deposited in BUMDs in the form of regional companies has changed. Initially it was regional wealth, it turned into wealth in regional companies.<sup>2</sup> The deposited assets are then managed independently by regional companies as legal entities subject to Law number 40 of 2007 concerning Limited Liability Companies.

The research above uses different terms from the mention of regional companies in article 2 (g) of the State Finance Law. This mention makes regional assets held in regional companies subject to article 50 of the State Treasury Law. Subordination of regional assets that have been deposited into regional companies means that these assets cannot be confiscated. Similar research was also carried out by Merdiansa Paputungan in the conclusion section of his research. He said that state assets deposited to BUMN (companies) were assets managed independently by the company as a private legal entity.<sup>3</sup> This also applies to BUMDs, especially regional companies.

The three studies that have been mentioned are in line with and support the results of the national working meeting and the Supreme Court (MA) fatwa regarding the legal status of state/regional assets that have been separated into BUMN/BUMD in the form of regional companies. Based on the number X contained in SEMA No. 7 of 2012, states that assets held by BUMN (Persero) can be confiscated. This is also reinforced by the content of number I letter (g), that prosecutors as state lawyers cannot represent state-owned companies in the form of private companies, because the status of state-owned companies is private legal entities. This fatwa also applies to BUMDs in the form of limited liability companies. Because both are legal entities that were formed and most of their capital comes from separate state/regional assets.

SEMA is different from the Constitutional Court decision no. 48 and 63 of 2013. In decision number 48, precisely at 3.15, PT BUMN/BUMD, through this decision, is deemed unable to be called a private legal entity in its entirety. The Constitutional

<sup>1</sup> Loura Hardjaloka, "Ketidakcermatan Hakim Berujung Pada Disparitas Putusan (Kajian Atas Berbagai Putusan Pengadilan Terakit Permohonan Pailit Terhadap BUMN)," *Jurnal Yudisial* 9, no. 1 (2016): 10, <https://doi.org/10.29123/jy.v9i1.28>.

<sup>2</sup> Nurul Efridha et al., "Analisis Akibat Hukum Kekayaan Daerah Yang Dipisahkan Pada Badan Usaha Milik Daerah (BUMD) Dikaitkan Dengan Kebijakan Direksi Dalam Kegiatan Bisnis," *Recht Studiosum Law Review* 2, no. 1 (May 31, 2023): 140, <https://doi.org/10.32734/rslr.v2i1.12114>.

<sup>3</sup> Merdiansa Paputungan, "Diskursus Kewenangan Audit BPK Terhadap Keuangan BUMN (Perseroan) Pasca Putusan MK Nomor 62/Puu-Xi/2013," *Mimbar Hukum* 29, no. 3 (2017): 433.

Court, through decision number 48 of 2013, said that wealth separated into BUMN/BUMD in the form of a limited liability company is the domain of state finances.

From this background, the researcher assumes that the contradiction or conflict in the legal regulations regarding confiscation of regional company assets stems from the writing of the term regional company in the State Finance Law. Therefore, researchers try to conduct research by focusing on issues regarding; first, why are there contradictions in legal regulations regarding the confiscation of regional company assets and; second, what should be the arrangements for confiscation of regional company assets. This research is aimed at understanding the background to the contradictions in legal regulations regarding the confiscation of regional company assets in the event of bankruptcy and what the ideal regulation of this problem is.

## **RESEARCH METHODS**

This research is a type of juridical-normative research. The data used is primary legal material from Law no. 23 of 2014 concerning Regional Government and PP no. 54 of 2017 concerning BUMD with Law no. 5 of 1962 concerning Regional Companies, Law no. 17 of 2003 concerning State Finance, Law no. 1 of 2004 concerning State Treasury, Law no. 37 of 2004 concerning Bankruptcy and PKPU, and PP no. 12 of 2019 concerning Regional Finance. Meanwhile, the secondary legal materials used are books and previous research articles that are relevant to this research, as well as articles obtained from internet sources. The approach used is a statutory approach and a conceptual approach. The analysis used is prescription analysis.

## **RESULTS AND DISCUSSION**

### **1. Contradictions in Legal Arrangements for Confiscation of Assets Belonging to Regional Companies**

The contradictions in legal regulations regarding the confiscation of assets belonging to BUMDs in the form of regional companies have become a matter of debate in the realm of implementation. The debate regarding whether or not it is permissible to confiscate the assets of BUMD Persero is the same as confiscating the assets of BUMN Persero. Therefore, discussions regarding assets owned and/or managed by BUMDs in the form of regional companies cannot be separated from discussions regarding the concept of regional finance. Regional finance itself is a part or domain or derivative of state finance. Explanation of regional finance, juxtaposed with the concept of blood companies and also the concept of blood companies contained in the State Finance Law.

In this research, an attempt to understand and explain the reasons for the contradictions in the regulation of asset confiscation of regional companies uses an exegetical interpretation method. Exegetical interpretation is an interpretation that emphasizes the text of the law to explain the logical meaning therein. This type of interpretation emphasizes three methods of interpretation at once, namely; grammatical, historical and logical methods. Apart from that, modern interpretation methods are also used. This interpretation seeks to explain words in context, so it is important in this interpretation to understand the supporting elements contained in a text.<sup>4</sup>

What is meant by historical interpretation is an explanation of the text of a legal regulation which is based on tracing the meaning aimed at a text in a legal regulation. Historical interpretation means interpretation based on the history of the formulation of a law or what is also known as the history of the establishment of a provision. One of the important things in it is searching for the meaning of the text which refers to relevant legal regulations.<sup>5</sup> Historical interpretation is used to discover the legislator's intentions regarding a text.<sup>6</sup>

Grammatical interpretation is defined as an effort to understand the text in legal regulations based on grammar. Searching for the meaning of text based on grammar means looking at the meaning or concept of the words used by the rule maker<sup>7</sup> Meanwhile, logical interpretation places more emphasis on logical relationships between laws and regulations. Each part of the law plays a role in understanding the meaning of the entire legal system.<sup>8</sup>

Apart from exegetical interpretation. This research also uses modern interpretation theory. Modern interpretation requires the ability to identify the elements contained in the concept of a text. This ability is needed because this type of interpretation focuses on understanding a text based on the concept of placing a text in a law. As quoted by Efendi and Susanti from McLeod, the main analysis in modern interpretation is the analysis of the language context and also the legal context.<sup>9</sup>

<sup>4</sup> A'an Efendi and Dyah Ochterina Susanti, *Logika Dan Argumentasi Hukum* (Jakarta: Kencana, 2020), 94.

<sup>5</sup> Jimly Asshiddiqie, *Pengantar Ilmu Hukum Tata Negara*, 7th ed. (Jakarta: Raja Grafindo, 2015), 236.

<sup>6</sup> Marwan Mas, *Pengantar Ilmu Hukum*, 2nd ed. (Bogor: Ghalia Indonesia, 2011), 172.

<sup>7</sup> Mas, 170.

<sup>8</sup> Efendi and Ochterina Susanti, *Logika Dan Argumentasi Hukum*, 93.

<sup>9</sup> Efendi and Ochterina Susanti, 94.

By using the interpretation method mentioned above, this discussion begins by stating the definition of state finances. After the definition of state finance, search for the historical meaning of the term regional company, as written in article 2 (g) of the State Finance Law. An understanding of the concept of regional companies which is researched using historical interpretation to find the meaning contained behind the use of this term in the State Finance Law as well as the legal implications of state assets being separated into state companies, as researched in the Regional Company Law number 5 of 1962. Including an understanding of wealth areas that are prohibited from confiscation based on article 50 of Law no. 1 of 2004 State Treasury.

The use of this interpretation method is attempted to reveal and explain why there are contradictions in legal regulations regarding the confiscation of regional company assets. This disclosure will also reveal the reasons why regional wealth that is separated from regional companies remains in the regional financial balance sheet. Apart from that, it will also reveal the differences in the concept of form and legal compliance between regional companies and regional companies.

As for clarifying this, the discussion begins with understanding the concept of state finance, because the latest law includes the writing of regional companies in it, as well as having implications for understanding the legal status of regional assets included and separated in regional companies, which is even understood by some groups. , applies to regional companies.

#### a. State finances

Definition of state finances, based on article 1 paragraph 1 PP No. 12 of 2019, are all regional rights and obligations in the context of implementing regional government which can be valued in money as well as all forms of wealth that can be made regional property in connection with the regional rights and obligations. More clearly, based on article 1 paragraph 1 of Law no. 17 of 2003 concerning State Finances, that what is meant by state finances are all rights and obligations to the state, both in the form of money and goods that can be valued in money and can be made property of the state in connection with the implementation of these rights and obligations.

Based on article 2 letter (g) Law no. 17 of 2003 concerning State Finance. Segregated assets in regional companies. Whether in the form of money, goods, securities or other rights to the state that can be valued in money, they are part of the state's assets. This provision is also used as a legal basis in determining the status of regional assets separated into BUMD. In this case, BUMD takes the form of a regional company.

Formulation of state/regional finances can be done using several approaches, one of which is the subject approach. With the subject approach, it is said that all state financial objects are controlled by the subject. Either by the central/regional government, state/regional companies or other bodies that manage state finances.<sup>10</sup>

Understanding state finances, as well as clarifying the scope and position as well as the juridical implications attached to each scope of state finances. One of them is state finances which are controlled by regional governments or which are used as separate capital participation in the formation of regional companies. Understanding the assets of regional companies that have been separated but are still part of state finances is a matter of debate. Both regulated in statutory regulations and by the Supreme Court and the Constitutional Court.

The derivation of rules regarding state finances is regulated in Law No. 1 of 2004 concerning State Treasury. Based on article 1 point 1 of Law no. 1 of 2004 concerning State Treasury, that what is meant by state treasury is the management and accountability of state finances, including investments and separated assets, which are stipulated in the APBN and APBD. In article 50 of Law no. 1 of 2004 concerning the State Treasury does contain the issue of prohibiting confiscation of state assets, including separated state/regional assets. This prohibition can be understood, because the regulatory reference contained in the State Treasury Law is Law no. 17 of 2003 concerning State Finance.

#### b. Legal Status of Separated Regional Property

Sahya Anggara in his book writes that there is juridical confusion and deviations or contradictions in the categorization of the scope of state finances. Especially those contained in article 2 letter g of the UUKN.<sup>11</sup>The capital included and separated to be managed by regional companies is part of state finances. In fact, after the enactment of the Law on Regional Government and the enactment of government regulations on BUMD, all forms of regional companies changed their status to BUMD.<sup>12</sup>Both BUMDs are in the form of regional public companies or regional companies. This means that the capital that is separated in the case of establishing a regional company remains within the domain of state assets and is not part of the assets of the regional company itself to be managed independently.

<sup>10</sup> Dadang Solihin, *Keuangan Publik: Pendanaan Pusat Dan Daerah* (Jakarta: Artifa Duta Perkasa, 2006), 3.

<sup>11</sup> Sahya Anggara, *Administrasi Keuangan Negara* (Bandung: Pustaka Setia, 2016), 13.

<sup>12</sup> Sigit Sumadiyono, "Konstruksi Yuridis Badan Usaha Milik Daerah Menurut Undang-Undang Nomor 23 Tahun 2014 Tentang Pemerintahan Daerah," *Legalitas X*, no. 1 (2018): 5.

It should be understood that regional companies and regional companies (BUMD) have different concepts. Even the legal basis used is also different. Regional companies, as stated in article 2 letter (g) of Law no. 17 of 2003 concerning State Finance is a derivation of the concept of regional companies regulated in Law no. 5 of 1962. Meanwhile, the legal basis for regional companies is subject to Law no. 40 of 2007 concerning limited liability companies, as mandated in article 339 of Law no. 23 of 2014 concerning Regional Government. The differences between these two types of legal entities also occur in the conceptual realm of them. There are also differences in the legal status of wealth between them.

The absence of separation between state/regional assets and assets managed by regional companies means that these assets are in two different legal statuses or positions. This also has implications for several things in managing the assets of regional companies as legal entities which are basically capital associations,<sup>13</sup> as is usual for legal entities regulated in Law no. 40 of 2007 concerning Limited Liability Companies.

Regional companies, according to their status as companies subject to Law no. 40 of 2007 concerning Limited Liability Companies, has the potential to go bankrupt like other legal entities in carrying out their activities. This potential for bankruptcy has been regulated explicitly and separately in PP No. 54 BUMDs. In article 127 part XIII PP BUMD, it is said that regarding bankruptcy, BUMD is subject to Law no. 37 of 2004 concerning Bankruptcy and PKPU. This provision is clear, that if a regional company, in carrying out its business activities, falls into a state of insolvency, then regarding its assets, it is subject to the bankruptcy provisions regulated in Law no. 37 of 2004 concerning Bankruptcy and PKPU.

Regulations regarding the subordination of BUMDs, including regional companies, to the Bankruptcy Law and PKPU, must also pay attention to the position of wealth/assets managed by BUMDs in the form of regional companies. It should be understood that in article 2 (g) of the State Finance Law it is stated that state assets managed by regional companies are part of the state financial domain, so the state treasury law applies to the assets of regional companies, regarding the prohibition of asset confiscation of state assets.

The strong relationship between Law no. 1 of 2004 concerning State Treasury and Law no. 17 of 2003 concerning State Finances, appears in the section on the prohibition of confiscation of movable and immovable goods as well as money or securities owned by the state. as mentioned in the previous section, state finances,

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<sup>13</sup> Anggara, *Administrasi Keuangan Negara*, 14.



in this case state finances managed by regional companies, cannot be confiscated when one day they are declared bankrupt by the Commercial Court.

So, regional assets that are separated from regional companies, if bankruptcy occurs, cannot be confiscated. The legal basis is clearly stated in article 50 of Law no. 1 of 2004 concerning State Treasury. This provision regulates the prohibition on any party from confiscating state/regional assets. The scope of state assets referred to in this article is as stated in article 2 of Law no. 17 of 2003 concerning State Finance. Including regional assets that are separated into regional companies.

That based on article 339 of Law no. 23 of 2014 concerning Regional Government. Regional companies are limited companies. A regional company is a company and at the same time a legal entity consisting of a capital association and established on the basis of an agreement. All authorized capital is divided into shares to carry out business activities by fulfilling the requirements and corridors stipulated in Law no. 40 of 2007 concerning Limited Liability Companies.

A company as a legal entity means that the company is understood as a legal subject that has rights and obligations. The elements that must be fulfilled by a legal entity to be categorized as a PT; Legal entity, originating from a capital association, established based on an agreement, the activities carried out are business activities and the capital managed is in the form of shares.<sup>14</sup>

The separation of wealth between state/regional finances and regional companies has implications for the state/region's power over wealth or assets managed by regional companies if they go bankrupt. Because the only people who can claim the assets of a bankrupt regional company are creditors.<sup>15</sup> Meanwhile, an application for bankruptcy of a regional company made by the directors, as regulated in the BUMD PP, must first obtain approval from the regional head and DPRD. After obtaining approval from the regional head and DPRD, it is then determined through a GMS.

Contradictions over legal regulations relating to the confiscation of assets belonging to regional companies have resulted in inconsistencies in legal regulations regarding the position of assets belonging to regional companies. On the one hand, regional companies as private legal entities are subject to Law no. 40 of 2007 concerning Limited Liability Companies. Meanwhile, regarding BUMD bankruptcy, a special chapter in PP no. 54 of 2017 concerning BUMD, it clearly states that bankruptcy of BUMD is subject to the Bankruptcy Law and PKPU.

<sup>14</sup> M Teguh Pangestu and Nurul Aulia, "Hukum Perseroan Terbatas Dan Perkembangannya Di Indonesia," *Business Law Review* 3, no. 1 (2017): 25.

<sup>15</sup> Mas, *Pengantar Ilmu Hukum*, 26.

On the other hand, the prohibition on confiscating state finances can be found in the State Treasury Law. The state finances referred to in this article are state finances which are separated to be managed by regional companies. So, this regulation contains overlapping rules and does not even reflect a good legal system in a country.

The presence of conflicts or contradictions between laws, in relation to regulations regarding the confiscation of assets belonging to regional companies. One of the reasons for the unclear status of the assets belonging to the regional company is the decision of the Constitutional Court when adjudicating the petition regarding Article 2 letters (g) and (i) of Law no. 17 of 2003 concerning State Finance. From the Constitutional Court decision number 48 and also number 62 in 2013, it is written that state assets that are separated into BUMN/BUMD companies, remain part of state assets.

#### c. Difference Between Regional Companies and Regional Companies Based on Regional Owned Enterprises

The term regional company in Law no. 17 of 2003 concerning State Finance, specifically in article 2 (g), must be understood as a form of legal entity that is different from BUMD in the form of a regional company. The legal basis for regional companies is established based on Law no. 5 of 1962 concerning Regional Companies. Meanwhile, regional companies are established based on Law no. 23 of 2014 concerning Regional Government. The concept between the two forms of legal entity has different meanings.

The concept of regional companies contained in the State Treasury Law can be traced through the Regional Companies Law, number 5 of 1962. What is meant by regional companies in this Law are companies that are fully controlled by the regional government. Its position as a legal entity is determined based on regional regulations intended for the establishment of regional companies. Regional companies that are established through regional regulations and refer to Law number 5 of 1962, then, whether "capital for all or part of regional assets is separated from the APBD, remains on the regional financial balance." In this case, regional finance is part of the state finance domain.

The explanation of the law also emphasizes the difference in capital between regional companies and mixed companies. The mixed company in question is a company established with reference to the provisions of KHUPerdata jo. UU no. 40 of 2007 concerning Limited Liability Companies. Even Law no. 12 of 1962 is intended to standardize the form and capital of assets separated from regions, both in the form of management, control and the legal form of regional companies. Furthermore, in the general explanation section regarding this law, it is also intended that regional

companies in their establishment, no longer rely on other legal forms. regional companies do not refer to the Civil Code, including Law no. 40 of 2007 concerning Limited Liability Companies as lex specialist from articles 1233-1356 and 1618-1652 of the Civil Code. Obtaining legal status for a regional company is based on the Regional Regulations which regulate the establishment of the regional company.

The concept of regional companies, as stated in the Regional Company Law, is used as a reference in the State Treasury Law, as can be seen from the writing which still uses the term "regional company". In simple terms, regional companies as stipulated in Law no. 1 of 2004 concerning the State Treasury is a regional company whose legal basis comes from the regional regulations of its establishment. The concept used is based on changes in the form of regional companies after the enactment of Law no. 23 of 2014 concerning Regional Government and PP no. 54 of 2017 concerning BUMD, refers more to the concept of BUMD in the form of a Regional Public Company (PERUMDA).

Meanwhile, a regional company is a legal entity formed for the purpose of gaining profits and increasing regional income or what is also known in legal terms as PAD (Regional Original Income). In article 285 paragraph 1 of Law no. 23 of 2014 concerning Regional Government, it is stated that one source of regional income is original regional income which includes, one of them, the results of the management of separated regional assets. Then in the explanation of this paragraph, what is meant by regional wealth management is regulated through regional regulations (perda). Regional revenues through regional companies are in the form of dividends.

Regional companies are part of regionally owned business entities, especially after being regulated through developments since the enactment of Regional Government Law No. 23 in 2014 and specifically regulated in Government Regulation no. 54 of 2017 concerning Regional Owned Enterprises. The capital owned by regional companies is capital participation from regional assets which are separated and determined by the regional government through regional regulations concerning the determination of the formation of regional companies.

The legal status of a company is subject to statutory regulations when its status has been determined in a regional regulation. All activities carried out by regional companies are fully subject to Law no. 40 of 2007 concerning Limited Liability Companies. According to Ridwan Kharyandi, BUMD in the form of a limited liability company is part of a legal entity company. Like general limited liability companies (PT), BUMN and BUMD are in the form of regional Peraweroan.<sup>16</sup>

<sup>16</sup> Ridwan Khairandy, *Pokok-Pokok Hukum Dagang Di Indonesia* (Yogyakarta: FH UII Press, 2013), 17.

Quoting from Teguh Pangestu and Nurul Aulia who referred to HMN Purwostjipto, the term company is closer in meaning to capital or shares.<sup>17</sup> This was also written by Sandra Dewi in her book, that the word company refers to capital that is transformed into shares. Legally, a limited liability company is a legal entity that has the right to own property, carry out activities and be responsible for its actions based on applicable legal regulations.<sup>18</sup>

A company as a legal entity means that the company is understood as a legal subject that has rights and obligations. The elements that must be fulfilled by a legal entity to be categorized as a PT; Legal entity, originating from a capital association, established based on an agreement, the activities carried out are business activities and the capital managed is in the form of shares.<sup>19</sup>

Thus, a regional company which in the law on regional government is said to be subject to and complies with the limited liability company law, is a legal entity. As a legal entity, a regional company has the right to own and manage its own assets and be separate from regional assets. The capital included by the regional government in establishing a BUMD in the form of a regional company automatically transforms from ownership of regional assets to regional ownership in the form of shares.

#### d. Contradictions in Arrangements for Confiscation of Regional Company Assets

Regulations regarding the prohibition of confiscation of state finances in Law no. 1 of 2004 concerning State Treasury. The perspective used still refers to the objectives of establishing regional companies as stated in Law no. 17 of 2003 concerning State Finance. This can be understood by the terms used in the State Finance Law. Meanwhile, after the issuance of Law no. 23 of 2014 concerning Regional Government, the legal form of regional companies has been transformed into BUMD which is differentiated into two types of BUMD, namely general companies for public services and regional companies which, in carrying out their business activities, are subject to the Limited Liability Company Law (profit oriented).

For these reasons, it can be understood that the protection or provision of immunity for state finances which are separated in the form of shares, based on the general explanation of Law no. 1 of 2004 concerning the State Treasury, is a reference that should only be placed on regional companies whose entire capital comes from regional assets. In this case, it can be understood from the character of regional

<sup>17</sup> Teguh Pangestu and Aulia, "Hukum Perseroan Terbatas Dan Perkembangannya Di Indonesia," 22.

<sup>18</sup> Sandra Dewi, *Aspek Hukum Perseroan Terbatas* (Solok: Insan Cendekia Mandiri, 2021), 3.

<sup>19</sup> Teguh Pangestu and Aulia, "Hukum Perseroan Terbatas Dan Perkembangannya Di Indonesia," 25.

companies that these regulations are more realistic if applied to BUMDs in the form of regional public companies (Perumda).

Meanwhile, for BUMDs in the form of companies, based on Law no. 23 of 2014 concerning Regional Government and Law 40 of 2007 concerning Limited Liability Companies, can still be confiscated if one day a regional company is declared bankrupt. This is in line with the regulations contained in Law no. 40 of 2007 concerning Limited Liability Companies, Law no. 37 of 2004 concerning Bankruptcy and PKPU and PP no. 54 of 2017 concerning BUMD itself. That based on this PP, bankruptcy can be carried out against regional companies. BUMD bankruptcy has criteria or requirements for approval from the Regional Head which are specifically regulated in CHAPTER XIII concerning BUMD Bankruptcy.

Thus, the contradiction regarding legal regulations regarding the confiscation of assets belonging to BUMDs in the form of regional companies is an implication of the use of the term regional company. The use of the term regional company in article 2 (g) of Law no. 17 of 2003 concerning State Finance and the state financial environment which by Law no. 1 of 2004 concerning the State Treasury, it is prohibited to confiscate it. This is not in line with the latest regulations regarding the concept of regional companies which have transformed into BUMD legal entities, especially those in the form of regional companies.

This explanation is one of the basics that can be used as a reference in understanding the position of regional assets that are separated from regional companies, including when confiscation will be implemented due to bankruptcy. The only difference is regarding the procedure for a bankruptcy application submitted by the director to the commercial court, it must be based on the approval of the regional head and DPRD and then submitted to the GMS. This is different from Law no. 37 of 2004 concerning Bankruptcy and PKPU, because this law does not regulate the bankruptcy of regional companies.

Confiscation of regional company assets is a legal implication if one day bankruptcy occurs in the regional company. Bankruptcy, as stated in Law number 37 of 2004 concerning Bankruptcy and PKPU, bankruptcy is a general confiscation of all assets of the bankrupt debtor. The assets in question are assets owned by the debtor. A bankrupt debtor is a legal subject who is in debt and unable to make debt payments due to falling into poverty.<sup>20</sup> This can also be interpreted as a condition that places debtors in a position where they are unable to fulfill their obligations to pay debts to creditors.

<sup>20</sup> Yuheslon, *Hukum Kepailitan Di Indonesia* (Gorontalo: Ideas Publishing, 2019), 12.

According to Suariyanti Laksmi and Astariyani, bankruptcy is a route taken by creditors to collect debts from debtors.<sup>21</sup> Rusli said that bankruptcy is a way out of debt problems that ensnare debtors because they do not have the power to pay debts to creditors.<sup>22</sup>

Bankruptcy can be interpreted as a condition where the debtor is unable to pay debts. Meanwhile, bankruptcy is a decision issued by a commercial court which results in the confiscation of all of the debtor's assets to be used for commercial purposes to pay off the debtor's debts to creditors.<sup>23</sup> From this explanation, it can be understood that bankruptcy is a means used to settle debts of debtors to creditors who are declared bankrupt.

Bankruptcy is a general confiscation of the debtor's assets. Bankruptcy is referred to as a general confiscation because all goods, property and/or wealth of the debtor, when declared bankrupt, all of the debtor's assets are confiscated. This condition results in obstruction of the debtor's right to manage the assets and/or assets he owns.

Thus, confiscation of regional company assets is interpreted as the transfer of power over the assets managed by the regional company if one day it is declared bankrupt. The confiscation is carried out by the court which manages and decides the bankruptcy of the debtor, assisted by a curator to settle the debtor's assets.

## **2. Arrangements for confiscation of assets belonging to regional companies**

### **a. Application of Jure Gestionis Principles in Arranging Regional Company Asset Confiscation**

*Jure gestionis* is a principle in civil law which is used as a basis for transferring the legal status of a public legal entity to a private legal entity. *Jure gestionis* can be interpreted as activities carried out by the state in the field of civil or commercial law. This principle can be used if there is a dispute involving the state, as a subject of civil law in the judiciary.<sup>24</sup>

The principle of *jure gestionis* is a doctrine used as a reference for assessing actions to invest capital from regional assets in regional companies. Therefore, referring to the results of the previous discussion, that the orientation of forming a BUMD in the form of a regional company is to seek profits and is subject to the PT

<sup>21</sup> N. L. G. S. Suariyanti Laksmi and Ni Luh Gede Astariyani, "Upaya Debitor Untuk Menghindari Kepailitan" (Badung: Hukum Bisnis Universitas Udayana, 2018), 10.

<sup>22</sup> Rusli Tami, *Hukum Kepailitan Di Indonesia* (Lampung: UBL Press, 2017), 16.

<sup>23</sup> Tami, 15.

<sup>24</sup> Batara Mulia Hasibuan, "Penyelesaian Sengketa Dalam Perdagangan Internasional," <https://business-law.binus.ac.id/2017/04/27/penyelesaian-sengketa-dalam-perdagangan-internasional/#:~:text=Jure%20gestionis%2C%20yaitu%20tindakan%2Dtindakan,arbitrase%2C%20dan%20lain%2Dlain>, April 2017.

Law, it can be confirmed that the Regional Company is a private legal entity. So, in Regional Companies, the principle of *jure gestionis* applies because of its commercial nature.<sup>25</sup> This is different from BUMD in the form of a Regional Public Company which is oriented towards Public Services, so what applies to it is what is called *jure empirii*.

Transformation of regional companies into other legal forms that are different from the aim of establishing regional companies. General explanation of number 1 of Law no. 5 of 1962 concerning regional companies is intended so that regional companies in their establishment, no longer rely on other legal forms. This is different from BUMD in the form of a regional company. Where in Law no. 23 of 2014 concerning Regional Government and confirmed through PP no. 54 of 2017 concerning BUMD, it is explicitly stated in article 4 paragraph 5 that BUMD in the form of a company, after its establishment has been determined through regional regulations, is automatically subject to the Limited Liability Company Law.

The elements that must be fulfilled by a legal entity to be categorized as a PT; Legal entity, originating from a capital association, established based on an agreement, the activities carried out are business activities and the capital managed is in the form of shares.<sup>26</sup> By itself, it can be understood that the state, in this case, is no longer a public legal entity that adheres to the principle of *jure imperii* but rather the state is a civil legal entity, so that in the state, the principle of *jure gestionis* applies.<sup>27</sup>

#### b. Arrangements for Confiscation of Regional Company Assets Based on Legal Objectives

Regulations regarding the confiscation of assets belonging to BUMDs in the form of regional companies must be aimed at legal objectives. First, legal justice, namely the moral basis for law, so that the basis or important reference for law is justice. The cultural idea of law is not formal, but is focused on justice. As for how to concretize justice in law, certainty is needed in it. This is Gustav Radbruch's view

<sup>25</sup> Muhammad Dzulfikri Rizki, Kholis Roisah, and Nanik Trihastuti, "Pertanggungjawaban Negara Atas Acta Jure Imerij Perusahaan Yang Didiuga BUMN (Studi Terhadap Kasus Emilio Agustin Maffezini V. Kingdom of Spain)," *Diponegoro Law Journal* 10, no. 1 (2021): 115.

<sup>26</sup> Teguh Pangestu and Aulia, "Hukum Perseroan Terbatas Dan Perkembangannya Di Indonesia," 25.

<sup>27</sup> M. Lutfi Chakim, "Jure Imperii Dan Jure Gestionis," *Konstitusi* (Jakarta, February 2017).

regarding legal justice, that justice in law is emphasizing the aspects of equality and equality of rights before the law.<sup>28</sup>

*Second*, legal benefits, namely a goal that emphasizes that the goal of law is to bring benefits to humans. This view can be seen, especially in Jeremy Bentham's view which is based on utilitarian theory. According to this theory, the purpose of law is to provide guarantees of broad benefits to many people.<sup>29</sup> Law is used as a means to strive for happiness as well as a general standard of happiness for everyone. Thus, the law must be aimed at broad benefits and reach a wide range of people.<sup>30</sup>

*Third*, Legal certainty is a condition where the law, in this case statutory regulations, can be implemented optimally and integrated with each other. The relationship that is built is not a relationship of contradiction, but a relational one. This means that each law discusses the same thing, has a point of view and supports each other. not contradictory and overlapping. Because when contradictions occur, the statutory regulations in question cannot be implemented properly.

According to Gutav Radbruch, as quoted by Siti Halilah and Mhd. Fakhurrahman, that legal certainty is an ideal so that its existence as a regulation can be implemented as expected in the substance of its material content. Legal certainty is a legal condition as a rule that must be obeyed.<sup>31</sup> Legal certainty is a principle that will guarantee the clarity of a legal rule.<sup>32</sup>

Thus, when a regional company is subject to the Bankruptcy Law and PKPU, the regional company's bankruptcy will be treated the same as other private legal entities. In order to achieve justice and legal benefits, legal regulations are needed as the main reference to serve as standards for each party involved in the same case. Apart from reducing conflict and differences in understanding regarding whether or not regional company assets are permitted, which incidentally are separated regional assets, it is also useful as a reference in creating justice in private law.

Regulations regarding the confiscation of assets belonging to BUMDs in the form of regional companies must comply fully with Law no. 37 of 2004 concerning

<sup>28</sup> Bernard L. Tanya, Yoan M. Simanjuntak, and Markus Y. Hage, *Teori Hukum; Strategi Tertib Manusia Lintas Ruang Dan Generasi*, Revisi (Yogyakarta: Genta Publishing, 2013), 117.

<sup>29</sup> Suparman Marzuki, *Pengantar Ilmu Hukum* (Jakarta: Rajawali Press, 2022), 8.

<sup>30</sup> Tanya, Simanjuntak, and Hage, *Teori Hukum; Strategi Tertib Manusia Lintas Ruang Dan Generasi*, 117.

<sup>31</sup> Siti Halilah and Mhd. Fakhurrahman, "Asas Kepastian Hukum Menurut Para Ahli," *Siyasah: Jurnal Hukum Tata Negara* 4, no. II (2021): 57.

<sup>32</sup> Mario Julyanto and Aditya Yuli Sulistyawan, "Pemahaman Terhadap Asas Kepastian Hukum Melalui Konstruksi Penalaran Positivisme Huum," *Crepido* 1, no. 1 (2019): 15.



Bankruptcy and PKPU, as written in article 127 (1) PP No. 54 of 2017 concerning BUMD. Including all the consequences that could potentially arise in its management. So, there is no longer any attempt by the state to exercise state financial immunity if it has chosen the legal form of a regional company as part of a limited liability company. Regional companies should have their own assets and be managed independently and separately from state/regional assets.

Thus, it is necessary to revise Law no. 17 of 2003 concerning State Finance. This is important, considering the position of regional companies as civil legal entities. The context of regional companies as stipulated in Law no. 17 of 2003 concerning State Finances must be removed when changes are made because it is no longer in accordance with the context and concept intended in the law. Because the BUMD concept is in the form of a regional company, which is different from the regional company concept based on Law no. 5 of 1962 concerning regional companies, of which the law is used as a reference when using the terms in article 2 (g) of Law no. 17 of 2003 concerning State Finance.

Amendments to Law no. 17 of 2003 concerning State Finances must also be followed by Law no. 1 of 2004 concerning State Treasury. Because, the juridical reference in the State Treasury Law, apart from the 1945 NRI Constitution, is Law no. 17 of 2003 concerning State Finance. Regulations regarding the confiscation of assets of regional companies, as previously explained, state that BUMDs in the form of regional companies are legal entities that are fully subject to Law no. 40 of 2007 concerning Limited Liability Companies, must be fair with companies in general.

## **CONCLUSION**

The contradiction in regulations regarding the confiscation of assets belonging to BUMDs in the form of regional companies occurs as an implication of the use of the term regional company as outlined in Law no. 17 of 2003 concerning State Finances which was later derived into Law no. 1 of 2004 concerning State Treasury. The terms used are concepts referred to in Law no. 5 of 1962 concerning Regional Companies. A concept that separates regional companies from companies that are subject to the Civil Code Jo. UU no. 40 of 2007 concerning Limited Liability Companies. Meanwhile, BUMD is in the form of a regional company, based on Law No. 23 of 2014 concerning Regional Government, clearly states its submission to Law no. 40 of 2007 concerning Regional Companies.

Legal regulations regarding the confiscation of assets of regional companies must be aligned with those of companies in general. This is a legal implication of regional companies' compliance with Law no. 40 of 2007 concerning Limited Liability Companies. Regional companies must comply with Law no. 37 of 2004 concerning Bankruptcy and PKPU. The subordination of regional companies to bankruptcy law must be on par with limited companies in general, because legally, regional

companies are part of limited liability companies. Legally, the assets of a regional company declared bankrupt cannot be limited based on article 50 of Law no. 1 of 2004 concerning State Treasury.

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