

A CRITICAL REVIEW OF THE RECORDING OF LAND OWNERSHIP TRANSFER IN ORDER TO INCLUDE CAPITAL IN THE LIMITED LIABILITY COMPANY DERIVED FROM MERGERS AND ACQUISITIONS - 2018

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A CRITICAL REVIEW OF THE RECORDING OF LAND OWNERSHIP TRANSFER IN ORDER TO INCLUDE CAPITAL IN THE LIMITED LIABILITY COMPANY DERIVED FROM MERGERS AND ACQUISITIONS

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As an economic actor, the Limited Liability Company is believed by many parties to have a strong legal protection for anyone who binds themselves through a legitimate agreement (*an agreement as a legal binding*). As a result, based on the balance sheet the binding force of the agreement will reduce the assets of the Limited Liability Company. This is because the stronger the binding force of the property agreement, the stronger the obligation that needs to be accounted for, resulting in Limited Liability Company reducing its assets in order to fulfill its achievement. The problems in this recent study were the position of Limited Liability Company as a subject of the land ownership in order to include capital and the procedure of land ownership transfer derived from mergers and acquisitions in order to include capital in Limited Liability Company. The result of this study was the land specifically as part of Limited Liability Company's assets (shares) should have its Proof of Ownership registered which is marked by the issuance of the Certificate of Land Ownership on the behalf of the Limited Liability Company either directly or through an ownership transfer by doing Inclusion in Limited Liability Company if the certificate is still on the behalf of the shareholder based on the Deed of Inclusion In Company.

Keywords: Land ownership transfer, Limited liability company, Mergers and acquisitions.

Introduction

The Limited Liability Company as a legal entity plays an important role in the economic development in Indonesia. This is understandable, considering it is easy to include capital in a Limited Liability Company through an investment, and at the same time having a significant debt easily obtained through the guarantee institution [1] (which considers land as a strong security object and easy to execute in the case of default [2]). The role of the Limited Liability Company may promote or otherwise impede the national economy if its policies and regulations are not synchronized, therefore, the state's function as a regulation maker (*regular*), as well as a manager/registrar of assessable material ownership (*bestuuren*), and as a supervisor (*tozichhouden*) have become essential within the traffic of investments to invest in Indonesia.

Corporate Law exploits capital in the terms of shares, meanwhile, shares and its protection system are essential for the Limited Liability Company regarding their business affairs in accordance with the business scope contained in the articles of association. The capital of the Limited Liability Company is

determined by the investment system, and Limited Liability Company is considered healthy or unhealthy depending³² on the number of investors who will invest their capital which is valued by the shares, either through Domestic Capital Investment (DCI) or Foreign Capital Investment (FCI).

The concept of the Capital of Limited Liability Company is included in the Corporate Law, meanwhile, the concept of the protection of land-related company's capital is included in the Land Law. The Capital of Limited Liability Company is protected through its registration in Bank Indonesia, this is because the company is obliged to deposit funds as an initial capital before its establishment which is marked by the issuance of Certificate of Shares of Bank Indonesia, meanwhile, land is considered as a part of protected shares if it is registered in Land Office marked by the issuance of Certificate of Land Ownership on the behalf of the Limited Liability Company.

In principle, the land law as part of the material law by nature is more closed (*close/Standard Agreement/standard of contract*) and the opposite of Corporate Law which is more open because it follows the nature of general Civil Law (*agreement*). Regarding the material law, all parties cannot create an agreement at will because they are limited by the closed rule of material law and unable to make agreement freely.^[3] The provisions regulated in the land law are exclusive and cannot be regulated otherwise unless mandated by the Law. Land law is often confronted by the open nature of agreement law, meaning the land law regarding the existence of the land cannot be made into an agreement freely because it is limited by the pillars of the land law itself.

Driven by the desire to integrate the original owners with their various needs, the Basic Agrarian Law brings a new uniqueness that often leads to many problems in its implementation, such as the agrarian law is a customary law, however, the substances of customary law in it is very minimal, meanwhile the rights of ownership are the strongest and the most fulfilled, however, they become weak when confronted by the State's control, and the state which is only said to have control over the land, however, has an authority to give an individual the land ownership, in addition, the prohibition to neglect becomes the basis of abolition of land ownership by disregarding the human rights and other principles. These factual facts show that even though the Basic Agrarian Law regulates the basic of land ownership such as the rights of ownership, however, there are still conceptual matters that require in-depth assessment to review and examine as conducted by the authors, and regarding the results, the authors have successfully found the Theory of Ownership Cycle of Indonesian Nation Land ^[4].

The institution of land ownership transfer as proposed in the Article 19 of the Basic Agrarian Law is one of the legal protection forms for parties who receive a transaction result over land ownership object through Sale and Purchase, Exchange, Grant, Inclusion in a Company, Deed of Sharing Ownership due to Inheritance/Husband and Wife/Shared Be¹⁶l, Deed of Grant of Mortgage, Building Rights on Land/Rights to Use over Land Ownership, Power of Attorney to Charge Mortgage ^[5], and Waiver of Rights with good intentions ^[6].

Article 37 Paragraph 1 of the Government Regulation Number 24 Year 1997 on Land Registration states that: The transfer of land ownership and ownership over apartment units through sale and purchase, exchange, grant, inclusion in ¹ company, and other legal ownership transfers excluding ownership transfer through auction, may only be registered if proved by the deed issued by t² authorized Land Deed Officer according to the applicable laws and regulations. Regarding that, the Article 1868 of the Indo²sian Civil Code states that: an authentic deed is a deed created in the form that is regulated by the law in the presence of the authorized public official of the region where the deed is made. Lumban Tobing mentions that the material binding force (the action of facing the parties/comparisons) and the formal binding force (deed) of the agreement on ownership transfer is very dependent on the deed authenticity ^[7]. This means the application of Cash and Bright principles in the customary law and *Verlijden* principle in the Dutch Civil Code are the major requirements to determine the degree of the deed's binding force. If any of the authenticity element is not fulfilled, the deed is potentially flawed by law and can be defined as a non-authentic (*underhand*) deed.^[8]

The existence of Limited Liability Company is also determined by the provisions on property separated from personal or individual¹² property and it involves the state in the case of bankruptcy and acquisition as regulated in Article 9 of Law Number 40 Year 2007 on Limited Liability Company.

The provisions on acquisitions and mergers affected by bankruptcy status of the Limited Liability Company still leave problems regarding the ownership transfer records due to collision between the norms of bankruptcy law as stipulated in Law Number 37 Year 2004 on Bankruptcy and Suspension of Debt Payment Obligation with the norms of land law as stipulated in Basic Agrarian Law in conjunction with Law Number 4 Year 1996 on Mortgage Rights Law. Regarding a bankrupt company, the legal norms built against the principle of legality states that one year prior the declaration of bankruptcy the property of the bankrupt company must be blocked/statu quo (prohibited from carrying out any legal action), meanwhile, Article 126 of the Regulation of the Head of National Land Agency Number 3 Year 1997 on the Implementation of the Government Regulation Number 24 Year 1997 on Land Registration states that: The blocking is not conducted one year prior to bankruptcy, however, it is conducted when the interested party requests to do a blocking records. This means the land derived from acquisitions undergoes *clear and cleanly* process at the time of the ownership transfer being recorded.

A company requires a substantial amount of capital to carry out its activities as an economic actor, thus it requires multiple shareholders in the form of corporation and the corporation itself always requires 4C activities (Corporations, Communications, Citizens, and Capitals)[9]. In practice, there are constraints to include capital resources in the company due to the controversy between the policies and the regulations. As a result, there are significant constraints such as difficulties in investing, licensing, applying income tax, applying land and building title transfer fee as well as difficulty in determining the status of the company's assets when doing a record of the land ownership transfer derived from mergers and acquisitions. Indonesia occupies the 72nd rank in the easiness to invest known as *Ease of Doing Business* (EODB)[10], a rank that is low enough for the foreign investments to enter Indonesia.

From the description above, the problem identifications are: (1) What is the position of Limited Liability Company as the subject of land ownership in order to include capital? and (2) What is the procedure of land ownership transfer derived from mergers and acquisitions in order to include capital in a Limited Liability Company?

Methods

The method used in this study is a normative legal research method that is the process to fit rule of law, legal principles, and legal doctrines to answer the legal issues faced with the approach used is the normative juridical that is a method in the study of normative law with using the regulation approach as a basis to conduct research to examine the problems that arise and analyze them descriptively.

Result and Discussion

Juridical Analysis of the Position of Limited Liability Company as the Land Ownership Holder

The economy of a country is heavily dependent on the actors of economic activities in conducting production, distribution, and consumption. Production activities are generally carried out by companies and business entities who conduct the function of production to meet the needs of goods and services. The legal entity can be divided into a private/civil legal entity and public legal entity. However, in its development, apart from the two legal entities mentioned previously, there are also religious legal entities such as waqf and temple, and also a magical legal entity such as customary law (Ulayat).

The existence of the private legal entity comprises the requirements of establishment and dissolution as well as the rights and obligations of the founders and management, this existence is also regulated in Indonesian Civil Code (*Civil Code*) and/or in Indonesian Trade Code (*Commercial Code*) and further regulations can be found in the Law Number 40 Year 2007 on Limited Liability Company, Law Number 16 Year 2001 on Foundation, Law Number 17 Year 2012 on Cooperatives, Law Number 41 Year 2004 on Waqf, Article 3 of Law Number 5 Year 1960, and Regulation of Minister of Religious Affairs Number

19 Year 2016 on Communal Rights. Meanwhile, the existence of the public legal entity is stipulated in Article 1 number 1 of Law Number 2 Year 2012 on Land Procurement for the Development of Public Interest in conjunction with Law Number 1 Year 2015 on State Treasury.

The subject land ownership is part of the legal subject. As a legal subject, the land ownership holder is subject to the provisions of the legal subject. The legal subject is interpreted as anything that can support the rights and obligations.[11] The subject of land ownership is known as the land ownership holder (as can be seen in the Certificate of Land Ownership as a copy of the land book) as regulated in Article 4 of Law Number 5 Year 1960 in conjunction with Article 3 of Government Regulation Number 24 Year 1997 on Land Registration. The National Land Law based on the Basic Agrarian Law describes the land ownership holder as follows:

- a. Individual (*Naturalijk Persoon*) as regulated in Article 1 of the Indonesian Civil Code the consists of private/individual and family. A family consists of a family of inheritance (*erfrecht*) as stipulated in Article 832 of the Indonesian Civil Code and a family of husband and wife (*marital*) as stipulated in Article 35 and 36 of Law Number 1 Year 1974 on Marriage and Undivided Shared Ownership (*joint partnership/Group/Community*).
- b. Legal entity (*Recht persoon*) that consists of public legal entity as regulated and subject to Law Number 19 Year 2003 (Related to State-Owned Enterprises and Regional-Owned Enterprises) and Law Number 1 Year 2004 (Related to the Government's Assets), Representative of Foreign Country/World Entity, Private Legal Entity including Limited Liability Company as stipulated and subject to Law Number 40 Year 2007, Foundation as stipulated and subject to Law Number 16 Year 2001, Cooperatives as stipulated and subject to Law Number 17 Year 2012, waqf as stipulated and subject to Law Number 41 Year 2004, Temple as regulated in the Government Regulation Number 38 Year 1963 in conjunction with the Decree of the Minister of Home Affairs Number 556 Year 1986, legal entity of customary law as regulated in Article 3 of Law Number 5 Year 1960, and Pakraman Village as regulated and subject to Government Regulation Number 38 Year 1963 in conjunction with the Decree of the Minister of Agrarian and Spatial Planning Number 276/KEP-19.2/x/2017 on Appointment of Pakraman Village in the Province of Bali as Subject of Shared Ownership (Communal Over Land) Year 2017. [12]

Juridical Analysis of the Implementation of Income Tax as well as Land and Building Title Transfer Fee in the process of Land Ownership Transfer Derived from Mergers and Acquisitions in order to Invest the Capital in a Company

A taxing subject is not necessarily a taxpayer. A taxing subject does not necessarily pay the tax because they are limited by their income known as the provisions of Non-Taxable Income. The issue on the value of tax object does not make a person freed from their obligation to pay the tax, considering the objection mechanism of the tax value has been regulated and a tax subject may be freed from their tax obligation if the objection is accepted by the authorized tax officer.

Several significant sources of potential taxes that contribute to the state's income are Land and Building Tax, Income Tax, as well as Land and Building Title Transfer Fee over the transfer of land ownership.

The merger, acquisition and segregation activities in a company cannot be separated from the tax aspects, especially the income tax, Value Added Tax (VAT), as well as Land and Building Title Transfer Fee. The imposition of income tax in the process of land ownership transfer is regulated in Article 2 paragraph (1) of Government Regulation Number 34 Year 2016 on Income Tax over Income derived from the Land and/or Building Ownership Transfer as well as Income derived from Binding Agreement on Sale and Purchase over Land and/or Building and its Changes.

The amount of Income Tax imposed in the process of land and/or building ownership transfer as referred in Article 1 paragraph (1) letter a of Government Regulation Number 34 Year 2016 is 2.5% of the gross amount of the transferred value, excluding ownership transfer of land and/or building in the

forms of a plain house or a plain apartment unit, this income tax is done by the taxpayer whose main business is to transfer the owners²⁵ of land and/or building.

The amount of Income Tax as referred in Article 1 Paragraph (1) letter b of Government Regulation Number 34 Year 2016 is 1% of the gross amount of the transferred value for the ownership transfer of a plain house and a plain apartment unit, this income tax is done by the taxpayer whose main business is to transfer the ownership of land and/or building.

The regulation of the income tax enforcement to the merged company on a fiscal basis has been accommodated in Income Tax Law, precisely in Article 4 paragraph (1) letter d number 1 and number 3, where it is mentioned that the profits obtained from the sale or transfer of property including profits obtained from business liquidations or mergers are the object of Income Tax. Subsequently, in Article 10 paragraph (3), it is also mentioned that the gained value or the transferred assets in liquidations or mergers is the amount that should be given or received based on the market price unless stipulated otherwise by the Minister of Finance. There are³³ exceptions that can be found in the provisions of Regulation of Minister of Finance Number 43/Regulation of Minister of Finance 03/2008, where the Minister of Finance provides a leeway based on the Article 1 paragraph (1) that states the Taxpayer conducting mergers may use the book value.

From the description above, it can be concluded that the implementation of Income Tax on the transfer of inbreng land ownership derived from mergers and²⁹ acquisitions has the same basic regulations with the transfer of land ownership by sale and purchase, this is based on the Government Regulation Number 34 Year 2016 on Income Tax over Income derived from the²⁸ Land and/or Building Ownership Transfer as well as Income derived from Binding Agreement on Sale and Purchase of Land and/or Building and its Changes. The exceptions of Income Tax obligation or collection is regulated in Article 6.

The implement¹³ion of Land and Building Title Transfer Fee in the process of the²³ ownership transfer is based on Law Number 21 Year 1997 on Land and Building Title Transfer Fee. In Article 2 of Law Number 21 Year 1997, it is stated that the tax object is the obtainment from the land and/or building ownership transfer. The definitions of the obtainment from the land and/or building ownership transfer are:

- a. Transfer of ownership due to sale and purchase, exchange, grant, grant of will, inclusion in a company or other legal entity, separation of⁶ ownership resulting in transition, the appointment of the buyer in an auction, execution of judge's decision that has a permanent legal force, and prize,
- b. Granting of new ownership due to the continuation of a waiver of rights, apart from the waiver of rights,
- c. Ownership of land as referred in paragraph (1) including rights of ownership, building rights on land, rights of use, rights of ownership over apartment unit, and²¹ rights of management.

From the description above, the Land Deed Officer and the Ministry of Agrarian and Spatial Planning/National Land Agency have the same duty regarding land registration, where one party is in charge of establishing the basis of ownership transfer and the other party is in charge of legitimizing the certificate and recording the transfer of land ownership. Indeed, the action of ownership transfer is directed to the administrative action, meanwhile, the civil matter is located in the agreement of both parties. Thus, the Land Deed Officer has a duty in assisting the administration.

Conclusions

To strengthen the exist²ence of Limited Liability Company as the holder of the land ow¹⁰nership, it is necessary to register the Deed of Establishment¹⁰, the Articles of Association (Article 8 of Law Number 40 Year 2007) to the Company Register at the Ministry of Law and Human Rights which is marked by the issuance of the Proof of Company Register and the validation of the articles of association. Meanwhile, in order to protect the capital and the binding parties, it is necessary to register the paid-up capital to Bank Indonesia which is marked by the issuance of Bank Indonesia Certificate, and especially

for the land as part of the Limited Liability Company's assets (shares) it is necessary to register the Proof of Title which is marked by the issuance of the Certificate of Land Ownership on the behalf of the Limited Liability Company either directly or through ownership transfer by doing Inclusion in the Limited Liability Company if the certificate is still on the behalf of the shareholder based on Deed of Inclusion in Company.

The Registration Procedure of Land Ownership Transfer of the Nominee Shareholders through the Deed of Inclusion in Limited Liability Company is in a proportional integrity between the bases of rights data (basic/primary requirements) and the supporting/strengthening data specified from the binding force, namely: Legal Basis (to avoid the judicial review), Requirements (the base of rights or the supporting data to ensure the quality of evidence to have a beslag executioner), Mechanism (stage process/business process to avoid blitness/State administration lawsuit based on the non-procedure to ensure that each stage is accountable and has a juridical responsibility), Flow Chart (Process Flow to ensure that all stages are conducted in accordance with the principle of good governance), Expenses Load (to ensure that every service contributes to the income to the state/bit getter function).

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