

DETERMINE PERSONAL STATUS OF LEGAL ENTITY: LIMITED LIABILITY COMPANY (LLC) FOR FOREIGN INVESTMENT IN INDONESIA

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ABSTRACT

Foreign investment in Indonesia has been on the rise in recent years, with many investors seeking to establish a Limited Liability Company (LLC) as their preferred legal entity. This research aims to examine aspects of determining the personal status of a legal entity, which is an LLC for foreign investment. The personal status of an LLC in Indonesia refers to the legal recognition given to the company as a separate entity from its shareholders or owners. The study explores the complex legal framework and regulations governing foreign investment in Indonesia, with a focus on the unique characteristics and considerations associated with LLCs. Through a comprehensive analysis of relevant laws, policies, and practical implications, this research aims to provide insights into the challenges and opportunities faced by foreign investors seeking to establish LLCs in Indonesia. The research findings are expected to contribute to a better understanding of the personal status of LLCs in the Indonesian legal system and facilitate informed decision-making for foreign entities navigating the complexities of the investment environment in the country.

Keywords: Personal Status, Limited Liability Company (LLC), Foreign Investment

A. INTRODUCTION

Indonesia is categorized as a developing country. To develop, considerable capital or investment is required. Indonesia realizes that the funds available in the country alone are not sufficient for the development of Indonesia and then tries to be able to include foreign capital, the use of technology and expertise and skills from abroad for the development of Indonesia without causing Indonesia's dependence on foreign countries continuously and not losing national interests. "The strengthening

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of the importance of development for Indonesia brings the Indonesian state into a choice, namely building and bringing in foreign capital". Developing countries are mostly of the view that nationalization without compensation in the short term provides great benefits but in the long term it will be a great loss because they cannot attract foreign investment and have to pay dearly for private investment (Kadek Adi Surya, 2023).

Law No. 25/2007 on Investment in Indonesia is a positive legal provision that regulates various aspects of investment activities. Investment is an important policy carried out in many countries, especially if the investment is foreign investment. One of the policies of containing foreign capital is to increase export potential and import substitution so that Indonesia can increase foreign exchange earnings and be able to save foreign exchange. Foreign investment is fully determined to be mandatory in the form of a Limited Liability Company legal entity (Wahyudi Hebibimisa Riyadi, dkk, 2023).

For investment business activities in Indonesia, based on existing data in Indonesia, electronically integrated licensing data (Online Single Submission/OSS), until the end of December 2019 there were 668,228 registered Domestic Investment (PMDN) and Foreign Investment (PMA) companies, with details of 642,309 PMDN companies and 25,919 PMA. The growth of foreign investment projects based on BKPM data, the investment value in the second quarter of 2023 reached Rp349.8 trillion which increased by 6.3% compared to the previous quarter and increased by 15.7% compared to the same period in 2022. This shows the potential for business traffic in Indonesia involving foreign legal subjects in conducting business activities in Indonesia (bkpm.go.id; Capaian Realisasi Investasi Semester 1 2023 Kementerian Investasi Optimis-Pertumbuhan Ekonomi Tetap Di Atas 5).

In addition to foreign investment in Indonesia, many unicorn-level Indonesian legal entities established by Indonesian citizens are also run abroad even though both activities in Indonesia, and the founder/controller are located in Indonesia. Indonesia currently records 3 Indonesian unicorn-level companies that have cross border activities with large business capitalization, including Traveloka, Tokopedia, and Bukalapak, and one Decacorn-level company, Gojek, investing in its business entity through overseas investment companies (katadata.co.id, 2019; Bkpm Investasi Ke-Unicorn Indonesia Masuk Lewat Singapura). Therefore, referring to the existing developments and cross-border business activities, both ownership of capital and business activities, legal certainty is needed in the event of a dispute, including its resolution referring to Indonesian legal arrangements.

With the same activities as in the activities of personal subjects in carrying out private activities, the subject of a legal entity in carrying out the objectives of its activities carries out activities related to private matters, including having its wealth or having an impact on private relations, including concerning existing public law. Therefore, Indonesian law or foreign law can recognize the ability and authority to assume legal rights and responsibilities as an entity separate from the founding subject of the corporation, while still being subject to the provisions of existing public law. However, in terms of determining the legal position of a corporation/business entity, it is necessary to refer to the place of establishment and registration of the legal entity. Based on the provisions of Indonesian law as in the provisions of laws and regulations, registration is carried out in Indonesia, if the legal entity operates in Indonesia. So, it is necessary to discuss what principles can determine the personal status of a legal entity, which in this case is a limited liability company for foreign investment activities in Indonesia.

B. DISCUSSION

Limited Liability Company (LLC) for Foreign Investment Regulation in Indonesia

The definition of foreign investment is found in article 1 of Law Number 1 of 1967 concerning Foreign Investment. Investment. Foreign Investment only includes direct foreign capital carried out according to or based on the provisions of the law and used to run a business in Indonesia (Valencia Putri and Kaylla Manisha, 2021).

1. The elements of Foreign Investment in the above definition may include: Directly made, meaning that the investor directly bears all the risks that will be experienced from the investment.
2. According to the law, meaning that foreign capital invested in Indonesia by foreign investors must be based on the substance, procedures, and conditions that have been determined in the applicable laws and regulations set by the Indonesian government.
3. Used to run a company in Indonesia, meaning that the capital invested by foreign

investors is used to run a company in Indonesia must have the status of a Legal Entity.

Article 5 paragraph (2) of Law Number 25 Year 2007 on Capital Investment, states "Foreign investment must be in the form of a Limited Liability Company based on Indonesian law and domiciled within the territory of the Republic of Indonesia, unless otherwise provided by law." The elements inherent in this provision include (Indah Sari., 2020):

1. The legal form of the foreign investment company is a Limited Liability Company (LLC);
2. Based on Indonesian law;
3. Domiciled within the territory of the Republic of Indonesia.

The provision of Article 5 paragraph (2) is closely related to its definition in Article 1 paragraph 3 of Law Number 25 Year 2007, that "Foreign investment is an investment activity to conduct business in the territory of the Republic of Indonesia conducted by foreign investors, both those who use foreign capital entirely or in partnership with domestic investors." A limited liability company that is established by foreigners, namely PMA (foreign investment company), has to apply a recommendation from the BKPM (The Coordinating Investment Board) before establishing the Limited Company. The BKPM will assist foreign investors in getting investment information. Hence, the government provides a very comfortable and easy way for foreigners who want to start doing business in Indonesia (Petra Bunawan, 2017).

The definition of a Limited Liability Company in Article 1 Number 1 of Law Number 40 Year 2007 on Limited Liability Companies explicitly mentions a Limited Liability Company as a legal entity. From this definition of a Limited Liability Company, it can be seen that a Limited Liability Company is a pool of capital. This means that the main thing in a Limited Liability Company business entity is capital. Capital is divided in the form of shares. Therefore, whoever controls the most shares in a Limited Liability Company will determine the policy of the Limited Liability Company. This policy is usually determined through a decision of the Board of Directors, Commissioners, or through a decision of the General Meeting of Shareholders. The establishment of a Limited Liability Company is the first step, where some parties have planned to establish a business entity as well as a Limited Liability Company legal entity, in Article 7 paragraph (1) of Law Number 40 of 2007 concerning Limited Liability Companies, states "The Company shall be established by 2 (two) or more persons by notarial deed made in the Indonesian language." (Riyadi, Tampongangoy, and Rumimpunu, 2019)

To clarify, the term "person" in this context refers to individuals, whether they are Indonesian or foreign citizens, as well as Indonesian or foreign legal entities. According to the law, a company is considered a legal entity and is established through an agreement, specifically because it has more than one administrator. The management of the company does not have any specific requirements regarding the presence of Indonesian citizens. This provision has allowed for the establishment of foreign companies with full ownership and control by foreign individuals or entities (I Made Rusdiko, dkk, 2019).

Regarding share ownership, the Investment Law prohibits domestic investors and foreign investors from making agreements and/or statements confirming that share ownership in a limited liability company is for and on behalf of another person. This is to prevent any violation of the list of business fields that are closed to investment, which regulates the business fields that are allowed for foreigners to enter with restrictions on the percentage of shares, as well as business fields that are not allowed for foreigners at all (Firdaus Ridhan

Zafhari, 2023). In investing in Indonesia, foreign investors cannot freely choose the line of business they wish to invest in. The business fields are classified into three fields, which include (Salim H S, Sutrisno B, 2023):

1. List of closed business fields;
2. List of open business fields; and
3. List of open business fields with requirements.

How to Determine the Personal Status of LLCs for Foreign Investment in Indonesia

Sudargo Gautama defines personal status as the legal position of a person which is generally determined by the law of the state and is considered permanently bound. Determining the personal status of the legal subject is a further step in determining whether the case submitted before the judge is a private international law case (containing foreign elements). After the judge determines that the case submitted to him is a private international law case determined by the primary link point, the judge then determines whether the juridical qualifications of the case are submitted to the judge (Mansur Armin Bin Ali, 2023)

Personal status is the group of rules that follow a person wherever he is and wherever he goes. These rules have a universal sphere of influence and are not limited to the territory of a particular country. In determining the personal status of a person, two principles apply, namely nationality and domicile. To determine the personal status of a legal entity, there are four theories, namely as follows (Sudargo Gautama, 2010):

1. Incorporation theory is the theory that a legal entity is subject to the law where it was established, namely the country whose law was used at the time of its establishment. This theory is used by China, Taiwan, South Korea, the Philippines, and Vietnam.
2. Statutory theory, a legal entity is subject to the law of the place where according to the statute the legal entity has its seat.
3. Effective management theory is the determination of the personal status of a legal entity based on the place of the most effective management of the legal entity.
4. Control theory, the personal status of a legal entity is based on the law of the country that controls the legal entity.

In practice, these theories are commonly used together. For example, the personal status of an LLC is the combination of the theory of incorporation and the position of management.

Personal status in the context of foreign investment refers to the definition and scope of the rights obtained by foreign investors, as mentioned in Law Number 30 Year 1999, and PERMA Number 1 Year 1990 (Ari Purwadi, 2016). In this context, personal status includes several aspects, such as:

1. The rights acquired by the foreign investor, such as the right of exploitation, the right of experience, and the right of guardianship.
2. Citizenship and representation of the foreign investor, which includes aspects such as registration, announcement, and licensing.
3. Liability and legal increase of foreign investors, covering aspects such as environmental supervision, tax provision, and organizing disputes with international arbitration bodies (Sayidin Abdullah, 2007).

In foreign investment, personal status affects how the foreign investor operates and is respected within the framework of laws and government policies. Therefore, foreign investors must comply with the requirements and responsibilities given by the law and the government.

Based on the prevailing positive law in Indonesia and the existing laws and regulations, especially those related to LLC, where the existing positive law, the determination of the status of a legal entity is based on the law of the place where the legal entity is established and formed. In this case, any legal entity conducting business activities in Indonesia must be established under Indonesian national law. However, in certain business activities, for example in the mining business or certain digital platform businesses carried out by foreign business entities, there are legal entities that although working and domiciled in the territory of Indonesia, are legal entities outside the territory of Indonesia. However, these legal entities are still required to comply with applicable laws and regulations in Indonesia, which are called Permanent Establishments that carry out their business activities in Indonesia.

The legal issue arises when a foreign legal entity conducts its business activities in another country in which the legal system is used to regulate and determine the jurisdictional authority status of a legal entity containing foreign elements. Concerning this connection, the principle commonly used in private international law is the application of the following principles:

1. Citizenship/domicile of shareholders based on the majority of shareholders (*lex patriae* or *lex domicile*).
This principle assumes that the status of a legal entity is determined based on the law of the place where the majority of its shareholders are citizens (*lex patriae*) or domiciled (*lex domicile*). In its development, this principle is no longer used because it is not following the times, and there are difficulties in determining the citizenship or domicile of the majority of shareholders, especially if the composition of citizenship or domicile turns out to be diverse.
2. Center of Administration/Business, based on the legal rules of the center of administrative activities of the legal entity.
This principle assumes that the jurisdictional status and authority of a legal entity must be subject to the legal rules of the place that is the center of the administrative activities of the legal entity. This theory requires that the law of the place where a legal entity concentrates its business or management activities should be used to regulate the jurisdictional status of the entity concerned. This principle is generally accepted in continental European countries. For developing countries, this principle is not so favorable because of its position as a host country in foreign investment activities. This is because foreign companies that invest have their headquarters abroad. The head office is usually located in a developed country. Thus, the applicable law to determine the status of personnel and jurisdiction of the branches/subsidiaries of the foreign company. This then creates a tendency for foreign companies to use their own laws which then harms the interests of developing countries as host countries that have natural resources.
3. Place of Incorporation (based on the place where the legal entity is established).
This principle assumes that the personal status and jurisdictional authority of a legal entity is determined based on the law of the place where the legal entity is officially established. This principle is generally used by developing countries as a counterweight to the principle of center of business administration/social privilege. For companies operating in a country with foreign elements due to the statement of foreign capital, share ownership, legal classification as a PMA company must be subject to the host country and subject to the laws of that country. If equipped with other national legal instruments such as contract law, corporate law, FDI law, technology experts and others that are adequate and fair, this principle is considered the best principle to support the economic interests of developing countries in the international trade arena.

4. Center of Exploitation Principle (based on where the company conducts operations, exploitation, or production activities).

This principle considers that the status of a legal entity must be regulated based on the law of the place where the company concentrates its operational activities, exploitation, or production of goods or services. This principle experiences difficulties when people are faced with a company that has various fields of exploitation or has various countries. For example, when the parent company experiences juridical problems related to its juridical potential, a very complex problem arises regarding its subsidiaries/branches in various regions which are subject to various legal systems

The four principles become the principle of connection to determine the status of a legal entity. When referring to the current Indonesian law, it still uses the parameters of place of incorporation or where the legal entity is established, where the provisions regarding Limited Liability Companies, Foundations, and existing legal entities still use this concept. This is reflected in Article 33 of Law Number 25 Year 2007 on Capital Investment, which regulates investment in the form of an LLC. This article stipulates the requirements for the place of establishment of the company and provides the legal basis for investment in Indonesia. Similarly, other articles in the relevant laws such as Article 54 which regulates provisions for legal entities in the form of foundations, and Article 78 which confirms various requirements for certain business entities.

C. CONCLUSION

The regulation of foreign investment policy and law is regulated through Law No. 25 Year 2007 which no longer makes a distinction between domestic investors (PMDN) and foreign investors (PMA) which was previously regulated through Law No. 1 Year 1967 on PMA and Law No. 6 Year 1968 on PMDN. The investment policy stipulated in Law No. 25 Year 2007 is to provide equal treatment to all investors from any country conducting investment activities in Indonesia. The determination of the personal status of a foreign investment limited liability company is by applying the principles of personal status based on international civil law. In determining the personal status of a person, two principles apply, namely nationality and domicile. To determine the personal status of a legal entity, there are four theories, which are Incorporation theory, Statutory theory, Effective management theory, and Control theory. The personal status of an LLC is a combination of the theory of incorporation and the position of management.

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