



Anticipating Losses as a Result of the Use of Special Purpose Vehicles in the Perspective of Indonesian National Law

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ABSTRACT

Keywords:

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This research has been conducted regarding several problems relating to the utilization of Special Purpose Vehicles (SPVs) in business transactions, particularly in businesses involving Indonesian companies or Indonesian entities. This research identifies three major problems as its focus: firstly, the extent of the legality of SPV utilization in business from an Indonesian law perspective; secondly, how the practice of SPV utilization appears from the perspective of business law in general; thirdly, how to ensure that the concept of SPV as regulatory circumvention does not create losses for certain parties, particularly for the Republic of Indonesia. The method used in this research is normative legal research through case, regulatory, comparative, and conceptual approaches. The normative legal research is based on implementing the rule of law concept in order to create a well-controlled and well-organized country. The case approach involves evaluating cases relating to SPVs as regulatory circumvention and opportunities to anticipate losses to the country arising from the use of SPVs as regulatory circumvention. The regulatory and comparative approaches involve evaluating rules and regulations currently existing in Indonesia and conducting a comparative study with other countries in order to obtain guidance for establishing regulations regarding limitations on SPV utilization in Indonesia. The theoretical and conceptual approaches have been used to analyze the problems arising from SPV utilization.

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INTRODUCTION

The rapid development of the business world in modern times has consequences for positive laws to be able to accommodate modernization in the business world. The development of law in countries that adhere to the Common Law System, which originated from the Anglo-Saxon legal system in England, is able to accommodate the development of business in the world, which is progressive, because the Common Law System is also adopted in the Anglo-American Legal System (Iqbal, 2022). The majority of countries that were once British dominions are dynamic, with the role of judges in the formation of new laws where judicial decisions apply as jurisprudence (reference in passing judgments) for similar cases in the future, which is called precedent (Tim Redaksi, 2016). Because of its flexible and dynamic nature, the Anglo-Saxon and later Anglo-American legal system is referred to as the Common Law System (Fuady, 2022). On the other hand, in countries that adhere to the Continental European Legal System, including Indonesia, the role of judges in the formation of laws is very small. The Continental European Legal System, also known as the Civil Law system, which has its roots in France, actually considers that law is only formed from statutes, so that outside the law there is no law, and judges only enforce laws that apply throughout the country (PMK RI, 2021). France created a legal codification

known as the Civil Code or the Napoleonic Code, and it was considered a perfect law. The Netherlands adhered to the principle of concordance by enforcing the Napoleonic Civil Code until the country had its own national law in the form of *Burgerlijk Wetboek* (BW) in 1815 and was brought by the Dutch to Indonesia (Dutch East Indies) as its colony (Indonesia Corruption Watch, 2021).

The development of various business transactions has resulted in the development of various forms of regulatory circumvention carried out by business people (Octavianda, 2025). Regulatory circumvention is defined as an act that is carried out for a specific purpose, namely so that in the legal relationship in question, a law other than what should be used or applicable is used, with the aim of avoiding a desired legal consequence. One way to carry out regulatory circumvention in the business field is to establish a Special Purpose Vehicle (SPV). In the Indonesian civil law system, an SPV is defined as a legal entity in the form of a limited liability company (PT) that functions to purchase financial assets and issue asset-backed securities as stipulated in Presidential Regulation Number 1 of 2008 concerning Amendments to Presidential Regulation Number 19 of 2005 concerning Secondary Housing Financing (Rizal & Edianto, 2023).

In the Common Law system, SPVs, also known as SPE (Special Purpose Entities), were initially usually established for the process of securitizing assets carried out through trust institutions, which is common in countries adhering to the Common Law System (Amornsawadwatana, 2010; Ansari, 2014; Inglehart, 2020; Lj, 2024; Pham et al., 2022). The assets placed in the trust are separate assets from the assets of the trustee who is the party who manages the assets in the trust, so that in the event of bankruptcy, the bankruptcy of the trustee will not make the assets in the trust become the trustee's bankruptcy *budel*. Therefore, SPVs are often referred to as legal entities established to avoid bankruptcy ("bankruptcy remote entity"). SPVs are also a means of tax avoidance and are often established in the Cayman Islands, which is a group of islands located in the Caribbean Sea about 475 miles south of Miami, Florida in the United States and about 200 miles west of Montego Bay, Jamaica. In connection with the use of SPVs as a tax avoidance effort, the government of the Republic of Indonesia through its Minister of Finance created a Tax Amnesty Program and issued Law Number 11 of 2016, which was signed on July 1, 2016, concerning Tax Amnesty. Not long after, the Minister of Finance of the Republic of Indonesia issued Minister of Finance Regulation Number 127/PMK.010/2016 dated August 23, 2016, concerning Tax Amnesty Based on Law Number 11 of 2016 concerning Tax Amnesty for Taxpayers Who Have Indirect Assets through Special Purpose Vehicles. Thus, although it does not specifically regulate the establishment and use of SPVs in Indonesia, with the existence of laws and regulations on tax amnesty, the Indonesian government indirectly recognizes SPV as a means for taxpayers to place their assets in the context of tax evasion.

In the airline business, an SPV is established for the purpose of financing or funding aircraft leasing. In general, lenders or funders are a consortium of banks or financial institutions that do not have an aircraft leasing business license, so legally they cannot be a lessee (Daniels et al., 2011; Landau, 2014; McGrath & Martin, 2017; Shannon et al., 2021). In order for a consortium of banks or financial institutions to maximize profits by leasing aircraft, the consortium establishes an SPV that functions as a leasing company or company that leases aircraft (lessee). Leasing agreements through the use of SPV should be suspected

to be agreements made without good faith because they are made to circumvent legal requirements. In fact, according to the 1969 Vienna Convention, Article 26, which is also contained in positive law in Indonesia in Article 1338 of the Civil Code (*KUHPerdata*), good faith is a condition that must be the basis for making an agreement. Good faith is required so that the agreement is binding on the parties who make it with binding force such as a law, according to the legal principle of *pacta sunt servanda*, which means that the legally made agreement is valid as law for the makers.

The purpose of this study is to analyze the legality of the use of Special Purpose Vehicles (SPV) in business transactions from the perspective of Indonesian national law, examine the practice of using SPV as a form of regulatory circumvention, and formulate a mechanism for anticipating state losses that may arise. The benefits of the research are to provide comprehensive legal policy recommendations for regulators in regulating the use of SPVs, as well as provide practical guidance for businesses to ensure compliance with Indonesian laws while still achieving legitimate business objectives.

METHOD

This research on the use of SPVs in business examines Indonesian national law using a normative juridical approach that emphasizes the use of secondary data by studying and examining legal principles, both in positive legal principles and jurisprudence related to the problems to be discussed. The method used is an analytical descriptive method, which is research that describes and analyzes the existing facts about the condition of business transactions in various fields that are carried out through the establishment of an SPV and the use of the SPV as one of the parties, then correlates these with the provisions of applicable laws, legal principles, and expert opinions on the problem in order to obtain answers to the research questions.

RESULTS AND DISCUSSION

Anticipating Losses of Using Special Purpose Vehicles (Spv) as an Attempt to Smuggle Laws

Initially, SPVs in Common Law countries were established for charitable activities in the form of charitable trusts, where the wealth managed by the trustee was used for charitable activities and the beneficiaries were the recipients of charitable funds. However, in further development, SPVs were established in the form of commercial trusts, paper trusts, limited partnerships, limited liability companies, and corporations. In order for the legal acts carried out by the SPV to be legitimate, the SPV must be able to carry out legal acts like a person, therefore the SPV is always established in the form of a legal entity. When the trend of using SPVs reached Indonesia, business practitioners or business actors in Indonesia used SPVs for business matters so that SPVs in Indonesia were generally not used for charitable activities and were established in the form of Limited Liability Companies (PT). Although SPVs are generally used to carry out legal smuggling, bad faith (*ek kwade traat*) in the smuggling of the law is difficult to prove. This is because the definition or definition of good faith itself is not described in more detail in the Civil Code, even though the *halal* cause which is one of the conditions for the validity of the agreement in Article 1320 of the Civil Code is further described in Article 1337 of the Civil Code, namely that a cause is prohibited

if it violates the law or is contrary to morality or public order. Because of the lack of clarity in the definition of good faith in the positive law that applies in Indonesia, although linguistically it can be assumed that a legal smuggling is an act that contains bad intentions (*ek kwade traat*) because the perpetrator intends to smuggle something, but legally it is difficult to determine whether an agreement made as a form of legal smuggling is an agreement that does not meet the provisions of Article 1338 Civil Code on good faith.

An example of the use of SPVs in Indonesia is that which has been carried out in the aircraft business in the leasing agreement of 6 (six) Airbus A330-300 aircraft in 1996 between PT. Garuda Indonesia (hereinafter referred to as "Garuda") is the lessee with GIE Sulawesi and GIE Sumatra which are SPVs acting as lessors. The two SPVs were established by a consortium of banks that are members of the European Credit Agency so that Garuda does not need to take out foreign commercial loans (PKLN) to pay off the price of the aircraft originally purchased from the aircraft manufacturer, Airbus Industry. The transaction for the purchase of aircraft from Airbus Industry was converted into a financial lease and a consortium of banks belonging to the European Credit Agency took over the purchase of the aircraft from Garuda, then leased the aircraft to Garuda through an SPV company set up by the bank's consortium acting as a lessor. The aircraft lease agreement between Garuda and GIE Sulawesi and GIE Sumatra was carried out to avoid Garuda from the obligation to pay for the purchase of these aircraft to Airbus Industry and to avoid the prohibition of the PKLN Team from making foreign commercial loans. From the perspective of Indonesian national law, the agreement does not violate the conditions for the validity of the agreement contained in Article 1320 of the Civil Code so that the agreement does not become null and void (*nieteg van rechtwege*), but there is still the possibility that the agreement will be requested to be canceled in court (*vernieteg baar*) if one of the parties feels aggrieved. As long as there is no request for cancellation (*vernieteg baar*), an agreement is still valid and binding on the parties who made it. As a result of the attempted smuggling of the law through lease agreements with the two SPV companies, namely GIE Sulawesi and GIE Sumatra, the lease rate charged to Garuda is higher than the normal price for operating leases with a lease term that is much longer than the normal average operating lease term, which is an average of 5-6 years (PMK RI, 2016).

SPVs in the Philippines are used for the purchase of non-performing assets which are loans of money and assets that are collateral for debts and receivables and for securitization, namely issuing securities as collateral for payment for the purchase of assets sold to the SPV. SPVs in the Philippines also function as capital companies established for securitization purposes and function as trust institutions under general banking laws. SPVs in South Carolina, United States, are used for insurance guarantee purposes through the issuance of securities while in North Carolina, United States, SPVs function to store financial assets or assets that have financial value and can be sold by SPVs so that SPVs obtain cash or fresh funds from the sale of these assets. However, based on the research conducted, it was obtained that in the Philippines, South Carolina and North Carolina, there have been no restrictions or prohibitions on the use of SPVs so there is still the possibility of using SPV for other purposes. Countries such as Australia and Ireland do not have specific laws and regulations governing the use of SPVs, but SPVs are regulated in regulations related to other issues such as the Anti-Money Laundering and Counter Terrorism Financing Bill 2005 or the

Anti-Money Laundering and Countering Terrorism Financing Act 2005 which was created as an effort by the Australian federal government to combat money laundering and financing against terrorist activities. The enactment of this law raises the need for a reporting entity that can be categorized as an SPV because the activities or activities that will be carried out by this reporting entity will be special activities.

The most popular areas to set up SPVs are offshore or offshore areas such as Bermuda, British Virgin Islands, Cayman Islands, and the Channel Islands, because of the various conveniences and privileges obtained by legal entities established in these areas as well as being a tax haven for business people. SPVs in Bermuda are often used for the process of securitizing aircraft, where SPVs will issue loan notes or preference shares to investors in the capital market to fund aircraft purchases. Meanwhile, in the field of taxation, the government of the Republic of Indonesia through its minister of finance issued a tax amnesty program based on Law Number 11 of 2016 which is explained in Article 1 paragraph 1 "Tax amnesty is the elimination of taxes that should be owed, not subject to administrative sanctions and criminal sanctions in the field of taxation, by disclosing assets and paying ransom as stipulated in this Law." Shortly after Law Number 11 of 2016 was signed, the Minister of Finance issued Minister of Finance Regulation Number 127/PMK.010/2016 dated August 23, 2016 concerning Tax Amnesty for Taxpayers who have indirect assets through Special Purpose Vehicles. Due to the regulation of indirect assets through this Special Purpose Vehicle (SPV), many parties suspect that this tax amnesty program aims to enable the Indonesian government to tax the assets of taxpayers who are Indonesian persons or legal entities placed in the form of SPV assets abroad so that the state of the Republic of Indonesia obtains income from the payment of these taxes.

The Tax Amnesty program is alleged to be the result of a data disclosure in April 2016 by the law firm Mossack Fonseca, a law firm in Panama that provides company incorporation services in Panama, which is the second tax-exempt haven after the British Virgin Islands, known as the Panama Papers. The Panama Papers document contains many names of figures from various countries and is reported to include many big businessmen and several officials from Indonesia. The news about the Panama Papers has not subsided, news has emerged again about the names of figures from various countries, this time including the names of high-ranking officials from Indonesia who appeared in a document known as the Pandora Paper in October 2021. This document was revealed by the International Consortium of Investigative Journalists which reveals the wealth of political elites, celebrities, businessmen, and other billionaires in tax heaven areas including Belize, British Virgin Island, Panama, Switzerland, and so on. According to the wife of one of the Indonesian businessmen whose name is listed in the Pandora Papers, the cost of setting up an SPV (or in Indonesia now known as a shell company) in the British Virgin Island is only around SGD 3000.- (three thousand Singapore dollars) or around Rp. 30,000,000 (thirty million rupiah) and after the SPV is established, the founder of the SPV only needs to pay an annual fee of about USD 100.- (one hundred US dollars) to a financial services agent and the SPV company only needs to have some kind of P.O. Box or post box to receive mail.

Shortly after the release of the Pandora Papers, the government of the Republic of Indonesia through its Minister of Finance again held a Tax Amnesty Program known as the Tax Amnesty Program Volume 2. Based on Law Number 11 of 2016 concerning Tax

Amnesty and Law Number 7 of 2021 concerning the Harmonization of Tax Regulations, the Minister of Finance of the Republic of Indonesia again issued Minister of Finance Regulation Number 196/PMK.03/2021 dated December 22, 2021 concerning Procedures for the Implementation of the Taxpayer Voluntary Disclosure Program. This shows that the disclosure of assets in tax haven areas is very significant for state income through taxes. However, because the property or asset or SPV established is outside the jurisdiction or jurisdiction of the Republic of Indonesia, the Indonesian government cannot exercise its authority to force the property or asset to be placed in the territory of the Republic of Indonesia or to force the SPV which is the means of placing the property or asset to be dissolved. The Government of the Republic of Indonesia can only make legal rules that stipulate that the voluntary disclosure of assets or assets from their owners will be subject to tax amnesty. The Government of Indonesia also cannot force the government of the country in charge of the area where the SPV is established to return the assets of Indonesian citizens stored in the area, nor can the Government of Indonesia force the government in charge of the area where the SPV is established to dissolve the SPV. This is due to the principle of Sovereignty (state sovereignty) which does not allow the government of one country to regulate or impose its will on the government of another sovereign country. Violations of the principle of Sovereignty will have an impact on the strained diplomatic and trade relations between countries (Tim Redaksi, 2021).

Therefore, Gary Gorton and Nicholas S. Souleles, two scientists from the University of Pennsylvania in the United States, proposed the Theory of Temporary Organization which defines an SPV as follows: "A legal entity by a firm (known as the sponsor or originator) by transferring assets to the SPV, to carry out some specific purpose or circumscribed activity, or a series of such for which they were created, and they can make no substantive decisions; the rules governing them are set down in advance and carefully circumscribe their activities. Indeed, no one works at an SPV and it has no physical location" is loosely translated as "A legal entity established by a business entity (known as a sponsor or original founder) by transferring its assets to the SPV, to carry out specific purposes or limited activities, or a series of activities to be carried out by the SPV, and the SPV cannot make decisions; The arrangements for the SPV were established at the beginning of its establishment and strictly restricted all its activities. In reality, no one works at an SPV and the SPV does not have a physical location. Based on this definition, it is clear that an SPV is a legal entity that only stands on paper (paper company) and is not present in real life to operate a certain business activity, does not have employees, does not have a physical location, so it cannot experience bankruptcy.

What is also very worrying about the establishment of this SPV is that the SPV is very likely and very potential to become a storage place for money laundry from various illegal activities originating from gambling, human trafficking, women trafficking and prostitution, the proceeds of corruption, the proceeds of drug sales, or even the funds are kept for certain purposes for example for the purpose of funding terrorism or illegal arms purchases. and so on. However, until now, positive law in Indonesia has not adopted the SPV theory and has not regulated the limits and prohibitions on the use of SPV for certain purposes. However, if there are problems arising from the establishment of SPV and/or transactions carried out by SPV as one of the parties, the judge must still be able to carry out

the judicial process and render a decision based on the principle of non-liquet which is accommodated in Law Number 4 of 2004 which has been updated and replaced with Law Number 48 of 2009 concerning Judicial Power, Article 10 paragraph (1): "The court is prohibited from refusing to examine, adjudicate, and decide a case submitted on the pretext that the law does not exist or is not clear, but is obliged to examine and adjudicate it." This provision is actually contradictory to the principle of legality which is generally used in the realm of criminal law "nullum delictum noela poena sine praevia lege poenali" which states that an act cannot be sanctioned if there is no legal rule governing it. However, the principle of non-liquet contained in Law Number 4 of 2004 must be implemented by judges in Indonesia because it has become a positive law that applies in Indonesia. This non-liquet principle does not affect much in the judicial world in Indonesia, which adheres to the Civil Law system, the judge's decision is not required to apply as a precedent that must be followed by judges in courts of the same level or lower courts that adjudicate similar or similar cases, as is the case in countries that adhere to the Common Law system.

Therefore, it is very important for Indonesia to start making laws and regulations that become national positive laws that regulate SPV, both in terms of the use of SPVs involving Indonesian legal entities, especially the use of SPVs as an attempt to smuggle laws that can result in state losses, especially financial losses, as well as the possibility of establishing companies that can be categorized as SPVs in Indonesia. As is currently known, many legal entities or business entities have offices in virtual offices, namely non-physical business address rental services that do not require the business entity or legal entity to have a physical office space but are sufficient for mailing addresses and packages, legal domicile addresses, and meeting rooms for meetings if needed and co-working spaces if needed. Meanwhile, real business and operational activities can be carried out remotely or anywhere. Even with the proliferation of malls and cafes in big cities, meetings are often held in cafes or restaurants in large malls that also provide special VIP rooms for meetings with more privacy. This virtual office service has the potential to be a means of establishing an SPV in Indonesia because it has fulfilled most of the elements as mentioned in the Theory of Temporary Organization. If the business entity or legal entity established using the virtual office is limited to only certain things and no business activities are carried out in real terms or if the director of the business entity or legal entity receives a salary not from the company's budget but only receives from the founder of the business entity or legal entity, then it is very appropriate to have a strong suspicion that the business entity or legal entity is an SPV.

CONCLUSION

This study concludes that Special Purpose Vehicles (SPVs) are often used as a means of regulatory circumvention, which is detrimental to the state, especially in terms of tax evasion and money laundering. An example of such loss can also be seen in business cases involving state-owned enterprises, such as what happened to *PT Garuda Indonesia*, where the use of SPVs results in higher aircraft rental costs. While not all uses of SPVs are detrimental, these practices pose great risks to the state. Therefore, this study emphasizes the need for relevant institutions to immediately develop clear and comprehensive regulations to limit the use of SPVs so as not to harm certain parties, especially the state.

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