

BPK Prepares a New Regulation to Recover State Losses



Since its establishment in 2006, the Audit Board of the Republic of Indonesia (*Badan Pemeriksa Keuangan* or “**BPK**”) has been regularly auditing state-owned enterprises (“**BUMN**”) and regional government-owned enterprises (“**BUMD**”) for indications of corruption. As part of this auditing authority, Article 12 of Law No. 15 of 2006 on the Audit Board of the Republic of Indonesia (“**BPK Law**”) also mandates the BPK to regulate further the exercise of its authority to evaluate and determine state losses that result from the actions of the following parties:

- (i) a treasurer;
- (ii) a member of the management of a BUMN and BUMD; and
- (iii) any other related company or institution that manages the state's finance.

This ability to further regulate also encompasses the authority to recover state losses by requiring the abovementioned parties to compensate the state losses.

However, to date, BPK has yet to issue a regulation to address and accommodate the above mandate specifically relating to the persons listed in points (ii) and (iii), despite already enacting BPK Regulation No. 3 of 2007 on Settlement of State Losses against Treasurers. As a result, there is no clear mechanism on how recovery efforts can be carried out against a member of the management of a BUMN or BUMD and related companies or institutions. In fact, there are different practices on how the state (including via the relevant BUMN, BUMD, or related company and institution) can carry out settlement or recovery efforts.

New Administrative Process

From the information that we have gathered, BPK is currently drafting a regulation to accommodate the mandate under the BPK Law. With regards to the substance of the draft regulation, the Chairman of BPK informed us that BPK intends to allow the settlement or recovery of state losses to be carried out through administrative measures consisting of five main steps, namely:

- (i) First, the state losses team will verify the existence of the state losses.
- (ii) Second, BPK will evaluate and assess the extent of such losses.
- (iii) Third, BPK will provide a recommendation as the basis for the issuance of the absolute liability letter (*surat keterangan tanggung jawab mutlak*) by the Head of the relevant institution to a member of management of the BUMN, BUMD, or a related company or institution.

This letter will request compensation from such member, company, or institution to cover the state losses and a handover of assets.

- (iv) Fourth, if they wish to do so, the member of the management of the BUMN, BUMD, or a related company or institution can object to the absolute liability letter.
- (v) Fifth, BPK will issue a loss determination letter or *surat pembebanan kerugian*, which is final and binding in nature, if the relevant party does not carry out the orders in the absolute liability letter or such party's objection is denied.

Based on the above, these steps will allow the recovery of state losses through an administrative process. This means that the unlawful conduct that results in the losses does not necessarily need to fulfil the elements of a criminal act, unlike in the current regime, which only allows the recovery of state losses through a criminal process. BPK will determine the extent and amount of the state losses, either through a recommendation in the absolute liability letter or through the issuance of the loss determination letter (*surat pembebanan kerugian*), neither of which will address any criminal elements.

Does the New Process Set Aside Criminal Liability?

It is important to note that the new administrative process will not set aside criminal liability in cases where the state losses resulted from unlawful conduct that fulfils the elements of a criminal act.

The Chairman of BPK stressed that any of the abovementioned parties may still be held criminally liable if their unlawful conduct fulfils the elements of a criminal act. Thus, the administrative process will not eliminate criminal sanctions (if relevant), which are to be decided separately in a court proceeding.

Instead, the administrative process is designed to ease the process of recovery or settlement of state losses.

Key Takeaways

While BPK has not made any further announcement on the enactment of the new regulation, in light of this finding, the managements of BUMN and BUMD, as well as related companies and institutions, should be extra cautious in conducting their business. Particularly, these parties should ensure compliance with good corporate governance principles, which would aid in avoiding liability for state losses.

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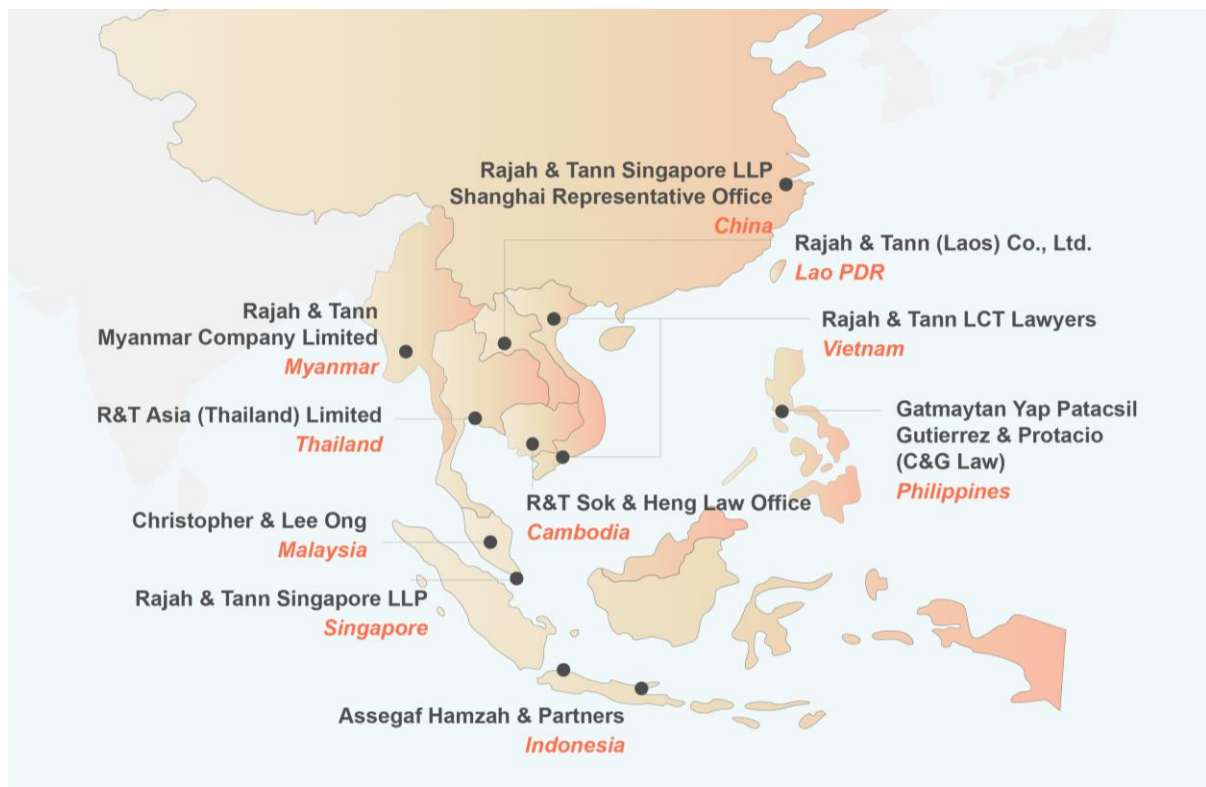
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