


## Responsibility of the Board of Directors, Commissioners, and Shareholders for the Company's Tax Debt

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Article Info	ABSTRACT
<p><b>Keywords:</b> Directors, Commissioners, Shareholders, Tax Debt, Personal Liability.</p>	<p>This research aims to determine what conditions can cause Directors, Commissioners and Shareholders to be imposed personally responsible for the Company's tax debts and who must prove (burden of proof) regarding whether or not such personal responsibility can be imposed on them. This research is a doctrinal research with a conceptual and case approach by using 11 court verdicts that have been legally binding. The results of this research indicate that for Directors and Commissioners, personal liability can be imposed if they commit corporate actions that exceed their authority (<i>ultra vires</i>) and do not comply with the principles of fiduciary duty, so they are not protected by the principles of business judgment rules. Meanwhile, for Shareholders, personal liability can be imposed if they make the LLC as a Special Purpose Vehicle (SPV) or their Alter Ego. Regarding the burden of proof, there are differences between the Doctrine, the PT Law, the KUP Law, and Court Decisions. Referring to the Doctrine and the PT Law, for Directors and Commissioners, a reversal burden of proof mechanism applies, where Directors and Commissioners must prove that they cannot be imposed personally liable. For Shareholders, an 'actori incumbit probatio' mechanism applies, where the burden of proof lies on the Tax Authority as the Claimant (especially for shareholders of Public Company). If referring to the KUP Law, both Directors, Commissioners, and Shareholders apply a reversal burden of proof mechanism. Meanwhile, if referring to court decisions, of the 11 (eleven) Decisions reviewed, there is still no uniformity regarding who is burdened with the burden of proof.</p>
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### INTRODUCTION

A limited liability company is a legal entity that possesses assets and liabilities distinct from those of its owners or shareholders. Shareholders' ownership in the Company is confined to equity shares, with fluctuations in ownership valuation contingent upon the Company's profit and loss performance (Asikin and Suhartana, 2016). A fluctuation in the Company's assets and liabilities does not necessarily correspond to a fluctuation in the Shareholders' assets and liabilities (Budiono, 2016). Besides Shareholders, the division of the Company's assets and liabilities extends to the assets and liabilities of other Company Organs, specifically the Board of Directors and the Board of Commissioners.

The notion of asset and liability segregation between the Company and its Organs ultimately led to the emergence of limited liability for Company Organs. If the Company cannot fulfill its debt obligations due to its assets being valued less than its liabilities (resulting in negative equity), the Shareholders, Directors, and Commissioners have no personal liability for repayment. The liability of shareholders is confined to the value of their shares. Similarly, the duties of the Board of Directors and Commissioners are confined to management and representation (for the Board of Directors) and oversight and counsel (for the Board of Commissioners) (Harahap, 2015; Dewi, 2017).

The liability of the Board of Directors, Commissioners, and Shareholders for the Company's obligations is generally limited; nevertheless, in specific situations, their liability may become unlimited. In common law jurisdictions, the doctrine in corporate law that allows for the removal of limited liability for Company Organs is termed "piercing the corporate veil." (Black, 1990).

The elimination of this liability limitation necessitates that if the Company's assets are inadequate to settle its debts, the Board of Directors, Commissioners, and/or Shareholders must assume responsibility for the deficit utilizing their personal assets. The individual accountability of company officials for the company's obligations is typically referred to as joint liability. External parties (creditors) or internal parties (shareholder lawsuits against Directors or Commissioners, generally referred to as derivative litigation) may make claims against these Company Organs for the Company's obligations (Black, 1990).

Tax liability constitutes a debt that the Company is obligated to repay. In this instance, the State or the Directorate General of Taxes functions as the Company's Creditor. If the Company cannot satisfy its tax obligations and its governing bodies fulfill the criteria for breaching the corporate veil, they shall be jointly and severally accountable for the Company's tax burden (Mardiasmo, 2009). If the Company's assets are inadequate, the Director General of Taxes (DGT) will immediately collect from the Directors, Commissioners, or Shareholders, designating them as Taxpayers.

In taxation regulations, the Taxpayer represents an extension of the entities accountable for settling a Taxpayer's tax obligation, namely the Company in this instance. The Taxpayer is defined as the Taxpayer and those entities that, under taxation legislation, may be held liable for the Taxpayer's obligations. To be classified as a Taxpayer, there are several distinctions in the frameworks or laws of Taxation Law, Limited Liability Company Law, and corporate legal doctrine (Soemitro, 2004; Zuraida, 2010).

## METHODS

This study constitutes normative legal research (doctrinal legal research). This study utilizes a conceptual framework by examining corporate legal doctrine, legislative laws, and the jurisprudence of definitive court rulings to address the aforementioned difficulties. This research, while employing court decisions, does not adopt a case study technique as it lacks a thorough examination of the legal rationale (*ratio decidendi*) in each ruling. According to Marzuki (2013), the legal authority of a court ruling is contingent upon its legal rationale (*ratio decidendi*).

Court rulings are statistically employed as jurisprudence to reinforce the proposed conceptual framework and facilitate comparison analysis among decisions. Susanti and Efendi (2022) posits that comparative law constitutes a method of investigation rather than a distinct branch of law, as is sometimes presumed. Comparative law is the analysis of the legal systems of one nation in relation to those of another, or the examination of judicial rulings from one jurisdiction alongside those from another about the same case.

This study involved a comparative analysis of judicial rulings concerning the imposition of personal accountability on corporate officials (Directors, Commissioners, and Shareholders) for the tax obligations of the Company. Eleven decisions with final legal effect (*inkracht van gewijsde*) were compared, encompassing both the cassation and judicial review levels.

## RESULTS AND DISCUSSION

### The Concept of Limited Liability in Limited Liability Companies

According to corporate law philosophy, acquiring legal entity status (*rechtspersoon*) indicates that a Limited Liability Company (LLC) has been acknowledged as a legal entity by the state. A Limited Liability Company (LLC), being an autonomous legal body, is capable of initiating legal proceedings in its own name. As an artificial entity lacking a physical form, the Company is represented in legal proceedings by its governing bodies, specifically the Board of Directors, the Board of Commissioners, and the Shareholders (GMS).

The term Limited Liability Company (LLC) indicates that the liability of the company's members for its debts is restricted. Consequently, one among the factors influencing business entities in selecting a Limited Liability Company (PT) as their corporate structure is the aspect of limited liability. Capital owners who lack the time and skill to manage a firm might nonetheless possess ownership through shares, so avoiding the necessity to jeopardize their personal assets as security in cases of financial difficulty (Prasetijo, 2003).

The principle of limited liability in a Limited Liability Company extends to other corporate entities, specifically the Board of Directors and Commissioners. The Board of Directors is responsible for managing and representing the organization. The Board of Commissioners is responsible for overseeing and advising the Board of Directors in the company's management. The principal objective of shareholders, executed by the Board of Directors (under the oversight of the Board of Commissioners), is to acquire and optimize the company's profits. To accomplish this purpose, the Board of Directors frequently must execute diverse risky ideas, depending on their business acumen, resulting in either profit or loss (Mulhadi, 2017).

If the efforts of the Board of Directors, overseen by the Board of Commissioners, yield a profit, such profit is attributed to the corporation. If a loss occurs, it is the company's loss. It would be inequitable for profits to be exclusively the company's entitlement while losses are shouldered by the Board of Directors and Commissioners (Purba, 2012).

Moreover, the principles governing limited responsibility for shareholders, directors, and commissioners are delineated in Law Number 40 of 2007 on Limited responsibility Companies, as amended by Job Creation Law Number 6 of 2023 (the Limited Liability Company Law). Shareholder provisions concerning limited responsibility are governed by

Article 3, paragraph (1), and Article 153J, paragraph (1). Regulations concerning Directors are specified in Article 95, paragraph (5), and Article 104, paragraph (4). Commissioners are governed by Article 114, paragraph (5), and Article 115, paragraph (3).

### **The Concept of Unlimited Liability in Limited Liability Companies**

The liability of a company's organs for the company's debts or losses is, by norm, limited. Nonetheless, under some conditions, the liability of a company's entities may become unlimited. In common law jurisdictions, the legal principle whereby the liability of a company's entities shifts from limited to limitless is referred to as penetrating the corporate veil (Sardjono, 2014).

Black's Law Dictionary describes piercing the corporate veil as "the judicial act of imposing personal liability on otherwise protected corporate officers, directors, and shareholders for the corporation's wrongful conduct". The factors that may lead to the piercing of the corporate veil include the following:

- a. Substantial undercapitalization of the business entity (capitalization needs differ according to industry, location, and unique firm conditions)
- b. Neglect of corporate formalities regarding conduct and paperwork
- c. Conflation of corporate assets and those of the shareholders
- d. Personal management of corporate assets by an individual
- e. Non-distribution of dividends
- f. Transfer of corporate assets by the principal shareholder(s)
- g. Inactive corporate executives and/or directors
- h. Concealment or distortion of membership
- i. Lack or inaccuracy of corporate documentation
- j. Was the corporation utilized as a "facade" for the personal transactions of the principal shareholder(s); Theory of Alter Ego
- k. Inability to uphold arm's length agreements with affiliated entities
- l. Distortion of assets or liabilities to consolidate them
- m. Additional reasons deemed pertinent by the court

Piercing the corporate veil may occur for shareholders if they engage in actions that exceed their power (*ultra vires*) or, colloquially, "meddle," by immersing themselves in the management of the firm, which is the exclusive prerogative of the Board of Directors. By engaging in these "meddling" behaviors, the shareholder is considered to have transformed the corporation into a special purpose vehicle for their own purposes. Under these conditions, the legal connection between the company and the shareholder becomes indistinct. The firm is really an extension of the shareholder's identity (Widjaja, 2008).

Directors may pierce the corporate veil if their activities in managing the firm exceed the authority defined in the Articles of Association (*ultra vires*) and they neglect to uphold fiduciary obligation standards. Principles of fiduciary duty encompass the duty of care, the duty of loyalty, and the duty of good faith. Even if the Company incurs losses, such losses are classified as a business risk if the Board of Directors has adhered to fiduciary obligation principles. Consequently, the Board of Directors cannot be held personally accountable for

these losses, as they are safeguarded by the notion of business judgment guidelines (Purnamasari, 2010).

The principle of breaching the corporate veil for Directors similarly applies to Commissioners, with necessary modifications. A Commissioner who acts outside their power (*ultra vires*) and/or neglects fiduciary duty standards in their supervisory and advising roles may be held personally accountable for the Company's losses (Tumbuan, 2017).

In conjunction with the principle of limited responsibility, the Limited responsibility Company Law also governs restrictions concerning the limitless liability of Shareholders, Directors, and Commissioners. Shareholders' provisions concerning unlimited responsibility are governed by Article 3, paragraph (2), Article 153J, paragraph (2), Article 7, paragraph (6), and Article 13, paragraph (4). The regulations concerning the Board of Directors are delineated in Article 97, paragraph (3), Article 104, paragraph (2), and Article 101, paragraph (2). In the interim, the regulations concerning the Commissioners are delineated in Article 114, paragraph (3), and Article 115, paragraph (1).

### **Responsibility of Directors, Commissioners, and Shareholders for the Company's Tax Debts**

Tax debt, akin to other financial obligations, is a liability that the Company, as the Taxpayer, is required to settle. If the Company's assets are inadequate to settle the tax obligation, the Director General of Taxes may pursue collection from additional Taxpayers other from the original Taxpayer. According to Article 1, number 28 of the Tax Law, a Taxpayer is defined as an individual or entity liable for tax payments, including representatives who uphold the rights and obligations of the Taxpayer in compliance with tax laws and regulations.

Moreover, pursuant to Article 32, paragraph (2) of the Tax Law, any company manager (Directors, Commissioners, Non-Formal Controllers, and Shareholders) is deemed a Taxpayer until they can demonstrate their ineligibility as such. Tax collection from taxpayers is conducted hierarchically, first with those considered most accountable for the outstanding tax obligation.

If the Taxpayer is a Limited Liability Company, pursuant to Article 9 of Minister of Finance Regulation Number 61 of 2023 about Procedures for Implementing Tax Collection for Outstanding Tax Amounts, the collection hierarchy is established as follows:

#### *Board of Directors*

- a. President Director or equivalent position;
  - b. Deputy President Director or equivalent position; and/or
  - c. Directors authorized to establish policies and/or make decisions in the financial sector.
- \*are personally and/or jointly liable for all Tax Debts and Tax Collection Costs.*

#### *Board of Commissioners*

- a. President Commissioner or an equivalent post;
- b. Deputy President Commissioner or an equivalent position; and/or
- c. other commissioners are individually and/or collectively accountable for all Tax Debts and Tax Collection Costs.

*Individuals possessing unequivocal authority* to establish rules and/or make decisions about the execution of business activities inside a limited liability company, including:

- a. individuals authorized to execute contracts with external parties and/or endorse checks;
- b. individuals authorized to appoint, replace, or terminate members of the board of directors, board of commissioners, heads of representative offices, branch managers, responsible persons, managers, supervisors, leaders, or those in equivalent roles;
- c. individuals empowered to exert influence or control over the Company without necessitating authorization from any entity; and/or d) individuals who are the actual proprietors of shares or capital in the Company (Beneficial Owners).

*\*Personally and/or collectively accountable for any tax liabilities and tax collection expenses.*

#### *Stakeholders*

##### For Publicly Traded Corporations

- a. Majority or Controlling Shareholders with unlisted or non-traded shares;
- b. Other Shareholders with unlisted or non-traded shares; and/or
- c. Indirect Majority or Indirect Controlling Shareholders.

##### Private Limited Liability Companies

- a. All shareholders of the Limited Liability Company; and/or
- b. Indirect majority shareholders and/or controlling shareholders are liable for tax obligations and tax collection expenses in proportion to their ownership stake in the Company's tax liabilities.

According to Article 32, paragraph (2) of the KUP Law in conjunction with Article 9 of PMK Number 61 of 2023, all Company Organs (Directors, Commissioners, and Shareholders) automatically assume the role of Tax Guarantor and, consequently, are personally liable for the Company's tax obligations in a hierarchical manner. To evade joint and several liability, Company Organs must demonstrate or persuade the Director General of Taxes that they do not qualify as Tax Guarantors. The KUP Law has a reversed burden of evidence methodology in identifying the Tax Guarantor.

In contrast to Article 32 paragraph (2) of the KUP Law, which implements a reversed burden of proof process, the PT Law distinguishes between Directors, Commissioners, and Shareholders. A burden of proof reversal applies to Directors and Commissioners. For shareholders, the onus of proof lies with the Directorate General of Taxes as the collecting creditor or the claimant (*actori incumbit probatio*).

Article 32, paragraph (2) of the KUP Law, which governs the qualification of a corporate organ as a corporate tax guarantor, has been previously examined by the Constitutional Court. A judicial review was submitted by a former director of PT UCI, a mining firm adjudicated bankrupt by the Commercial Court. The applicant initiated a court review as the Director General of Taxes pursued tax collection actions against him notwithstanding his cessation as a director following the company's bankruptcy. The Constitutional Court denied the judicial review petition in Decision Number 41/PUU-XVIII/2020.

The legal question in this judicial review case pertains not to the burden of proof, but to the designation of a corporate organ as a tax guarantor, despite the company's bankruptcy status. According to Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations, a company's bankruptcy does not automatically lead to its dissolution or termination. Consequently, the Panel of Constitutional Justices affirmed that

tax liabilities remain collectible from the Taxpayers. The question of whether a (former) Director can be personally accountable for the company's tax obligations depends on the enforcement of legislation according to the relevant evidential framework (case-by-case basis).

This document is a summary of eleven legally binding cases that offer insight into judges' perspectives on the qualifying of a corporate entity as a Taxpayer and the associated burden of proof. While Indonesia does not follow a strict system of jurisprudence, the application of jurisprudence is permitted. Currently, a tendency exists in which numerous judges are modifying jurisprudence to deliver legally certain (expected) rulings (Table 1).

**Table 1.** The summary of the eleven final decisions

No	Decision No.	Taxpayer (PPH) and Object of Dispute (OS)	Verdict	Judge's Consideration
1	329PK/Pdt/2011	PP: H.O. (Commissioner and Majority Shareholder of PT) OS: Auction & Replacement Certificate (PMH Lawsuit to Pontianak District Court)	Taxpayer Wins (PK Cancels Cassation that Cancels PT/PN, Cassation: absolute competenc e lies with PP)	It is a PMH (Not a Tax Dispute)
2	369/B/PK/PJK/2012	PP: A.S. (Commissioner and 25% Shareholder of PT) OS: PP Account Blocking	PP Loses (Supreme Court Upholds Tax Court Ruling)	The burden of proof is not on the DGT
3	446/B/PK/PJK/2012	PP: S.D. (Commissioner and 25% Shareholder of PT) OS: PP Account Blocking	PP Loses (Supreme Court Upholds Tax Court Ruling)	The Supreme Court did not enter into the evidentiary aspect, validating Commissioners/Shareholders as PP (ignoring proportionality)

No	Decision No.	Taxpayer (PPH) and Object of Dispute (OS)	Verdict	Judge's Consideration
4	492/B/PK/PJK/2020	PP: S.A.N. (Board of Directors) OS: PP Account Blocking	PP Wins (Supreme Court Upholds Tax Court Ruling)	DJP must prove (PP status is not automatic for Directors)
5	527 PK/Pdt/2010	PP: B.H. (Third Party Buyer of Taxable Assets) OS: Lawsuit by PMH, Buyer of Land Owned by PP	Plaintiff Loses (PK cancels Cassation which upholds PTPN - Absolute Competence)	The land status still belongs to PP (there has been no transfer of rights), the DGT can confiscate the assets of the PT Management.
6	664 PK/Pdt/2009	PP: R.S. Board of Directors OS: Asset Confiscation (Car), PP's Reason: Commissioner "Borrowed Name"	PP Loses (PK Cancels PT and PN)	Absolute Competence is in PP
7	120/B/PK/Pjk/2020	PP: H. (Shareholders) OS: DGT letter refusing to cancel the Taxpayer's Decree and Blocking	PP Wins (MA rejects DJP's PK on PP's decision)	PP's Good Faith has paid according to its share ownership portion
8	318/B/PK/Pjk/2019	PP: H (former Commissioner) OS: DGT letter refusing to cancel the Taxpayer's Decree and Blocking	PP Wins (MA rejects DJP's PK on PP's decision)	PP can no longer be qualified as APP (has ceased to be a Commissioner) – What about Article 115 of the PT Law?

No	Decision No.	Taxpayer (PPH) and Object of Dispute (OS)	Verdict	Judge's Consideration
9	1506/B/PK/Pjk/2020	PP: W.A. (Directors, Parent Employees) OS: Minister of Finance Decree on PP Prevention	PP Wins (MA cancels PP's decision)	The Board of Directors representing 25% of Shareholders, the GMS proposes to prevent the emergence/continuation of
10	1570/B/PK/Pjk/2020	PP: D.A. (Directors, Parent Employees) OS: Minister of Finance Decree on PP Prevention	Win PP (MA cancels decision PP)	The Board of Directors representing 25% of Shareholders, the GMS proposes to prevent the emergence/continuation
11	1898/B/PK/Pjk/2021	PP: M.A.W ((Management/Shareholder) OS: Decree on the Status of Taxpayer in relation to PP	PP Loses (PK Application Not Accepted Due to Time Outage)	Strengthening the Tax Court's Decision (Management/Shareholders are PP, without proof by the DGT)

The summary of the eleven final decisions indicates that the judges, including those of the Supreme Court, remain divided on the classification of a corporate entity as a taxpayer and the associated burden of proof. Some require the Director General of Taxes to produce proof, while others indicate that the party responsible for giving proof is the corporation organ (the Director General of Taxes does not have to submit proof).

## CONCLUSION

Based on a conceptual study of relevant laws, regulations, and the jurisprudence of the eleven legally binding decisions referenced, the following conclusions are derived: Directors and Commissioners may incur personal liability if they engage in actions that exceed their authority (*ultra vires*) and neglect to adhere to fiduciary obligation principles, hence lacking protection under business judgment guidelines. Simultaneously, shareholders may incur personal culpability if they utilize the company as a Special Purpose Vehicle (SPV) or as their Alter Ego. Concerning the burden of proof, discrepancies exist among the Doctrine, the Limited Liability Company Law, the General Provisions and Taxation Law, and Judicial Decisions. According to the Doctrine and the Limited Liability Company Law, the burden of evidence is reversed for Directors and Commissioners, requiring them to demonstrate that they cannot be held personally accountable. For shareholders, the *actori incumbit probatio*

principle applies, placing the burden of proof upon them, especially in the context of Public Limited Liability Companies. According to the KUP Law, the burden of evidence reversal mechanism is applicable to directors, commissioners, and shareholders. Nevertheless, an examination of the 11 analyzed court decisions reveals a lack of consensus over the allocation of the burden of proof.

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