

# The Liability of Author for Not-Paid Money of Relinquishment of Rights to the State Treasury

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## Abstract

This study which entitled "The Liability of a Notary for not-paid Money of Relinquishment of Rights to the State Treasury", aims to know the authority of a notary in making the deed of relinquishment of rights on land and request of right on land and also aims to know whether the notary is accountable for the non-payment of Fees on the Acquisition of Land and Building Rights (BPHTB) and money to the State Treasury which is harm to the client. The study which used legislation approach and case approach, obtained the following conclusion: the authority of notary in making deed of transfer of land rights controlled by the state on the basis of the relinquishment of rights by the developer, it means related to the authority of the notary in making the deed of the land as stated on Law Article 15 paragraph (2) letter f on Notarial Profession that the notary has the authority to make the deed of transfer of land mapping based on the deed of relinquishment of rights on land. The deed of relinquishment of rights on land is not made in front of the land-deed officials (PPAT), since the relinquishment procedure has been done as long as the buyer does not fulfill the requirements as the buyer of rights on land. Based on the description and discussion related to the authority of the notary to receive the deposit money to the state entrusted from the interception, it can be explained that the deed of relinquishment of rights made by the notary and the money of relinquishment of rights given due to the issuance of the deed of relinquishment of right as stated on the Regulations of the State Minister of Agrarian Affairs/Chairman of the National Land Agency (BPN) Article 103 paragraph (1) No. 9 Year 1999. Notary in running his position as a public official who has the authority in making an authentic deed is obliged to act honestly, when a notary makes a deed of relinquishment of rights, the client is obliged to pay the income to the state as the requirement of an authentic deed making. If in fact the notary makes the deed of relinquishment of rights, while the income to the state is not paid because it is used for its own interest, it can be said that the notary in making the deed does not meet the deed making procedure.

**Key Terms:** *Liability, Notary, Money of Relinquishment of Rights to the State Coffers*

## I. INTRODUCTION

Deed made in front of the notary has the potential to pay taxes, the tax can be paid in the Tax Office before the Deed of Conditional Sale and Purchase Agreement (PPJB) is made, and sometimes the clients who want the deed immediately made, they can deposit the tax payment to the notary. It can be said that such condition is mutually beneficial because the deed of Conditional Sale and Purchase Agreement (PPJB) made while on the other side, the notary is trusted by the client, and the client does not have to bother paying his tax at the Tax Office and the deed immediately made.

Notary not only can receive the Fees on the Acquisition of Land and Building Rights (BPHTB), but also other taxes, for example related to the request of rights on land by paying to the state treasury which got from the relinquishment of rights on land handled by the notary. The relinquishment of rights on land occurs because the person concerned is not allowed to control the plot of land with the status of property rights.

The tax payable by a notary for the interest of the client is not as a crime, but if the notary does not pay it to the state treasury and even uses the tax money, it can be said to have committed embezzlement. If the notary embezzles the tax money deposit, taxpayers will feel harmed, because as taxpayers, they are considered that they do not pay the taxes. In such condition, the notary must pay the tax.

There is an issue that when a notary makes the deed of Conditional Sale and Purchase Agreement (PPJB) / the relinquishment of rights on land is being questioned because the requirement of request of rights on state land which includes the applicant's obligation to pay the money to the state treasury through a notary, but the notary uses the money for personal needs. By not paying the Slip Tax on Acquisition of Land and Building (SSB) / BPHTB / Purchase Tax, then the process title transfer of building rights Certificate no. 13 cannot be processed into the name of the buyer, as the case below:

In April 2011, PT. PGD bought a piece of land to build a branch office in the area. Then there is the offer of the land owner on behalf of NLW (seller) who are willing to sell the land area of 700 m<sup>2</sup> according Freehold Title (SHM) no.256 / Singapadu Village to

PT. PGD. Then they make PPJB to the office of Notary / PPAT AS, S.H., M.Hum to do transaction. On June 28<sup>th</sup>, 2011, a deed of Sale and Purchase Agreement (PPJB) No. 14 was signed and agreed to the sale of the land for Rp. 2,750,000,000 (two billion seven hundred fifty million rupiahs).

There is a problem about the area of land sold, so the seller requests to measure again from 700 m<sup>2</sup> to 600 m<sup>2</sup>. It is approved by the director of PT. GD, so an addendum of PPJB is created and in agreed addendum, the area of land which was sold is 600 m<sup>2</sup> at a price of Rp. 2,350,000,000 (two billion three hundred fifty million rupiahs). Shortly thereafter, NLW give the inheritance to I WN, so SHM No. 3097 / Singapadu Village on behalf of NLW and NWW created. Due to the completion of the rights giving, PT. PGD paid the remaining balance of Rp. 1,600,000,000, - (one billion six hundred million rupiahs) in accordance with the deed of PPJB. At the request of Notary / PPAT AS, S.H., M.Hum, the costs which must be paid by PT. PGD for process of certification or transfer of title according to letter number 371 / PPAT / IXI2011 is Rp. 149.000.000, - (one hundred forty nine million rupiahs). Apparently, Notary / PPAT AS, S.H., M. Hum does not pay the money to the state treasury, because it has been used for personal purposes. by not paying the cost of the Slip of tax on Acquisition of Land and / or Building Rights (SSB / BPHTB / Purchase Tax), then the transfer of title process of Rights of Building Certificate no. 13 cannot be processed into on behalf of PT. PGD and currently it is still in the name of Dra. NLW and NWW.

## II. RESEARCH PROBLEMS

Based on the description as mentioned above, the research problems are:

- a. To analyze the authority of a notary to make a deed of relinquishment of rights on land and land rights application.
- b. To analyze whether the notary is liable for the non-payment of BPHTB and the money to the state treasury which can harms the client.

## III. DISCUSSION

The relinquishment of rights on land is a form of relinquishment of rights on land from the holder. According to Hutagalung (2012: 179), the relinquishment of rights on land is done if the subject who requires the land does not fulfill the requirements to become the holder of the rights on land needed. Therefore, it cannot be obtained by transaction and the land holder is willing to relinquish his rights on land. This means that the acquisition of rights on land is done by relinquishment of rights if the party who requires the land is not eligible to become the holder of the rights on land needed.

PT. PGD as a state-owned company (Indonesian State-Owned Enterprises (BUMN)) needs to provide the land for the construction of branch offices in the region and receives an offer from NLW (seller) of land area of 700 m<sup>2</sup> according to SHM no. 256 / Singapadu Village. According to Article 21 UUPS, only Indonesian can own property rights. The government has been established legal entities which may own property rights and its terms. According to General Elucidation II number 5 of Basic Agrarian Law (UUPA), that foreigners may own land with limited right of use. Likewise, basically legal entities cannot own property rights (article 21, paragraph 2). The consideration to (basically) forbid the legal entities to own property rights is because the legal entities do not have to own property rights but the other rights, as long as there are sufficient guarantees for their special needs (right to exploit, right to build, right of use).

PT. PGD as a company in the form of a legal entity (Persero) is not eligible to become the holder of the necessary land rights, so that what can be done is through the relinquishment of rights. The relinquishment of rights on land is done on a letter or deed made in front of a notary who declares that the rights holder concerned has relinquished the right of his land. The deed or letter is generally titled Deed of Relinquishment of Rights on Land (APH). APH is sometimes also known as the Letter of Relinquishment of Rights on Land (SPH). APH must be made in front of a notary so that its proofing power is perfect compared to if it is made under the name. The relinquishment or transfer of rights on land according to Article 1 Sub-Article 6 of Presidential Regulation (Perpres) 36/2005 is the activity of releasing legal relation between the holder of the rights on land and the land under his control by giving compensation on the basis of the deliberation.

With the relinquishment of rights, the land concerned becomes state land. The party who needs the land may apply the new request of rights on land to the local Land Office in accordance with the provisions of the law and their necessary.

The provisions concerning on the granting of rights on state land shall be governed by the Regulation of the Minister of Agrarian Affairs / Head of the National Land Agency Number 9 year 1999 on Procedures for the Granting and Revocation of Rights on Land and Rights to Manage (hereinafter referred to as Regulation of the Minister of Agrarian No. 9 year 1999). The regulation stated that the granting of rights on land is the Enactment of Government which gives a right on State land, the extension of rights, the renewal of rights, and including the granting of the rights above the Right to Manage. The Enactment of Government in relation to the acquisition of rights on land is a decision issued by the authorized officer to grant the right on land. The form of Enactment of Government in the acquisition of rights on land is the Decree of Granting Rights (SKPH) (Santoso, 2011: 63).

Legal relationship (*rechtsbetrekkingen*) according to Soeroso (1992: 269) is "the relationship between two or more legal subjects on rights and obligations on the one hand in the face of rights and obligations on the other side". According to Marzuki (2009: 253-254), the legal relationship is a relationship regulated by law. Relationship between fellow legal subjects may occur between a person and another person, between a person and a legal body, and a legal entity with other legal entities.

Legal relationship is a relationship regulated by law. According to Marzuki (2009: 254-255), there are private legal relationship and public legal relationship. Private legal relationship is created by the parties about objects within the scope of the family and property is a private legal relationship. The legal relationship within the scope of family law can only occur between the subject of human law and legal entities both private legal entities and public legal entities. The public legal relationship is the relationship between the state and the tied individual relationships that are political, social, and administrative.

According to Marzuki (2009: 258), liability / *aansprakelijkheid* is a specific form of responsibility. The definition of liability refers to the position of a person or legal entity that has to pay a form of compensation or redress after a legal event. Djojodirdjo (1982: 113) gives opinion on liability that there is a "liability to an actor of a violation of the law, then the actor must be responsible for his actions and because of the responsibility the actor has to be responsible for his actions in the lawsuit which filed in the court by the victims". Concerning on the liability understanding presented by Djojodirdjo above, it can be explained that liability is a condition to bear the losses incurred and disputed. The responsible party is the actor who committed the act whose acts cause harm to others.

The liability is due to the existence of a mistake, but as Marzuki (2009: 259) notes, that mistake is not an element that must be met in every case in order for a person to be responsible. In addition, a person or legal entity may be responsible for the actions of another person or legal entity. In accordance with this liability, the loss caused by the act of violence to the law which done by another person. It means that the suspect is not always the actor of a liability act, but it may be another person, even if the person is not a party who actually commits an offense. In the civil provisions, the hospital is also liable or responsible for any mistakes made by the parties under its auspices or by the person in charge.

Liability, according to the Indonesian Dictionary is defined as the circumstances to bear everything happened and disputed. The Liability according to Anshori (2009), if it is related to the responsibility of a notary, a notary as public official (*openbaar ambtenaar*) has the authority to make an authentic deed as stipulated in Law Article 15 paragraph (1) on Notarial Profession, and in running his position, he can be charged a responsibility for his deed in relation with his authority in making deed.

Based on the civil law, liability is differentiated in several principles namely the principle of liability based on fault and presumption of Liability. According to the principle of presumption of liability, the defendant is liable for any damages incurred, but the defendant may relieve himself of his liability, if he can prove his absence of fault. The principle of liability based on prejudice is the principle also a liability based on fault, but by shifting of the burden of proof to the defendant. Absolute Liability or Strict Liability occurs inseparable from the doctrine of *Onrechmatige daad* as stated in Article 1365 which emphasizes the existence of a fault. It has a meaning that there must be a provision of legislation that is violated. In empirical fact, not all faults can be proven, and some even cannot be proved at all. To overcome the limitations of fault based on liability, a strict liability principle was developed (Wahyudi and Azheri, 2008: 4-8).

The liability of a notary as a general official dealing with the deed making divided into 4 points (Anshori, 2009: 18), namely:

1. The liability of a notary in civil to the truth of the deed he made
2. The liability of a notary in criminal to the truth of the deed he made
3. The liability of a notary under UUJN;
4. The liability of a notary in carrying out his duties based on the code ethics of a notary.

The liability of tied notary related to:

- 1) The profession, the liability of the notary profession in relation to the profession in running his duties based on the code ethics of a notary
- 2) Legal liability, differentiated between civil liability, criminal liability, and administrative liability.

The authorization process is made for a long time and the recipient of authority runs the same authority by searching and signing the PPJB, under such conditions which are often questioned in the deed by the notary is whether the authority is still valid and whether the authorizer is still active. The notary makes the deed of PPJB based on the letter of authority to sell from the developer to the developer's employees. In making the Deed of PPJB, the notary shall not first check the legality of the letter of authority by seeking information about the its validity period and not contacting the developer regarding the legality of the signatory of the letter of authority whether the signer is still as the director who has the authority to do legal action by granting that authority.

Notary who does not check the legality of the deed of authority can be said that in making PPJB, the notary is not in accordance with the procedure of making authentic deed. Unlawful acts which committed by the notary are violating the procedure of authentic deed making, that is, do not recognize the authorizer as the client, so the notary does not take a close look at the wishes of the parties (interview), does not check the evidence of the letter related to the desire or the wishes of the parties, cannot give advices and creates a framework of deeds to satisfy the wishes such parties, fails to comply with all administrative techniques of notarial deed, such as reading, signing, giving copies and filings for minutes, and does not do the liability as the notary (Adjie, 2013: 131). The obligation in the implementation of other duties is the obligation as regulated in Article 16 paragraph (1) UUJN that the notary in carrying out his / her duties must act in trust, honest, thorough, independent, impartial, and guarding the interest of related party in legal action. Notary who makes the Deed of PPJB without paying attention to the procedure of making authentic deed, but only knowing the party (recipient of authority) well means in making the deed, the notary is not independent and aligned, because it is influenced by party as a close relation and does not side with the person in the deed of authority who acts as an authorizer.

A Notary who has made a deed incompatible with the procedure of making an authentic deed by writing the head of the deed and the end of the deed by stating himself a notary, but in this case, the client is the President Director of the developer and in the deed of authorization process, he is never presented to hear the reading of the deed and the signing of the deed, then the deed is invalidated. If

in practice the deed is recognized that it is invalidated or includes false information and because his act is harmful to the client, it can be sued for compensation on the basis of having committed the unlawful act.

Unlawful acts consist of two words of action and against the law. According to Syahrani (1989: 278), the unlawful act is: "To do or not to violate the rights of others, or to contradict the legal obligations of the person who is acting on their own, or to be contrary to the decency or caution as is appropriate in the traffic of the community, against self or other goods of others ". To do or not to violence means that the act against the law done either intentionally or unintentionally committing an offense both written and unwritten. SH, as a notary in carrying out his authority to make an authentic deed must be submissive and obedient to UUJN, so if in carrying out his position, he is not honest and aligned, it can be said that he has committed unlawful acts that violate UUJN.

The act of a notary is said to have contradicted the legal obligations means that he commits the violation of obligations based on the law, both written and unwritten. Notaries in making authentic deeds must obey to the rules of the UUJN, and if the notary makes a deed in an empty paper which has been signed before, and the signing is without explanation of the intent and purpose of the signing, it may be said that the notary has violated the obligation of the notary as the author of the deed authentic.

Unlawful act is violating a person's rights. If it is associated with a notary profession, a notary may be said to have committed an act unlawful when in running his duties deliberately commits an act which harms one or both parties who is as his client in making a deed and it can be seen that the notarial act is against the law. So, the notary must be liable of his act that against the law.

The action is categorized as unlawful act if a notary who has a duty to provide services to the public or people who need his services in the certification or making the deed. Then, in the deed there is a contact that is contrary to the law which can cause harm to other people as well as the party is knowing nothing about the contact, then with the passive and silent attitude of the notary concerned, he has committed the unlawful act. This can happen because the notary has insufficient knowledge (*onvoldoende kennis*); less experience (*onvoldoende ervaring*); and / or have less understanding (*onvoldoende inzicht*) (Anshori, 2009: 18)

Nevertheless, as Mertokusumo (ye) notes, that since the notary basically only records what the client is saying and is not obliged to investigate the material truth of the content, it is not true if the judge cancels it (or blames the notary and declares the notary has committed an offense). Notary may be mistaken on the contents of the deed because of misinformation (intentionally or not) from the parties. Then, this mistake cannot be responsible to the notary because the content of the deed has been confirmed to the parties by the notary (Mertokusumo, 2007). Mertokusumo's opinion in line with the formulation of a general elucidation of UUJN which states that an authentic deed essentially contains of formal truth in accordance with what the parties notify the notary. However, a notary has an obligation to include that what is contained in a notarial deed is readable so that content of notary deed becomes clear as well as it provides an information including access to relevant legislation for the signatories of deed. So, the parties may decide freely to approve or disapprove the contents of notarial deeds to be signed.

The compensation is known in BW, it happened because of broken promise or default and due to unlawful acts or *onrechtmatige daad*. The lawsuit of damages incurred by unlawful acts is specified in Article 1365 BW, "Every act against the law which harms to someone else obligates the person whose acts harm others to pay the compensation". Concerning on the provisions of Article 1365 B.W. above, it contains of following elements:

1. Unlawful acts (*onrechtmatige daad*);
2. There must be an error/ fault;
3. There must be a loss incurred;
4. There is a causal relationship between acts and losses (Abdulkadir, 2002: 142).

Looking at the element of there must be an error/ fault, the errors or fault in unlawful acts, in civil law does not distinguish between the fault caused by the deliberate actors, but also because of the actor's negligence or lack of caution. This provision is in line with Syahrani (2004: 279) statement as follows: "does not distinguish between mistakes in deliberate and fault in the form of inadvertent." Notary who has made a deed that is not in accordance with the procedure should know that he will not make the deed of PPJB without knowing the truth of the deed of authority first. However, SH still make the deed of PPJB which means that his action is done intentionally. This means that the element must have an error/fault which has been met.

Elements must be no harm. According to Syahrani (2004: 280) about the matter of loss in unlawful deeds, he states that "it can be a material loss and an immaterial loss." Losses in material form are the amount of losses that can be calculated, while the immaterial losses are the amount which cannot be calculated, whether contaminated or resulting in death.

The existence of a causal relationship means that the loss suffered is caused by the act against the law done by the actor. This is in accordance with Syahrani (2004: 281) who cites Von Kries theory as follows: "A novelty can be called the cause of a result, if in the experience of society, it can be expected, that the cause will be followed by that effect". This means that if there is a cause but the cause does not cause a loss, or a loss arises but it is not caused by the actor, it cannot be said of a causal relationship between the act and the resulting loss.

Based on the explanation above, it may be explained that the lawsuit compensation is based on an act of unlawful conduct if the actor performs an act which fulfills the whole element of Article 1365 B.W. Regarding who is required to prove the unlawful act, according to Article 1865 BW, it is stated: "Anyone who postulates that he has a right, or to uphold his own right or deny any right of another person, points to an event, is required to prove the right to the event." This means that in an unlawful act, someone who is required to prove the existence of an unlawful act is a party whose rights are violated which must prove that its rights have been violated by others. Therefore, if the party who feels his right is harmed, but cannot prove a violation of the rights because one of the elements is not met, then the lawsuit compensation on the basis of unlawful acts will not succeed.

AS, S.H., M.Hum is a notary who makes the deed of relinquishment of right on land from the right holder of NLW by PT. PGD, so the plot of land becomes state land. PT. PGD submits a Land title application to land office with HGB status. As the applicant, PT. PGD request the deed through the US, SH, M.Hum. Then, the notary filed a request for rights by paying BPHTB and money to the State Treasury or Letter of Acquisition of Land and Building Rights (SSB / BPHTB / Purchase Tax) as much as Rp 149,000,000 (a hundred forty nine million rupiahs), as referred to in Article 103 paragraph (1) of Regulation of the State Minister of Agrarian No. 9 Year 1999. AS, S.H., M.Hum who is as the notary does not pay for it, but uses it for personal needs.

#### IV. CONCLUSION

The authority of notary in making a deed of transfer of right on controlled by the state on the basis of the relinquishment of rights by the developer means in relation with the authority of the notary to make the deed related to land as Article 15 paragraph (2) letter f UUJN. This means that the notary has the authority to make deed of transfer on plot of land based on deed of relinquishment of rights on land. Based on the description and discussion related to the authority of the notary to make the deed of relinquishment, it can be explained that the notary has the authority to make the deed of relinquishment of the land. The relinquishment of the land title is not made in front of the PPAT, since the relinquishment procedure is done caused by the buyer does not fulfill the requirements as the buyer of rights on land.

Based on the description and discussion related to the authority of the notary to receive the deposit money from the client, it can be explained that the deed of relinquishment is made by a notary, and the money of relinquishment of rights discharged due to the deed of right on relinquishment released in accordance with Article 103 paragraph (1) No. 9 Year 1999. Notary in running his position as a public official has the authority to make an authentic deed who is obliged to act honestly. When a notary makes a deed of relinquishment of right, the client is obligated to pay the tax to the state as the requirement of authentic deed. But, when the deed of relinquishment has been made by the notary but the tax for the state is not paid because it is used for the personal needs of notary, then it can be said that the notary does not meet the procedure of making deed.

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  - b. Is the notary liable for the non-payment of BPHTB and the money to the State Treasury so that it harms the client?

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