

## Accountant Public Liability in Criminal Case Relating to the Financial Statements

Raja Sirait<sup>1\*</sup> Made Warka<sup>2</sup> Krisnadi Nasution<sup>3</sup> Otto Yudianto<sup>3</sup>

1. Doctorate of Law Candidate at Law Faculty of 17 Agustus 1945 University Surabaya

2. Professor of Law, Faculty of Law, 17 Agustus 1945 University Surabaya

3. Lecturer of Law, Faculty of Law, 17 Agustus 1945 University Surabaya

### Abstract

The purpose of financial statements audit by independent auditors in general is to express opinions on fairness, in all material matters, financial position, operations results, changes in equity, and cash flows in accordance with generally accepted accounting principles in Indonesia. The auditor is responsible for planning and carrying out the audit procedures to obtain adequate assurance whether the financial statements are free from material misstatement, whether caused by errors or fraud. The financial statements are the responsibility of management, and the Accountant professional should not be charged in criminal court. The auditor's responsibility is to express opinions on the financial statements. Professional requirements demanded by independent auditors are those who have education and experience practicing as independent auditors. In observing the auditing standards set by the Indonesian Accountants Association, an independent auditor must use his judgment in determining the required audit procedures in accordance with the circumstances, as an adequate basis for his opinion. The independent auditor is also responsible for his profession, the responsibility to comply with the standards acceptable to fellow practitioners. In all matters relating to engagement, independence in mental attitude must be maintained by the auditor. The standard requires the auditor to be independent, meaning that he/she is not easily influenced, because he carries out his work in the public interest. The general public's trust in the independence of the independent auditors is very important for the development of the Public Accounting Profession. The profession of public accountant has set out in the Indonesian Code of Ethics for Accountants, so that members of the profession keep themselves not to lose the perception of independence from the public, not easily entangled in the criminalization of Public Accountants.

**Keywords:** Accountant Public, Liability, Criminal Case, Financial Statement.

### 1. Background

The need for users of Public Accountant services is currently increasing, especially the need for quality financial information that is used as one of the considerations in making economic decisions, so that they can play a role in the free trade era and can meet the needs of service users. Public Accountants are required to constantly improve competence and professionalism. In order to support the fulfillment of the needs of service users and protect the interests of the community as well as protect the profession of the Public Accountant. Public Accountants support professions in the business world, in the era of trade and service liberalization, the need for users of Public Accountants will continuously increase, especially the need for quality financial information that is used as one of the considerations in making economic decisions. Public Accountants are professions that emerge and grown from the public demand for an independent communication mechanism between economic entities and stakeholders, especially with regard to the accountability of the entity concerned.<sup>1</sup>

In Indonesia, seeing the fairly rapid development of the Public Accountant profession and the occurrence of similar problems, the government renewed regulations relating to the practice of Public Accountants by issuing Minister of Finance Regulation Number 17/PMK.01/2008 dated February 5, 2008, concerning Public Accountant Services, to create more effective and sustainable arrangements, guidance and supervision of this profession and the Public Accounting Firm and protect the public interest. However, even today law enforcement against fraudulent practices in financial reports has not been able to provide a sense of justice. The maximum sanction given to this profession is administrative sanctions in the form of license revocation. Some Public Accountants have submitted an application challenging the law to the Constitutional Court registered with Case Testing Number 84/PUU-IX/2011. The description of the criminalization of actions in the profession of Public Accountants and the challenging of this law is the reasoning for the interest to become a dissertation writing and criminalization policy process carried out by the legislators especially regarding the arguments that developed during the trial of Case Number 84 / PUU-IX / 2011 concerning challenging Article 55 and 56 of the Law of Public Accountants on The Constitution of the Republic of Indonesia of 1945.

The urge to look deeper the basic idea of construction of criminalization and reasoning of the public accounting profession formulated in Article 55 and 56 of Law Number 5 of 2011 (hereinafter referred to as the

<sup>1</sup> Mardiasmo, *Pewujudan Transparansi dan Akuntabilitas Publik Melalui Akuntansi Sektor Publik* Jurnal Akuntansi Pemerintah, Volume 2, Number 1, May 2006.

Public Accountants Act) is the numerous rejection of the Public Accountants Act starting from the stages of the Bill until the ratification becomes law by Public Accountants in Indonesia. After being promulgated into the Public Accountants Act, several public accountants supported by Indonesian Institute of Certified Public Accountants (IICPA) submitted a petition for judicial review to the Constitutional Court against Articles 55 and 56 of the Public Accountants Act with Register Number Case 84/PUU-IX/2011.

Article 55 letters a and b of the Public Accountants Act, state: "Public Accountants who:

- a. Manipulate, help manipulate, and / or falsify data relating to services provided as referred to in Article 30 paragraph (1) letter J;
- b. By intentionally manipulating, falsifying, and / or eliminating data or records on working papers or not making working papers relating to the services provided as referred to in Article 3 paragraph (1) so that they cannot be used properly in the framework of inspection by the authority party sentenced to a maximum of 5 (five) years imprisonment and a maximum fine of Rp. 300,000,000.00 (three hundred million rupiahs) ."

Article 56 of the Public Accountant Act, reads: "Associated Parties which commit acts as referred to in Article 55 shall be punished with a maximum imprisonment of 5 (five) years and a maximum fine of Rp. 300,000,000 (three hundred million rupiahs)."

Argumentation and ratio of legislation and construction to be constructed in formulating lawsuit norms to the Constitutional Court from criminal provisions Article 55 and 56, in Law Number 5 Year 2011, namely:

1. Construction in the norm formulation is based on the argument for the need for legal protection to the public, especially the public using public accountant services. This aspect of protecting the public becomes an argument in the debate that took place in the Constitutional Court session;
2. The second construction is based on aspects of legal certainty. This aspect of legal certainty is associated with a clearer and more specific formulation of prohibited acts and is given criminal sanctions so that they are considered more specialist (*lex specialist*) compared to the formulation in the Criminal Code which is more general in its regulation. This argument shows that there is an inequality in the meaning of criminalization itself which actually means the formulation of criminal provisions norms;
3. The third construction relies on the realization of transparency aspects of financial reporting by public accountants. This aspect is based more on reporting on cases of financial manipulation by several large companies in the world such as Enron, which allegedly involved public accountants and public accounting firms;
4. The fourth construction relies on the professionalism of public accountants will be enhanced by transferring some codes of ethics such as "working paper" to the public domain so that criminal sanctions can be imposed. Criminal sanctions are aimed at public accountants or public accounting firms that violate the Public Accountant Professional Standards, whereas Public Accountant Professional Standards violations that constitute a code of ethics for Public accountants as part of the private ethic domain can be used to resolve the internal organizational mechanism of the public accounting profession (Indonesian Institute of Certified Public Accountants);
5. The fifth construction is based on a deterrent effect. The provision of criminal sanctions is expected by the legislators to provide a deterrent effect to the rogue public accountants that failed to carry out their duties properly and correctly;
6. The sixth construction relies on moral panic related to allegations of global circumstances involving rogue public accountants in several major cases such as Enron involving Public Accounting Firm Artur Andersen, Satyam and World com.

The construction of this concept can be equated with harm principle, the concept of subsociality is taken into account in exploring and examining an act or activity that is appropriate to be constructed as a criminal act or not. Thus that in committing criminalization in addition to paying attention to the harmony of principles in criminal law (*schuld* / error, nature against the law / deviance of conduct) must also see a real damage to other people / society.

Lon L Fuller described as, "a system for governing human conduct by formally enacted rules". This legal production process cannot be separated from the interests of various parties, including government, society, businessmen and the international community. Therefore, in every process of criminalizing an act that harm the community, a holistic and comprehensive study is needed by paying attention to the community.

This is reinforced by the Mirror concept proposed by Tamanaha that "The law must be a reflection of the community or community where the law is applied. Law is a mirror of society, which functions to maintain social order."<sup>1</sup> Tamanaha's view provides a new color in jurisprudence that the law provides space and opportunities to the nation's legal system. Even Lawrence Friedman said, "that the legal system does not float in a vacuum of culture, free from space, time and social context, but the legal system describes and reflects things that happen to the community". Vago added, "the law reflects intellectual, social, economic and political

<sup>1</sup> Tamanaha, B.Z., *A General Jurisprudence of Law and Society*, Oxford University Press, London, 2001, Page 1.

conditions during the period.<sup>1</sup>

Specifically, Werner Menski also criticized western legal experts who equate the legal system of a nation as follows, “as western academics we seem, by our own history and training, to be too embedded to ways of perceiving and studying law that is not accountable for the culture-specific embeddedness of legal phenomena in the world. This is also to prevent the occurrence of legal gaps in the law can occur due to differences in cultural characteristics adopted by a nation will affect the legal behavior that exists in a society. Understanding the differences between places, also means as differences between socio-cultural contexts, and no longer (only) due to the transition between inter-time contexts.”<sup>2</sup>

Public Accountant which is a profession emerged and grew from the public demand for an independent communication mechanism between economic entities and stakeholders, especially with regard to the accountability of the entity concerned. Professional services for Public Accountants are the exclusive rights of Public Accountants and the results of the work of Public Accountants used by the public (users of financial statements) as one of the ingredients in economic decision making. Users of the Public Accountant's work are not only clients who provide assignments, but also the public (investors / shareholders, creditors, government, society).<sup>3</sup> In Indonesia the law that specifically regulates the Public Accountant profession as a whole does not exist, before the issuance of Law Number 5 Year 2011. Act Number 34 of 1954, regarding the use of an accountant degree, which consists of seven articles has not regulate the entire Accountant profession Public, and is not in accordance with the current development of the Public Accountant profession. Law Number 34 of 1954, has not regulate the fundamental matters in the profession of Public Accountants as Law Number 5 of 2011. The responsibility of the Public Accountant for the financial statements being examined lies in the statement of opinion given. The purpose of the examination is to provide an opinion whether the financial statements reflect fairly the financial position, results of operations and changes in the company's financial position in accordance with the Financial Accounting System applied consistently.

Indeed the Public Accountant Law has answered the absence of legislation on the public accounting profession in Indonesia. However, after the Constitutional Court Decision Number 84 of 2011, which provides privilege to Public Accountant without criminal charges, the public accountant is still required by professionals to be more thorough in carrying out their audit duties.

## 2. Discussion

Disclosure of financial report findings from a Public Accountant is the most important aspect of financial statements. Disclosure of findings provide ease of understanding of the contents of reports for users to make the right decisions, so that Public Accountants will not be treated arbitrarily and criminalized. Criminal sanctions on Article 55 and 56 actually harm the profession of Public Accountants, because as a profession that is highly sensitive to public trust. Therefore, the Constitutional Court's decision is a means to stop the criminalization of Public Accountants, but is also not easy, because the Constitutional Court's decision is not easy to apply too.

### 2.1. Waiving Financial Statements From Financial Crimes

By using the theory of criminal responsibility in a foreign language referred to as “*toereken-baarheid*”, “*criminal responsibility*”, “*criminal liability*”, this criminal responsibility is intended to determine whether a Public Accountant in carrying out his profession can be liable for or not against his actions.<sup>4</sup>

The audit objective of financial statements by independent auditors in general is to express opinions about fairness, in all material respects, financial position, results of operations, changes in equity, and cash flows in accordance with generally accepted financial accounting standards in Indonesia. The auditor is responsible for planning and carrying out the audit to obtain adequate assurance whether the financial statements are free from material misstatement, whether caused by errors or fraud. The financial statements are the responsibility of management, but often times the Public Accountant profession is criminalized, because of the Financial Report.

The application of agreed procedures for the prospective financial statements of the prospect can carry out based on the agreed procedure attestation agreement on the prospective financial statements with the following conditions:

1. The accountant is independent;
2. Certain accountants and users agree on the procedures carried out or must be carried out by the accountant;
3. Certain users assume responsibility for the adequacy of agreed procedures to fulfill their objectives;
4. Prospective financial statements include a summary of significant assumptions;
5. Prospective financial reports that are treated with agreed procedures can be estimated or measured in a

<sup>1</sup> Tamanaha, *Ibid.* Page 2.

<sup>2</sup> Soetandyo Wignjosubroto, *Hukum: Konsep dan Metode, Makalah disampaikan The 2nd Course On Strengthening Socio Legal Studies*, Jakarta, May 20-27<sup>th</sup> 2008.

<sup>3</sup> Mardiasmo, *Ibid.*

<sup>4</sup> S.R Sianturi, *Asas-Asas Hukum Pidana Indonesia dan Penerapannya*, Edition. IV, Alumni Ahaem-Pateheam, Jakarta, 1996, page 245.

- reasonable and consistent manner;
6. Criteria that must be used in determining findings are agreed between accountants and certain users;
  7. The procedures applied to the financial statements are expected to produce findings that are reasonably consistent using these criteria;
  8. Evidence relating to prospective financial statements treated with agreed procedures is expected to exist to provide an adequate basis for stating findings in the accountant's report;
  9. If applicable, an explanation of agreed materiality limits for reporting purposes;
  10. The use of reports must be limited to certain users.

According to Statement of Financial Accounting Standards Number 1 Financial Accounting Standards, the usefulness of financial statements in a company is as a tool of accountability in the dissemination of information by the board of directors to the owner or to the public. Complete financial statements consist of 5 components, namely: balance sheet, income statement, statement of changes in equity, cash flow statement, and notes to financial statements. Financial statements are critical information needed in decision making.

The financial statements or commonly referred to as annual reports in the Law on Limited Liability Companies are regulated in Chapter IV, Part Two which consists of Articles 66 to 69.

## 2.2. Legal Position of Independent Auditors

In the provisions of article 68 of the Law on Limited Liability Companies, it is stipulated that the company's financial statements are required to be audited by a public accountant which, if not implemented, results in the financial statements and the annual report of the company cannot be approved by the General Meeting of Shareholders. Companies that do not meet the criteria referred to in article 68 of the Company Law do not mean that they are not allowed to submit their financial statements to a public accountant to be audited, the company may audit its financial statements with the aim of ensuring its financial transparency and accountability as a form of accountability to its stakeholders.

According to Mulyadi, "the audit is a systematic process for obtaining and evaluating evidence objectively regarding statements of economic activities and events, with the aim of determining the level of conformity between these statements and the established criteria, as well as submitting the results to the user. who has an interest".<sup>1</sup> Therefore the Auditor has a very strong position in building a strong company and gain high trust from stakeholders. There are two terms that refer to accountability in the legal position of legal subjects in the legal dictionary, namely liability and responsibility. Liability is a broad legal term that refers to almost all the characters of risk or responsibility, which are certain, which depend or which may include all the actual or potential characters of rights and obligations such as losses, threats, crimes, costs or conditions that create the duty to abide the law.

Responsibility means everything that can be accounted for an obligation, and includes decisions, skills, abilities and skills including the obligation to be responsible for the implementation of laws. In terms of practical use, the term liability refers to legal accountability, namely accountability due to errors committed by legal subjects, while the term responsibility refers to political accountability.<sup>2</sup>

The audit by auditors, especially by the Public Accountant Office has been regulated by Law Number 5 of 2011, concerning Public Accountants. As for the basis of the preparation of the Public Accountants Act if seen based on the explanation are as follows:

- a. Protect public interests;
- b. Support a healthy, efficient and transparent economy;
- c. Maintaining the integrity of the Public Accountant profession;
- d. Protecting the interests of the Public Accountant Professional in accordance with professional standards and codes of ethics;
- e. Providing a stronger legal basis for the public, regulators and the public accounting profession;
- f. Affirming the existence of Public Accountant services that have been recognized in several laws and regulations in Indonesia;
- g. Regulating the profession of a Public Accountant with legislation of the same level of the Law is a common practice in other countries;
- h. Community demands for the integrity and professionalism of the Public Accountant;
- i. The development of social environment, such as technology and service trade liberalization, which affect the profession of Public Accountants.

<sup>1</sup> Mulyadi, *Pemeriksaan Akuntan*, Edisi 3, (Yogyakarta: Publishing Section Sekolah Tinggi Ilmu Ekonomi YKPN, 1990), page 4.

<sup>2</sup> Ridwan H.R., *Hukum Administrasi Negara*, Raja Grafindo Persada, Jakarta, 2006, page 335-337.



### **2.3. Legal Protection of Parties Who Are Harmed by the Misleading Statement of Misleading Financial Statements**

Capital Market Law in Article 82 paragraph (2) is a form of protection from two sides:

1. Financial Services Authority has the capacity to enforce laws and regulations in the field of capital markets relating to transactions that contain conflicts of interest such as transactions that contain differences in economic interests between companies on one hand with the board of directors, commissioners, or shareholders on the other. Such transactions may be carried out or facilitated by the directors based on their authority. certain conflict of interest transactions. Law enforcement for violations of certain provisions concerning conflict of interest is a repressive measure. That is, the act has occurred and the possibility of loss is real
2. While the application of the principle of openness and empowerment of independent shareholders in the decision-making process is a legal means to prevent certain conflicts of interest transactions that usually benefit certain parties and harm the company. The application of the principle of openness and empowerment of independent shareholders is a preventive measure.

Preventive action is considerably better. However, shareholders need to understand and use their rights to proactively protect the interests. Indeed, the Limited Liability Companies Law states that the board of directors and commissioners are also limited to the extent that such actions are within their authority. However, accountability can be demanded from the management if the management's actions constitute an act beyond his authority which is contrary to the provisions, and the action causes loss to the company. The Indonesian Company Law and the Capital Market Law can be used by independent shareholders to take repressive measures by filing civil claims to the district court against directors or commissioners who neglect or execute actions that harm the company (Limited Liability Companies Article 97 paragraphs 6 and 7, Article 101, and Capital Market Law Article 111).

The Company Law adheres to the principle that directors and commissioners cannot hide behind the company for a loss, if the loss is clearly a decision made by the board of directors and commissioners. Because as a company manager, directors have authority. According to Limited Liability Companies Article 97 paragraph 6, "in the event of negligence or error of the board of directors or commissioner for transactions that have a conflict of interest that cause losses to the company, minority shareholders can file a civil claim on behalf of the company to the district court against the Board of Directors or Commissioner".

In addition, Financial Services Authority indirectly strives for shareholders to be aware and exercise the rights in protecting their interests according to the prevailing laws and regulations. The Company Law encourages shareholders and investors to actively monitor the development and activities of the company. The Indonesian Company Law also provides protection to minority shareholders as in Article 54 paragraph (1), 55, 66 paragraph (2), 67, 110 paragraph (3), 117 paragraph (1) letter b.

### **2.4. Transparency Principle in Submitting Financial Reports**

In Article 1 point 25 of the Capital Market Law, it is stated that, "The principle of openness is a general guideline that requires issuers, public companies, and other parties to comply with this law to inform the public in a timely manner all material information about their business or effects that can affect against the investor's decision on the intended effect and or the price of the effect." The principle of transparency is a core issue in the capital market and at the same time is the soul of the capital market itself. Transparency about material facts as the soul of the capital market is based on the existence of an transparency principle that allows the availability of consideration for investors, so that he can rationally make a decision to buy or sell shares.<sup>1</sup>

In the capital market there are violations of the principle of transparency. One form of the violation is a misleading statement or misleading information that results in the creation of a picture of a condition that is different from the actual situation, thus misleading the users of financial statements, especially investors or shareholders of public companies. Misrepresentation often occurs in financial statements, so a financial report is misleading or often referred to as misleading financial statements, which are manipulative. In Bapepam's Decree Number Kep-86/PM/1996 concerning Information Disclosure that Must Be Announced Immediately To the Public (Regulation Number X.K.1). Among other things, it is determined that in the event of material events or facts, it must be reported to Bapepam, and announced to the public no later than the second working day after the incident.

Accurate and timely disclosure and transparency regarding all matters that are important to the performance of the company, ownership, and stakeholders. In making decisions, the directors and the board of commissioners always strive to present transparency to stakeholders with four characteristics, namely, relevancy, reliability, comparability, and understandability.

Every information disclosed must be audited in advance in order to obtain high quality standards, audits

<sup>1</sup> <http://peraturanlk-bapepam>, *Perlindungan Investor Dalam Pasar Modal*, accessed on date January 5<sup>th</sup>, 2016.

must be carried out by independent auditors to provide information that is independent of external parties. Information dissemination paths must reflect fairness, timeliness and cost efficiency so that information is relevant.

## **2.5. Fairness of Corporate Audit Financial Report**

Accounting Principles as a proposition or doctrine to oversee a particular system or activity that has been accepted its truthness. The principle of accounting is not an essential truth in the field of accounting, because essentially accounting is always evolving and is always changing in accordance with developments and changes in values that occur in society.

Auditing for companies is quite important because it has a major influence on the activities of the company concerned. At the beginning of its development auditing was only intended to find and expose frauds and mistakes, then developed into an examination of financial statements to provide opinions on the correctness of the presentation for the company's financial statements and also a factor in decision making.

As the company develops, the audit function is increasingly important and needs arise from the government, shareholders, financial analysts, bankers, investors, and the public to assess the quality of management from the results of operations and the managers achievements. To overcome these needs, management audits arise as a trusted tool in assisting the implementation of their duties by providing analysis, assessment, recommendations on activities that have been carried out.

## **2.6. Legal Assistance to Independent Auditors Concerning Financial Statements**

In the worst case scenario, failure in fulfilling obligations, either as a result of defaults (Article 1243 Civil Code) or Unlawful Acts (Article 1365 Civil Code) which by law (by law) based on Article 1131 of the Civil Code, will provide consequences for those that has committed default or not abiding the law to bear all losses of the injured parties by using all of their assets, not only for current loss but future loss as well.

In the event of a violation committed by a Public Accountant in providing his services, both for the findings of evidence of any violation that is of a minor violation to a serious offense, pursuant to PMK Number 17/PMK.01/2008 is only subject to administrative sanctions, in the form of: sanctions warning, sanction of freezing permits and sanctions for revocation of permits as regulated among others in Article 62, Article 63, Article 64 and Article 65.

Auditor's Legal Obligations are:

1. Obligations to clients (Liabilities to Client). Obligations of Public Accountants to clients due to failure to carry out audit duties according to the agreed time, inadequate audits, failure to meet errors, and breaches of confidentiality by public accountants;
2. Obligations to third parties according to Common Law (Liabilities to Third party) Obligations of public accountants to third parties in case is a loss suffered by the plaintiff because it relies on misleading financial statements;
3. Civil Liability under Liability under securities laws. Legal obligations regulated according to federal securities with strict standards;
4. Criminal Liabilities. Legal obligations arising as a result of the possibility of a public accountant being blamed for criminal acts under the law.

While the legal obligations governing public accountants in Indonesia explicitly do not exist, but implicitly already exist as stated in the Public Accountants Professional Standards, Financial Accounting Standards, Capital Market Regulations or Financial Services Authority, Taxation Laws and others relating to the legal obligations of accountants.

Acts against the law in Indonesia normatively always refer to the provisions of Article 1365 of the Civil Code. The formulation of norms in this article is unique, unlike the provisions of other articles. The formulation of the norms of Article 1365 of the Civil Code is more a norm structure than the substance of the complete legal provisions. This has resulted in the substance of the provisions of the Civil Code 1365 of the Civil Code always requiring materialization outside the Civil Code. Acts against the law arises due to the principle that anyone who commits an act that cause harm to another person obliges the person responsible to replace the loss. This can be seen in Article 1365 of the Civil Code which determines that every act against a law that causes harm to another person, obliges the person who commits the act to compensate. An act against law that the liability can be demanded to pay compensation if the following elements, are met:

1. Elements of Actions;
2. Elements Against the Law;
3. Error Elements;
4. Elements of Losses;

## 5. There is a Causal Relationship between Actions and Losses.<sup>1</sup>

The existence of a legal instrument that regulates public accountants in Indonesia is needed by the community, including by the profession to complete the existing rules of the game. This is needed so that on one side of the profession can carry out their professional responsibilities with a high level of compliance, and on the other hand the community will have a strong foundation if at any time they will prosecute professional responsibilities.

The auditor is only responsible for opinions about the financial statements and the opinion must have integrity and professional competence based on the standards set. So legal liability is not a threat to auditors but it is more of a challenge to work more professionally and independently.

### 2.7. Legal Protection of Clients Regarding Audited Financial Statements

Audited Financial Statements can be wrong, and the Public Accountants Act provides legal protection for them. It could happen, for example, that there is a misleading information on financial reports caused by misrepresentation or omission. Misrepresentation can occur if there is a statement that is clearly not in accordance with the facts. Therefore misrepresentation is sometimes also called a misstatement that is an act that makes a false statement, especially with regard to internal data that can be misleading for investors.<sup>2</sup> Thus the violation of the Openness Principle in the form of a “misleading statement” must be legally accountable.

Article 93 of the Capital Market Law concerning the prohibition of misleading statements states; Each party is prohibited, in any way, from making statements or giving information that is materially incorrect or misleading that affects the price of the Securities on the Stock Exchange if at the time the statement is made or information is given:

- a. The party concerned knows or should know that the statement or statement is materially incorrect or misleading; or
- b. The party concerned is not careful enough to determine the material truth of the statement or statement.<sup>3</sup>

Misleading statements can lead to fraud. In the view of capital market law, violations of the principle of transparency are categorized as fraud. This is also supported by Barry. A.K. Rider who stated that “sun light is the best disinfectant and electric light the best policeman”. In other words, Rider stated “more disclosure will inevitably discourage wrongdoing and abuse”.<sup>4</sup>

The Board of Directors is jointly responsible for submitting misleading financial statements. In The Capital Market Supervisory Agency Regulations, namely Rule Number VIII.G.11 Concerning the Responsibilities of the Board of Directors of the Financial Statements in Number 4, the directors of the issuer or public company are jointly and severally liable for statements made based on this regulation including possible losses.

### 2.8. Legal Audit Program in Financial Report Crimes

Legal Audit Work Program is a series of audit techniques and procedures that are arranged systematically to be carried out to collect evidence in order to test the hypothesis that has been set. In preparing the audit work program, the auditor must pay attention to the objectives of the audit and the authority possessed by the auditors. If the auditor face difficulty to carry out certain audit techniques or procedures, he must look for alternative techniques or procedures that can be used to achieve the same goal.

The most frequent fraud in the accounting field is white-collar crime or better known as corruption. This crime is committed by someone who has an important position and role in the organization. Where, by utilizing all authority he has, it will provide him the convenience to commit fraud without anyone's suspicion. But fraud in accounting is not just a matter of corruption, but more broadly such as illegal taking of assets and even in the preparation of financial statements even if fraud is commonly called misstatement that will mislead materially or significantly. In this case, the financial statements present assets or revenues that are higher than the actual assets (revenue / overstatements) and present assets or revenues lower than actual (asset / revenue understatements). The causes or root causes of fraud are briefly explained through expressions of fraud by need, by greed, and by opportunity (fraud occurs because of needs, because of greed and because of opportunities). Meanwhile, according to Cressey, “fraud is caused by pressure (pressure), perceived opportunities (perceived opportunity), and rationalization”. The fraud audit consists of two main components, namely a proactive fraud audit and an investigative audit. For proactive fraud audit a system review is conducted which aims to identify potential or risk of fraud. While investigative audit, aims to prove the occurrence of fraud. Fraud is a crime that can be handled in two ways, namely by preventing and detecting fraud. Experts estimate that fraud revealed is a small part of all actual fraud.

<sup>1</sup> Krisnadi Nasution, *Penerapan Prinsip Tanggung Jawab Pengangkut Terhadap Penumpang Bus Umum*, Jurnal Mimbar Hukum, University of Gajah Mada, Volume 26 Number 1, February 2014, Page 57-58

<sup>2</sup> Bismar Nasution, *Peraturan Keterbukaan Laporan Keuangan Perusahaan Publik, Disampaikan pada seminar Nasional Sehari tentang Pengelolaan Perusahaan Publik yang dilaksanakan oleh Lembaga Pengembangan Sektor Publik*, Jakarta, date August 21<sup>th</sup> 2003.

<sup>3</sup> Law Number 8 of 1995 concerning Capital Market, State Gazette Number 64 of 1995

<sup>4</sup> Bismar Nasution, *Keterbukaan dalam Pasar Modal*, University of Indonesia, Faculty of Law, Graduated Program, 2001, Page 11.

Therefore, the main effort should be to prevent fraud. Because like diseases in the human body, it is better to prevent fraud than to treat. Prevention of fraud begins with internal control, in addition prevention is done with two other important concepts to prevent fraud, namely to instill awareness of fraud awareness and efforts to assess the risk of fraud risk assessment.

## **2.9. Legal Responsibility of Directors in Submission of Financial Statements**

Implementation of jointly and severally responsible responsibilities is the legality of the Indonesian Company, which is only known in the 2007 Limited Liability Company Law. In the previous legislation both in the 1995 Commercial Code and Limited Liability Company Law, Bapepam Regulation Kep-40/ PM/2003 the directors' responsibility for financial statements was the principle of personal responsibility which was dependent on the factors who committed the mistakes, negligence or violations. The legal responsibility is only borne by the directors who do it. Other members of the board of directors are not involved jointly.

Article 97 paragraph (4) of the Company Law adheres to the principle of jointly upholding responsibility for each member of the board of directors for errors and negligence in the management of other members of the board of directors. However, the application of this principle can be dodged by members of the board of directors who do not participate in making mistakes or negligence, if the member of the board of directors concerned "can prove" the following matters:

- a. The Company's loss is not due to errors or negligence;
- b. Has executed out and carried out the management of the Company in good faith and prudence for the interests of the Company in accordance with the purposes and objectives of the Company as stipulated in the articles of association of the company;
- c. Does not have a conflict of interest, either directly or indirectly, over the management actions that cause loss to the Company;
- d. Has taken action to prevent the occurrence or continuation of the loss. According to the explanation of Article 97 paragraph (5) letter d, what is meant by "taking actions to prevent the occurrence or continuation of losses", including the steps to obtain information about management actions that can result in losses, among others, through a board of directors meeting.

Exemption requirements referred to in Article 97 paragraph (5) are cumulative and not alternative. It was concluded from the formulation. Between the terms of the letters a, b, c, and d, there is no word "or". There are words "and" between letters a, b, c, and d. Based on the formulation facts mentioned above, it can be concluded that these conditions are cumulative.

## **2.10. Sanctions on Directors for Submission of Misleading Financial Statements**

In order for a member of the board of directors to be protected and free from joint responsibility for errors and negligence of other members of the board of directors in the management of the Company, the members of the board of directors concerned must be able to prove the matters referred to in Article 97 paragraph (5) letter a, b, c, and d. Even if one matter cannot be proven, against him the enforcement of the principle of joint responsibility is determined in Article 97 paragraph (4) of the Company Law. The regulation on the implementation of the disclosure principle in the Indonesian capital market contains provisions concerning the prohibition of misleading acts, both in the prospectus and mass media relating to a public offering. In addition, the prohibition on misleading conduct has imposed sanctions in the form of imprisonment for a maximum of 10 (ten) years and a maximum fine of Rp. 15,000,000,000.00 (Fifteen billion Rupiah) against violations of these acts. However, the implementation of regulation for disclosure principle which contains the provisions for the prohibition of misleading acts is very simple and inadequate to regulate elements of misleading conduct. For example, Article 78 of Law Number 8 of 1995 concerning the capital market determines that it is not permissible to make false statements of material facts or to not contain correct material facts.

Other prohibitions can also be seen in Article 93 of Law Number 8 of 1995 concerning Capital Markets, which prohibits anyone in any way makes statements or provides information that is materially incorrect or misleading, which can affect the stock price on the Stock Exchange.

Provisions regarding fraud (anti fraud) in Indonesia in general have been regulated in the Criminal Code and the Civil Code. This can be seen in Article 390 of the Criminal Code which regulates provisions regarding hoax, stating that "anyone who intends to benefit themselves or others by fighting the right to reduce or increase the price of merchandise, bonds or securities, by broadcasting false news, is punish able for prison term of two years and eight months."<sup>1</sup>

However, this provision is not effective in providing legal guarantees for investors in the capital market because it does not contain mandatory disclosure arrangements, and does not specifically regulate fraud or

<sup>1</sup> R. Soesilo, Kitab Undang-Undang Hukum Pidana, (Bogor : Publisher Politeia,1976) page 232.



fraudulent acts in stock transactions.<sup>1</sup> While sanctions for directors according to the Law are also specifically regulated in Article 91-93 of the Company Law. Dismissal of directors is regulated in Article 91, Article 92, and Article 93 of Company Law. There are two types for of dismissal of directors, namely temporary termination and permanent dismissal. Members of the board of directors who are dismissed are first given the opportunity to defend themselves in the General Meeting Of Shareholders.<sup>2</sup>

Temporary dismissal is meant for a temporary termination. Because of its temporary nature, the dismissal at later date with a General Meeting Of Shareholders decision may result in the member of the board of directors being able to work again to carry out their duties or be terminated. Regarding the authorized personnel to impose a temporary dismissal decision, is not always executed by the General Meeting Of Shareholders, but can also be executed by the Commissioner (Article 92 paragraph (1) of the Company Law). According to the explanation of Article 92 paragraph (1) of the Company Law, the temporary dismissal decision of the Commissioner for the benefit of the company cannot be awaited until the General Meeting Of Shareholders is held because the General Meeting Of Shareholders requires time to implement it. This quick decision is actually intended to save the company from further a loss due to the actions of members of the board of directors who are deemed to deviate from Article 85 paragraph (1) of the Company Law. Since the actions of the Commissioner are temporary in nature, the General Meeting Of Shareholders must be held as soon as possible. For this reason Article 92 paragraph (4) stipulates that at the latest 30 days after the date of temporary dismissal, a General Meeting Of Shareholders must be held. In the General Meeting Of Shareholders, members of the board of directors that are temporarily terminated by the Commissioner can file a defense.

If the defense can be accepted by the General Meeting Of Shareholders, then the General Meeting Of Shareholders will revoke the temporary dismissal decision. Members of the board of directors concerned with the resolution of the General Meeting Of Shareholders who revoke the temporary dismissal can return to their obligations. However, on the contrary, if the defense of a member of the Board of Directors is rejected, the General Meeting Of Shareholders issues a decision to terminate permanently the person concerned. To hold a General Meeting Of Shareholders for the above purposes, the time has been set no later than 30 days after the date of the temporary dismissal, it possibly to encounter obstacles, namely failing to achieve quorum in the General Meeting Of Shareholders.

## **2.11. DECISION Number 84 / PUU-IX / 2011 Constitutional Court Republic of Indonesia Revokes Article 55 and 56 of Law Number 5 of 2011 concerning Public Accountants**

According to the Public Accountants, states Article 55 and Article 56 of the Public Accountants Act are contrary to some Articles of The Constitution of the Republic of Indonesia of 1945, because they give rised to legal uncertainty. This is based on the reason Article 55 letter a of the Act a quo contains the word “manipulation” meaning is obscured because the manipulation is not recognized in the basic formulation of the Criminal Code as a basic provision in criminal law. In the practice of the public accounting profession, manipulation in the audit is interpreted as positive. In the audit the term “data manipulating” or “data manipulation” is used which means an investigator or auditor analyzes data stored in various data storage media to find something he is looking for.<sup>3</sup>

Thus the term “manipulation” has obviously caused ambiguity and multiple interpretations when faced with an act that is allegedly manipulated. The ambiguity of the meaning of the word manipulation results in legal uncertainty that is contrary to the assurance for the right to fair legal certainty as referred to in Article 28 letter D paragraph (1) of The Constitution of the Republic of Indonesia of 1945. If the notion of data manipulation in the a quo Public Accountant Act is applied to the work of the accounting profession, an auditor may be accused of manipulating data due to uses of computer programs to process data. This situation placed Public Accountant in a threatening position for doing his job even though it has been done correctly. A Public Accountant can be accused of manipulating data even though it is done following a computer program which is a work tool.<sup>4</sup>

Thus the term “manipulation” which has consequences on punishment has created a sense of insecurity or extreme fear that the Public Accountants feel can not freely carrying out their profession to do or not act as guaranteed by Article 28 letter G paragraph (1) of The Constitution of the Republic of Indonesia of 1945.

Public Accountant, who intentionally manipulates, falsifies, and / or removes data or records on working papers or does not make working papers relating to the services provided as referred to in Article 3 paragraph (1) so that they cannot be used properly in the framework of examination by the party authorized to be sentenced to a maximum of 5 (five) years imprisonment and a maximum fine of Rp. 300,000,000.00 (three hundred million rupiah)”, contrary to Article 28 letter D paragraph (1) of The Constitution of the Republic of Indonesia of 1945, because it creates legal uncertainty.<sup>5</sup>

<sup>1</sup> Bismar Nasution, *Keterbukaan dalam Pasar Modal*, Op.Cit, page 65.

<sup>2</sup> Gatot Supramono,SH, *Hukum Perseroan Terbatas*, Publisher Djambatan : Jakarta,2007, page 91.

<sup>3</sup> Theodorus M. Tuanakotta, *Akuntansi Forensik dan Audit Investigatif*, Publisher Salemba Empat, 2010, Jakarta, page 484.

<sup>4</sup> Minutes of Constitutional Court Decision Number 84/PUU-IX/2011.

<sup>5</sup> Minutes of Constitutional Court Decision Number 84/PUU-IX/2011.

This clearly contradicts The Constitution of the Republic of Indonesia of 1945 based on the following reasons:

1. The phrase “manipulation” meaning that it is not clear in criminal law so that it can cause ambiguity or multiple interpretations when faced with an act which is alleged as the argument of a Public Accountant related to Article 55 letter a of the Public Accountant Act.
2. The phrase “removing data or records on working papers or not making working papers” creates multiple interpretations because the form and process of preparing working papers vary greatly because the standard of its formation Public Accountant Professional Standards is only subject matter and full of professional judgment. In addition, working papers for audit services, review services, and other services as a form of public accountant services differ in the depth of their preparation. Working papers for audit services must be prepared to obtain reasonable assurance, the paperwork for review services to obtain limited assurance (lower confidence than reasonable assurance), and working papers for other services are prepared to obtain very limited assurance. lower than limited assurance). Thus making the preparation of paper as an act that is criminalized is very difficult to measure the element of action.
3. The phrase “so that it cannot be used properly in the framework of the examination” it is meaning is obscure. The meaning of “cannot be used properly” does not have clear and definite standards or is very subjective (depending on the examiner's “taste”).
4. The phrase “examination by the authorities” it is meaning is not clear because in the explanation mentioned the authorities include the Minister, the police, the prosecutor's office, and the court. Bearing in mind that the police, prosecutors, and courts do not have the qualifications and interests to check the quality of working papers.<sup>1</sup>

Article 55 letter b of the Public Accountants Act is contrary to Article 28 letter G paragraph (1) of The Constitution of the Republic of Indonesia of 1945, because the Article a quo has created a very insecure sense or extreme fear extreme that the Public Accountants feel can not freely to carry out their profession to do or do not act. This is based on the reasons as explained below:

1. Article 55 letter b of the a quo Law which states that intentionally manipulating, falsifying, and / or eliminating data or records on working papers or not making working papers is excessive considering the nature of the working paper itself which is not a final document. In other words, the product characteristics of a Public Accountant's work is an opinion or opinion of a public accountant on a financial report or financial information, an opinion is a reasonable assurance and not an absolute truth statement on financial statements or financial information.
2. The establishment of a law governing the Public Accountant profession should be based on customary law that applies in the practice of the Public Accountant profession. Therefore, the phrase in Article 55 letter b, “... removes data or records on working papers or does not make working papers ...”, is clearly an administrative ethical act that violates the Public Accountant Professional Standards. Thus the settlement or ethical and administrative sanctions are more appropriate so that they are not excessive and demonstrative. In the opinion of the Public Accountants, the legislators did not consider the behavior contained in Article 55 letter b the a quo Act was the realm of private ethics and not the public sphere. Not to mention the phrase “... cannot be used properly ...” in Article 55 letter b of the Act a quo, has an unclear meaning (*obscur libel*) because the size cannot be used the way as it should and very multi interpretative.<sup>2</sup> Supposedly, the Actors formulate clearly and in detail (*the principle of lex certa or bestimmtheitsgebot*) regarding actions that are ultimately subject to criminal sanctions. The legislator must also define clearly without vague (*nullum crimen sine lege stricta*), so that there is no ambiguous and fuzzy formulation regarding actions that are prohibited and given sanctions. Formulation that is not clear or too complicated will only create legal uncertainty.
3. Criminal charge should not be used if the resulting by-products are more detrimental than the act that will be criminalized. In other words, criminal threats should not be used to achieve a goal that can basically be achieved in other ways that are just as effective with fewer sufferings and losses.

Public Accountant Profession highly prioritizes the trust of service users, the use of penal facilities as contained in Article 55 of the Law a quo will threaten the continuity of insurance services performed by a Public Accountant or Public Accountant Office. If the Public Accountant profession is continuously faced with criminal law, this profession will become very vulnerable and people will be reluctant to become a Public Accountant. Such conditions will tarnish the profile of the number of Public Accountants in Indonesia which are very far behind other countries in ASEAN. Especially in 2015 Indonesia will face service liberalization including public accountant services for the ASEAN region.

Article 55 letter b of the Public Accountants Act is contrary to Article 28 letter I paragraph (2) of The Constitution of the Republic of Indonesia of 1945, because Article a quo has created discrimination in the public

<sup>1</sup> Minutes of Constitutional Court Decision Number 84/PUU-IX/2011.

<sup>2</sup> Minutes of Constitutional Court Decision Number 84/PUU-IX/2011.

accounting profession with other professions related to financial examination and presentation of data. Against the journalist profession based on Law Number 40 of 1999, concerning the Press, not giving criminal provisions even provides a criminal threat for people who obstruct the work of journalists. Article 56 of the Public Accountant Act has created a sense of insecurity or fear so that the Public Accountant and his partners feel that they are not free to carry out their work to do or not act.<sup>1</sup>

Criminal law politics used in the provision of Article 56 of the Law a quo is more on the use of emotional criminal facilities as mere retaliation. Especially for the acts as regulated in Article 55 letter b the a quo Law which is also imposed on the associated party is very improper because it punishes actions in which the victims or losses is not clear. In addition, the formulation of primary legal norms and secondary legal norms in Article 56 of the Law a quo (secondary norms) immediately refers to Article 55 of the Act a quo (primary norms) resulting in obscurity of meaning (*obscur libel*).

### **2.12. Urgency of the Code of Ethics for Public Accountants**

With the Constitutional Court Decision Number 84 of 2011, is eye opening to, the urgency of the Accountant Code of Ethics can be empowered, and optimized. In the midst of a global business competition world with a very complex reality today, many factors need to be maintained and carried out by business community. Business management requires several simultaneous skills development competencies, mastery of science and technology, dynamic organizational management, accommodating socio-cultural aspects and several other policies. One of the interesting things in recent business development shows an aspect that needs to be applied by business community to keep the business permanent.

In the Indonesian context, the Code of Ethics for the Indonesian Accountants Association is one of the products of the code of ethics made. In many ways, the points in the Code of Ethics are indeed directed to organize the public accounting profession. However, in the beginning it was explicitly stated that this code of ethics also applies to areas of expertise in other accounting professions, such as management accountants, government accountants and educating accountants: "The Code of Ethics of the Indonesian Accountants Association is intended as a guide and rule for all practice as a public accountant, work in the business world, in government agencies, and in the world of education in fulfilling their professional responsibilities. International Federation of Accountants (IFAC) code of ethics is an important reference in the development of a code of ethics throughout the world. The goal is also linear with another Code of Ethics, which strengthens the accounting profession and contributes to the development of a strong international economy through the establishment and promotion of adherence to high-quality professional standards.

### **2.13. The Essence of Criminal Accountability in Financial Reports from Public Accountants**

Accountability or known as the concept of "liability" in terms of legal philosophy, a great philosopher of the 20th century, Roscoe Pound stated that: Use simple word "liability" for the situation whereby one may be exact legally and other is legally subjected to the exaction. "Criminal liability is interpreted as Pound is an obligation to pay the retribution that will be received by the perpetrator from someone who has been harmed. The basis of the existence of a criminal act is the principle of legality, while the basis of being able to criminal charge a person is a mistake, which means that a person cannot be accounted for and convicted of a crime if he does not commit a mistake. A person who commits a criminal act can be sentenced if he commit a mistake, and when someone can be proved to commit a mistake.

To determine the existence of an error someone must fulfill several elements, namely:

1. The ability to be responsible to the doer;
2. The inner connection between the doer and his actions in the form of intentions (*dolus*) or negligence (*culpa*) which are referred to as forms of error;
3. There is no reason for the elimination of errors or no reason to forgive.

Associated with the profession of a Public Accountant, the possibility of error is in the fraudulent financial statements. Criminal acts have consequences for accountability and criminal imposition.

According to Tunggal, an action is considered to be fraud, that is:

1. There must be a misrepresentation and fulfills a number of elements, where all elements must be present, if none is found, then considered fraud does not occur;
2. From a past (past) or present (present);
3. The fact is material (material fact);
4. Done intentionally or without calculation (make-knowingly or recklessly);
5. With intent to cause the other party to react;
6. The injured party must act (acted) against misrepresentation;
7. Result in detriment.

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<sup>1</sup> Minutes of Constitutional Court Decision Number 84/PUU-IX/2011.

According to Razaee and Riley explained there are three elements that must be considered by the management of the company if they want to prevent fraud, namely:

1. Creating and restoring a culture that adhere honesty and high ethical values;
2. Application and evaluation of anti-fraud control processes;
3. Development of the oversight process.

In Amrizal, one of the associations in the USA that dedicates its activities to preventing and eradicating fraud, the Association of Certified Fraud Examination (ACFE) classifies fraud into three groups and fraud detection actions based on the three groups of fraud are:

- 1) Financial Report Fraud;
- 2) Misuse of Assets (Asset Misappropriation);
- 3) Corruption (Corruption).

Factors that cause a person to commit fraud are three things: pressure, opportunity, and rationalization, as illustrated in the fraud triangle.

### 3. Conclusions And Suggestions

Based on the description of the dissertation, for problem 1 and problem 2 it is concluded:

1. The position of the Public Accountant shows responsibility for the profession, and is fully responsible in accordance with the laws and regulations, especially in Law Number 5 of year 2011, concerning Public Accountants. So that the quality of work runs in accordance with the Professional Standards of Public Accountants.
2. The Criminal Accountability of Public Accountants for audited financial statements is in the form of intentions so that actions due to misconduct carried out by the Auditee (the company be examined) are omissions, could not be charged by the Public Accountant.
3. Public Accountants should work in accordance with the Professional Standards of Public Accountants, by submitting audited financial statements based on material facts or the presentation of financial statements that have been presented in accordance with Financial Accounting Standards. Thus that if the Auditee has decreased productivity or performance in the company, the board of commissioners and directors can take an attitude and action for the survival of the company audited by a Public Accountant, that the Public Accountant is not easily criminalized.
4. The Indonesian Accountant Code of Ethics Council must maintain and strive to decriminalize the profession of the Public Accountant. In addition, with the existence of a code of ethics, the public will be able to assess the extent to which a Public Accountant has worked in accordance with professional standards and ethical standards set by the profession. The performance of the Public Accountant is an action or implementation of audit tasks that have been completed by a Public Accountant in a certain period of time, and with the Decision of the Constitutional Court can prevent the criminalization of Public Accountants.

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