

CONSTITUTIONAL AND LEGAL ISSUES RELATING TO ZAKAT ON COMPANIES

By

Tun Abdul Hamid Mohamad

In this article, “company” means a limited company.

In my articles written since 2013, I have posed the question supported by my arguments, as to whether a company is liable to pay zakat since, in law, it has a separate legal entity from the shareholders and it is not a natural person capable of believing or disbelieving in the articles of faith (*rukun iman*) and, therefore is neither a Muslim or a non-Muslim and zakat is a religious obligation on individual Muslims. (The articles are available on my websites.)

In this article, I am focusing mainly on the constitutional and legal issues arising therefrom.

We should begin from List II (State List) of the Ninth Schedule of the Federal Constitution (State List).

“Zakat, Fitrah and *Baitulmal* or similar Islamic religious revenue;”

We must bear in mind that List II is a legislative list, meaning that matters stated therein are within the jurisdiction of the State Legislative Assembly (SLA) to make laws. Hence, SLA had made provisions regarding payment of zakat. An example is section 86 of the Administration of the Religion of Islam (State of Selangor) Enactment 2003 (Enactment 1 of 2003):

" Section 86. Power to collect and distribute zakat and fitrah

Majlis is empowered to collect and distribute zakat and fitrah due from every Muslim person in the State of Selangor in accordance with Hukum Syarak on behalf of His Royal Highness the Sultan."

Note the words “...empowered to collectzakat... due from every Muslim person....” The National Language version uses the words “*orang Islam*” for the words “Muslim person”. There is no definition of “person”. However, section 2 defines “Muslim” as follows:

“Muslim” means—

- (a) a person who professes the religion of Islam;
- (b) a person either or both of whose parents were at the time of the person’s

birth, a Muslim;

(c) a person whose upbringing was conducted on the basis that he was a Muslim;

(d) a person who is commonly reputed to be a Muslim;

(e) a person who has converted to the religion of Islam in accordance with section 108; or

(f) a person who is shown to have stated, in circumstances in which he was bound by law to state the truth, that he was a Muslim, whether the statement be oral or written;"

Note that in all the subsections, the description attached to the word "person" could only mean that the word "person" refers to a natural person. It cannot be anything else because:

1. Only a natural person can be a Muslim or a non-Muslim, a believer or a non-believer;
2. Zakat, one of the Five Pillars of Islam, is an obligation on Muslims (who must necessarily be natural persons);
3. Islamic law, the subject matter of the enactment legislated pursuant to List II (State List), Ninth Schedule of the Federal Constitution, is only applicable to Muslims (who must necessarily be natural persons).

Pausing here, the Majlis is empowered to collect zakat from Muslims, who must necessarily be natural persons. I submit that the drafters of the enactment understood the position or did not even think of providing for collection of zakat from companies, because zakat is not an obligation on companies as no company is a Muslim, or, for that matter, a non-Muslim.

Section 21 of Syariah Criminal Offences (Selangor) Enactment 1995 (Enactment No. 9 of 1995) makes it an offence for non-payment of zakat and fitrah:

"Any person who is liable to pay zakat or fitrah but –

(a) refuses or willfully fails to pay such zakat or fitrah; or

(b) refuses or willfully fails to pay such zakat or fitrah through an amil appointed, or any other party authorized, by the Majlis to collect zakat or fitrah,"

Section 37 of the same enactment also makes it an offence for any person who collects zakat without authority.

I submit that these provisions too are only applicable to natural persons who are Muslims for the reasons I have given in discussing section 86 of the Enactment 1 of 2003 above.

In addition:

1. Companies is a federal matter and state law cannot impose zakat obligation on them.
2. A company is not “a person professing the religion of Islam” referred to in the State List.
3. A company is not a Muslim by definition in section 2 of the said enactment and the enactment is not applicable to non-Muslims.

Do not think that there is a lacuna in the law. The law is correct when it legislated that the word Muslim refers only to a natural person. What appears to be one mistake after another only arises when the word is wrongly applied to companies.

Now, let us look at fatwa. I shall only refer to the State of Selangor. The Fatwa Committee of Selangor had issued a fatwa on obligation of companies to pay zakat. In this article, I am not arguing whether it is correct or not. I am merely pointing out that even if it is gazetted, it has no legal effect on companies because:

1. A fatwa of the committee is only binding on individual Muslims. Section 49 (1) provides:

“(1) Upon its publication in the Gazette, a fatwa shall be binding on every Muslim in the State of Selangor as a dictate of his religion and it shall be his religious duty to abide by and uphold the fatwa, unless he is permitted by Hukum Syarak to depart from the fatwa in matters of personal observance.”

2. The enactment is made pursuant to the State List which confers jurisdiction to SLA in respect of the “creation and punishment of offences by persons professing the religion of Islam....” A company is not a person “professing the religion of Islam.”
3. Section 21 of Enactment No. 9 of 1995 is only applicable to individual Muslims.
4. Syariah Court only has jurisdiction over Muslims.

I repeat that it is not a lacuna in the law. It is the wrong extension of the religious obligation of individual Muslims to legal entities created by human beings that makes the law appears to be wrong.

Now, let us look at section 6A (Tax Rebate) of the Income Tax Act 1967 (ITA 1967). That section was added by act A380 and operative from year of assessment 1977 (I stand corrected if there was a similar earlier provision). That section 6A allows rebate (including for zakat – subsection (3)) to be given to “individual resident”.

“individual” is defined in section 2 as follows: “individual” means a natural person;” In other words, that section only allows tax rebate for zakat to be given to natural persons and not to companies.

I submit that the drafters of section 6A of the ITA 1967 too knew what they were doing. They drafted the law to give tax rebate to natural persons who pay tax because only natural persons can be Muslims and are obliged to pay zakat.

We will now look at subsection (11A) of section 44 of the ITA 1967.

Section 44 is a section applicable to taxpayers, individual and companies, in calculating their total income. Frankly, I do not understand what that section says. However, as we are not calculating the total income of a taxpayer, it does not matter. For our purpose, it is enough to say that in calculating the total income of a taxpayer, individual as well as companies, *zakat perniagaan* may be deducted.

So, it is argued that the law recognizes that companies do pay *zakat perniagaan*. Therefore, companies are obliged to pay zakat.

I accept that that the law recognizes that companies do pay *zakat perniagaan* as deduction for it is given in calculating the total income of a company. However, that does not mean that, under Shariah, they are obliged to pay zakat. The income tax authority is not the authority to determine whether companies are obliged to pay zakat.

When companies show that they pay *zakat perniagaan* and ask for deduction similar to that given to individuals, what more in the light of the “fatwa” of the Majlis Fatwa Kebangsaan, certainly the tax authority will accept their representation and urge the government to move the Parliament to provide for it.

These confusions had arisen as a result the imposition of zakat on companies arising from lack of appreciation of the concept of separate legal entity. If you go further, for example, into the issues arising from companies whose shares are owned by Muslims and non-Muslims, *haul*, what type and whose zakat the companies are obliged to pay and the method of calculating the zakat, we get even more confused. Companies too are equally confused, leading to different practices.

I think, we should retreat to the starting point: zakat is for natural persons who are Muslims. Collect from them whatever zakat from whatever source they are required to pay under Shariah. Tax is for companies. Collect from them whatever tax they are required to pay under the law.

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tunabdulhamid@gmail.com
<http://www.tunabdulhamid.my>
<https://tunabdulhamid.me>