

QUESTIONS AND ANSWERS ON OBLIGATION OF COMPANIES TO PAY ZAKAT

Question 1.

We observe that the Muslim scholars in Malaysia are aware of your view on this matter but, unfortunately, they ignore it because they want to achieve the great objective (*maqsad*) of zakat which is helping the poor and the needy. Do you agree with their stand and/or opinion that in order to achieve the *maqsad* of zakat, they can ignore and override the principle of separate legal entity of a company and its non-religious entity and impose zakat on the entity accordingly?

Answer:

We should not be confused between the obligation to pay zakat and the objective of zakat.

We are talking about the obligation to pay zakat. Forget the company for a while. Just because you “want to achieve the great objective (*maqsad*) of zakat which is helping the poor and the needy”, can you, according to Syariah, impose the obligation to pay zakat on people who are not obliged to pay zakat, e.g. non-Muslims? (Taxing them at a rate similar to zakat is a different matter.) Similarly, can you increase the rate of zakat payable by Muslims who are liable to pay zakat, to achieve that objective? (Again, you may tax them over and above the zakat.)

The issue is whether a company is liable (*wajib*) to pay zakat, not what you are able to or going to, do with the money.

Question 2.

According to a research paper written by Sheikh Imran Ahsan Khan Nyazee, he views that to impose zakat on a company, there is no option under the law except that its veil must be lifted/pierced to render both the company and its shareholders (assuming that they are natural persons and Muslims) as a single entity. We observe that he views a company similar to a *syarikah* or Islamic partnership concept which does not have a ‘veil’ in between the company and the shareholders. What is your comment on his view and our observation on this?

Answer:

A company is a company. Its features are different from a partnership or a *sharikah* or Islamic partnership. Lifting the corporate veil is a common law principle applicable to a company. It is only done, in very exceptional cases **by the court** in a case before the court when certain conditions are met. It is not for the company to lift its own corporate

veil in order to pay the debt of the shareholders. Unpaid zakat is a “debt” of the shareholders, their personal obligation, like paying their electricity bills. Can you lift the corporate veil to pay the shareholders’ electricity bills?

Question 3.

Is the “fatwa” of the Muzakarah Majlis Fatwa Kebangsaan on the imposition of zakat on companies more applicable to conventional partnerships registered under the Partnership Act 1961 as well as a sole-proprietorships registered under the Registration of Businesses Act 1956 since, based on your analysis of the “fatwa”, the Majlis seemed to be confused regarding the difference between a company and a partnership?

Answer:

The “fatwa” of the Muzakarah Majlis Fatwa Kebangsaan is nothing more than an expression of opinion. The committee is not a fatwa committee established by law. The opinion is not binding even on Muslim individuals, what more companies.

That “fatwa” was meant for companies. Unfortunately, the Majlis did not appreciate the concept of separate legal entity of companies. They treated companies like partnerships.

Trying to apply the ‘fatwa’ to partnerships may cause more confusion when there is no dispute regarding the obligation of the individual Muslim partners to pay zakat, including from their partnerships, if any. If they are unable to separate their respective ownership, they could apply the principle of *khultah* to calculate their zakat.

Question 4.

We observe that the “fatwa” is only applicable to the concept of partnership since under the Shariah, there are several hadiths which show that the *sharikah* (Islamic partnership) and *mudarabah* are subjected to zakat. The zakat here refers to *zakat perniagaan*. However, both *sharikah* and *mudarabah* are a partnership concept that is jointly owned by the members/partners as a single entity and is akin to a conventional partnership under the law which is not similar a legal structure and framework like a company. What is your comment on this?

Answer:

My answer to question 3 is applicable here.

I had read the translation of the hadiths before but cannot remember the details and I am not an expert in interpreting them. Are the hadiths talking about liability of a partnership (a mere given name with no legal entity of its own) to pay its own zakat or about **how the**

zakat of the individual partners are to be calculated when they trade in a partnership and the property is mixed and not identifiable, e.g. a herd of sheep?

If it is a method of calculating the zakat of the individual partners, then clearly the hadiths are no authority for the proposition that a partnership is liable to pay its own zakat. Then, it is the partners who have to pay their respective zakat from the partnership. Since their respective ownership of the partnership property cannot be separated, the principle of khultah is applied to calculate their zakat. The persons liable to pay zakat are the partners, not the partnership. Their zakat from the partnership is calculated that way as a matter of convenience.

Question 5.

You also view that the above Majlis has no legal standing but could be legalised with limited jurisdiction. May we know how it could possibly be done under the law and does this suggestion solve this zakat issue?

Answer:

As it is, the committee is not established under any law. It is not a fatwa committee. Thus, if it purports to issue a fatwa, the members may commit an offence under the state law.

I am of the view that it could be legalised and be given similar power as the fatwa committees established under state laws, making its rulings fatwas applicable to Muslims in Malaysia regarding matters falling under its jurisdiction.

In this regard, we should fall back on Paragraph 4 (k) of Part I (Federal List) of the Ninth Schedule of the Federal Constitution:

“(k) Ascertainment of Islamic law and other personal laws for purposes of federal law; and”

So, Parliament may enact a law establishing the National Fatwa Committee with power to issue fatwas regarding matters falling under its jurisdiction. But, it does not cover zakat as zakat is a State matter.

I have also argued in my articles that the power to ascertain Islamic law with regard to Islamic banking, finance and takaful should remain with the Shariah Advisory Councils of Bank Negara and Securities Commission, respectively.

Question 6.

Your view is that imposing zakat on a company is unconstitutional because the former is from the State List and the latter is from the Federal List. Can this unconstitutional issue be resolved?

Answer

Zakat is a State matter – State List. It means that the federal Parliament has no the power to make law pertaining to zakat. Companies is a Federal matter - Federal List. It means that the State Legislative Assembly (SLA) has no power to make law pertaining to companies. So, neither State no Federal may make law imposing the obligation to pay zakat on companies.

The only way to resolve it is to amend the Constitution either to transfer zakat to Federal List or companies to State List. Even if two thirds majority in SLA and Parliament are obtained, I do not think it could or should be done. For sure, states will not agree to give up their rights to collect zakat to Federal Government.

To transfer jurisdiction over companies to the states will create many problems. (I can write another article on this alone.)

It is not a lacuna in the law. The drafters of the Constitution had got it right: zakat is a religious obligation on Muslims who must necessarily be human beings, not a name on paper created by Parliament to facilitate trading. It is when zakat obligation is extended to companies that we face these constitutional and legal issues.

Question 7.

If your view of No. 6 is in the affirmative, what is the legal status of the provision in the Income Tax Act 1967 (ITA 1967) which gives tax rebate to companies for the zakat paid by them? Is it also unconstitutional?

Answer

Does the ITA 1967 give a tax rebate to companies?

Let us look at section 6A (Tax Rebate) of the ITA 1967). That section 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 ITA 1967 does not provide for rebate to be given to companies. So, the question does not arise.

Question 8.

What is your general view on the imposition of zakat on a business entity irrespective of whether it is a sole-proprietor, partnership, limited liability partnership (LLP) and/or company? This is because under the Shariah, there is a concept of zakat on business (*urudh tijarah*) or *zakat perniagaan* and we observe that the scholars have attempted to make an *ijtihad* on this *zakat perniagaan* into the legal structure of a company that is incompatible to this shariah principle of *zakat perniagaan*.

Answer

Zakat is a religious obligation on individual Muslims. We should not be talking about imposing zakat on sole-proprietorships, partnerships or companies. It is the individual Muslim who must pay his zakat from whatever source, sole-proprietorships, partnerships and companies, included.

Question 9

What is your suggestion to the issue of imposition of zakat on companies? Specifically, what is your suggested legal framework for the imposition of zakat on business entities to ensure its conformity with the existing Malaysian law?

Answer

My answer is the same as in question 8.

Question 10

Do you agree with the scholars' view that a company is obliged to pay zakat by looking at its shareholders' religion who are Muslims and at the same time the same shareholders are obligated to pay their respective zakat on shares (principal capital amount plus dividend) is tantamount to a double zakat on the shareholders as a whole?

Answer

My view is that a company should not pay zakat at all. A company has no religion. A company does not become a Muslim or a person "professing the religion of Islam" because the shareholders are Muslims just as a robot does not become a Muslim if its owner is a Muslim, even though the robot has no separate legal entity. It is the individual Muslim who has to pay his zakat from whatever source, companies included.

It appears to me that, when the Shariah scholars are faced with the concept of separate legal entity of a company, they searched for something similar in Shariah jurisprudence.

They found mosque, *wakaf* and *baitul mal* having one or two similar characteristics. They concluded that the concept of separate legal entity was recognized by the Shariah.

I submit that they are a poor comparable to a company.

To justify the imposition of zakat on a separate legal entity, the Shariah scholars turn to *khultah*.

I submit that the *khultah* is not a separate legal entity. *Khultah* is only a method of calculating the zakat of individual Muslim partners where the property is mixed. The obligation to pay zakat is on the individual partners, not the sheep or the farm. It is the individual Muslim partners' zakat that is paid. Otherwise, why apportion the zakat between the partners?

To give religion to the separate legal entity, they look at the religion of the shareholders.

I submit that it is wrong to impute the religion of the shareholders to a name on paper. Besides, that is breaching the concept of separate legal entity.

I do not look beyond the issue of obligation of a separate legal entity to pay zakat because the deeper we go, the deeper we get lost in the legal jungle. That is why I suggest that we 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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