

# **Imposing Zakat on Legal Entities and Its Applications to Islamic Financial Institutions<sup>1</sup>**

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## **Abstract**

*Zakat is imposed on particular assets own by Muslims. However as there has been a tremendous development in trades locally and globally, and with the growth of Islamic banking and finance and the increase of demand for Shariah compliance services and supplies, there is a suggestion by some contemporary Muslim scholars to impose zakat on the legal entity. This implies that the calculation is based on the company's net asset value. Based on this proposition, there is no need to look at who are the shareholders whether they are government link companies, foreign parent companies or individual proprietors, Muslims or non Muslims. This paper aims at examining the validity of imposing zakat on the legal entities from Shariah perspective.*

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<sup>1</sup> This paper was presented at International Zakat Conference, organized by Dompot Zakat Indonesia, Bogor, Indonesia by 19-21 July 2011.

## **Introduction**

Incorporation has been a vital force to mobilize large amount of capital from a wide range of investors in scale enterprise and industry throughout the modern world including the Muslim countries. However, is this principle acceptable in the Islamic economy and does Islam acknowledge the concept of legal entity? The research aims to explain this concept and imposing zakat on it from the Shari'ah point of view.

## **The Concept of Legal Entity**

According to Sheikh Taqi Uthmani,<sup>2</sup> the concept of legal entity could also be seen in the concept of limited liability as they share the same characteristic. Limited liability from the modern economic and legal terminology is a concept whereby a person's financial liability is limited to a fixed sum, most commonly the value of a person's investment in a company or partnership with limited liability. In other words, if a company with limited liability is sued, then the plaintiffs are suing the company, not its owners or investors. A shareholder in a limited company is not personally liable for any of the debts of the company, other than for the value of their investment in that company. This usually takes the form of that person's dividends in the company being zero, since the company has no profits to allocate. The same is true for the members of a limited liability partnership and the limited partners in a limited partnership.<sup>3</sup>

According to Sheikh taqi Utmani the concept of legal entity has Shariah grounds such as waqf, bait al-mal, khultah and mudarabah funds.

Waqf is a legal and religious institution wherein a person dedicates some of his properties for a religious or a charitable purpose. The properties, after being declared as Waqf, no longer remain in the ownership of the donor. The beneficiaries of a Waqf can benefit from the

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<sup>2</sup> Usmani, Taqi, An Introduction to Islamic Finance, Maktaba Ma`riful Qur`an, p221

<sup>3</sup> [http://en.wikipedia.org/wiki/Limited\\_liability](http://en.wikipedia.org/wiki/Limited_liability)

corpus or the proceeds of the dedicated property, but they are not its owners. Its ownership vests in Allah alone.

In this note we can see that waqf has been treated as a separate legal entity and considered to have some similar characteristics to those of a natural person. We can see from the rulings given by the fuqaha' (Muslim jurists) in respect of Waqf which are; if a property is purchased with the income of a Waqf, the purchased property cannot become a part of the Waqf automatically however it rather shall be treated as a property owned by the Waqf.<sup>4</sup> Also same goes to the money given to a mosque as donation does not form part of the Waqf, but it passes to the ownership of the mosque. Here again the mosque is accepted to be an owner of money.<sup>5</sup>

It is clear from these examples that the Muslim jurists have accepted that a Waqf can own properties. Obviously, a Waqf is not a human being, yet they have treated it as a human being in the matter of ownership. Once its ownership is established, it will logically follow that it can sell and purchase, may become a debtor and a creditor and can sue and be sued, and thus all the characteristics of a 'juridical person' can be attributed to it.<sup>6</sup>

Sheikh Taqi Uthmani has proposed a takaful model based on the principle of waqf where all the premiums from the depositors are regarded to be owned by the waqf institution. Takaful operators in Pakistan and South Africa are using this model.

Another classical juristic example of legal entity is Bait al-mal which is the treasury or inland revenue of an Islamic state. Being public property, all the citizens of an Islamic state have some beneficial right over the Baitul-mal, yet, nobody can claim to be its owner. Still, the Baitul-mal has some rights and obligations. Imam Al-Sarakhsi, the well-known Hanafi jurist, says in his work "Al-Mabsut":

*"The Baitul-mal has some rights and obligations which may possibly be undetermined."*<sup>7</sup>

<sup>4</sup> Al-Fatawa al-Hindiyyah, Waqf, ch.5, v.2, p.417.

<sup>5</sup> Al-Khurashi, Al-khalil, v7, p.80 ((This principle has been expressly mentioned by some jurists of the Maliki school also. They have stated that a mosque is capable of being the owner of something. This capability of the mosque, according to them, is constructive, while the capability enjoyed by a human being is physical))  
<sup>6</sup> Ustmani, Taqiyah Introduction to Islamic Finance, Maktaba al-Farooq, p.220.  
He also said: *"If the head of an Islamic state needs money to give salaries to his army, but he finds no money in the Kharaj department of the Baitul-mal (wherefrom the salaries are generally given) he can give salaries from the sadaqah (Zakah) department, but the amount so taken from the sadaqah department shall be deemed to be a debt on the Kharaj department"*.<sup>8</sup>

It seems that not only the Bait al-mal, but also the different departments therein can borrow

## IMPOSING ZAKAH ON LEGAL ENTITIES

As corporate entities have been established and acknowledged by Shariah the question is whether it is obligated to pay zakat like natural Muslim persons. There is a need to look to the most important conditions upon obligation to pay zakah which are among others, the individual (zakah payer) must be Muslim, the property must be owned by particular individual (*mu'ayyan*), there must be a complete ownership over the zakah property (*al-milkiyyah al-tamah*) as well in term of *nisab* (minimum value of asset which makes it subject to zakat) and *hawl* (one year completion of zakat financial year) of zakatable items.

There are two major different opinions of contemporary scholars on whether a legal entity should be responsible to pay zakat as held by contemporary scholars:<sup>30</sup>

1) This is the view of some contemporary scholars such al-Buti<sup>31</sup>, Dr Wahbah al-Zuhaily, Dr Hassan al-Amin and others which upholds the obligation of zakat remains restricted to

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<sup>7</sup> Sarakhsi, Al-Mabsut, v14, p33.

<sup>8</sup> Opcit.v3,p18

<sup>9</sup> Usmani, Taqi, An Introduction to Islamic Finance, Maktaba Ma`riful Qur`an, p228.

<sup>10</sup> Narrated by al-Bukhari, Kitab al-Zakat, hadith no. 1382.

<sup>11</sup> See, Ali Muhyi al-Din al-Qura Daghi, , al-shakhsyah al-I'tibariah wa Ahkamuha al-Fiqhiyyah fi al- Dawla al-muasirah, p15

<sup>12</sup> Al-Shirazi, al-Muhazzab.

<sup>13</sup> Al-Bahuti, Kashshaf al-Qina', vol. 2,p. 192

<sup>14</sup> Ibn Muflih, al-Furu', vol.2, p. 293

<sup>15</sup> Usmani, Taqi, An Introduction to Islamic Finance, Maktaba Ma`riful Qur`an, p228.

<sup>16</sup> Al-Hattab, Mawahib al-Jalil, vol. 2,p.267, al-Qarafi, al-Zakhirah, vol. 3, p. 79.

<sup>17</sup> Al-Shafi'i, al-Umm, vol. 2, p. 14

<sup>18</sup> Al-Nawawi, al-Majmu', vol. 5, p. 408, al-Sharbini, Mughni al-Muhtaj, vol. 1, p. 377

<sup>19</sup> Al-Qurrahdaghi, Buhuth fi al-Fiqh Qadaya Zakat al-Mua`sirah, p 262.

<sup>20</sup> Al-Qardhawi, Fiqh al-Zakat,vol. 1p. 95. Ibn al-Humam, Fath al-Qadir, vol. 2, p. 153, Ibn 'Abidin, Hashiyah Radd al-Muhtar, vol. 2, p. 259, Mawahib al-Jalil, vol.2,p. 366, Sharh Mukhtasar Khalil, vol. 2, p. 157. al-Sharbini, Mughni al-Muhtaj, vol. 2, p. 121, Ibn Qudamah, al-Mughni,vol. 4, p. 69.

<sup>21</sup> The hadith is narrated by al-Bukhari and Muslim.

<sup>22</sup> AL-Nawawi, al-Majmu', vol5, p.391.

<sup>23</sup> al-'Abdari, Al-Taj wa Ikliil li Mukhtasar Khalil, vol. 2, p. 266.

<sup>24</sup> AL-MAwsuah Fiqhiyyah KUwaitiyyah, Madah khultah.j16,p224.

<sup>25</sup> Ibn Qudama, Al-Mughni, v2,p609/ Al-Dusuqi, Sharh Kabir, v1,p440/ Al-Qalyubi, Sharh Minhaj wa Hasiyyah12/2.

<sup>26</sup> Ibn Rush, Bidayat al-Mujtahid, vol. 1, p. 264, al-Hattab, Mawahib al-Jalil, vol. 2, p. 267

<sup>27</sup> al-Shafi'i, al-Umm, vol.2, p.14, al-Sharbini, Mughni al-Muhtaj, vol. 1, p. 377, Ibn Qudamah, al-Mughni, vol. 2, p. 249, al-Bahuti, Kashshaf al-Qina', vol.2, p. 198

<sup>28</sup> Al-Nawawi, al-Majmu', vol. 5, p.404, al-Sharbini, Mughni al-Muhtaj, vol. 1, p. 376, Ibn Qudamah,al-Mughni, vol. 2, p. 249, al-Bahuti,Kashshaf al-Qina', vol. 2,p. 196

<sup>29</sup> Al-Dardir, al-Sharh al-Kabir, al-Qarafi, al-Zakhirah.

<sup>30</sup> For further discussion see <http://www.islam-qa.com/ar/ref/69912>

<sup>31</sup> Al-Buti, al-Shakhsyah al-I'tibariyyah, Ahalliyatuhawa Hukm Ta'aluq a;-Zakat Biha

the individuals. Each property owner or shareholders shall pay zakat when his portion of asset has reached his own nisab and hawl.

2) The second view is largely attributed by Dr. Shawki Ismail Shahatah<sup>32</sup>, Dr Mahmud al-Farfur, Dr Ahmad Majzub and Dr Ali Muhyiddin al-Qurrah Daghi<sup>33</sup>. This opinion accepted the concept of *shaksiyyah iktibariyyah* (legal entity) for the company. Therefore, the company is required to pay zakat as it is required from an ordinary human being or natural person. In this case the company will pay zakat on behalf of the shareholders.

This is in line with what the First Zakat Conference had resolved<sup>34</sup> with regards to Zakat of the company and its shares:

“The duty of to pay zakat on the company (by shares) is imposed on the company itself based on the concept that such company possesses *shakhsiyyah iktibariyyah* (legal entity) in the following situations:

- a) There is a law compelling the company (to give out zakat)
- b) The company’s article of association provides for such.
- c) The General Meeting of the company has issued a resolution on that matter.
- d) The shareholders of the company have consented to it.”

The Majma' al-Fiqh al-Islami resolved almost similar rulings: <sup>35</sup>.

First: Zakat on the shares of the company is compulsory for the owners, and the company will pay zakat on behalf of the owners if such is stated in the company’s article of association, or agreed upon during the company's general meeting, or if there is any

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<sup>32</sup> Shahatah, Shawki Ismail, *Muhasabat Zakat al-Mal, Iman wa Amalan*, 1<sup>st</sup> Edition, 1970, p. 92.

<sup>33</sup> See Dr Abdullah bin Mansur al-Ghufaily, *Nawazil al-Zakat*, pg185.

<sup>34</sup> First Zakat Conference, Kuwait, Rejab 29, 1404/ April 30, 1984. See <http://zakat.al-islam.com/def/default.asp?l=arb&filename=Quest/desc/item6/item2/desc2>

<sup>35</sup> Fourth Conference, Resolution no 3, 4/08/88, Jeddah, 18-23 Jamadil Akhir, 1408, 6-11 February 1988

existing law requiring the company to pay zakat, or if there is an authorization from the shareholders for the company to pay zakat on their behalf.

Second: The Company should pay zakat the same as any other ordinary individual. This means that the company shall treat the shares of the shareholders as a property owned by one individual upon which zakat is obligated upon the property, and the calculation is like the property is owned by one person in the types of the properties, its nisab or the amount of zakat payable on the property. All the above are based on the concept of "al-khultah" which, as opined by several fiqh jurists, should be applicable in other properties as well (i.e. not only restricted to livestock).

The resolution also prescribes exclusion:

"ويطرح نصيب الأسهم التي لا تجب فيها الزكاة, ومنها أسهم الخزنة العامة, وأسهم الوقف الخيري, وأسهم الجهات الخيرية, وكذلك أسهم غير المسلمين."

"The portion of shares of the asset which are not subject to zakat should be excluded from calculation such as the shares owned by Public Treasury, waqaf property, property belonging to charitable organizations as well as property owned by the non-Muslims."

Nevertheless, in paying zakat, the company shall consider all the general conditions and necessary requirement to pay zakat for individual. Therefore, when the company wants to pay zakat, it should consider all the requirement of an individual to pay zakat like Islam, nisab, al-nama' and complete ownership. Therefore, in the payment of zakat, the company should exclude the ownership of non Muslim, the public ownership and charity organizations.

## **ZAKAT ON GOVERNMENT FULLY-OWNED AND PARTLY-OWNED COMPANIES**

There are two views on this issue. The first view indicates that the zakah shall not be imposed to the government-owned companies although they are formed for profit purposes. However, it is by the condition that the profit must be submitted back to the government directly or indirectly. This is also opinion that accepted by majority of the

jurists such as Abu Hanifah, Abu Yusuf, the Malikites and the Hanbalites in general.<sup>36</sup> According to Sheikh Al-Zuhayli on this matter, since the company owned by the government whether it belongs to public sector or state, they are included under the category of public properties and not subject to zakah even it is profit oriented. It is because though most of government companies fulfilled the requirement of an-nama` (growth) but still does not satisfy the requirement of complete ownership.<sup>37</sup> In addition, it is also argued that zakat is a special act of worship which requires intention, and this intention should come from the right owner of the asset.

Nonetheless, Muhammad Ibn Al-Hasan Al-Shaybani<sup>38</sup> a disciple of Abu Hanifah on the second view holds that zakah should be imposed on the public companies that are established to make profits. This view is supported by the several of contemporary jurists such Dr. Muhammad Nu'aym Yasin<sup>39</sup>, Dr. Rafiq al-Misri<sup>40</sup>, Dr 'Abd al-Hamid al-Ba'li<sup>41</sup>, Dr. Hasan al-Bily<sup>42</sup>, Dr. Muhammad Sir al-Khatm<sup>43</sup> and Dr. Muhammad bin 'Aqil<sup>44</sup>. Similarly, Article 37 of Qanun Zakat Sudan states that public companies and properties are exempted from the payment of zakat only when such properties are not used for profit gaining. If the properties are used for the purpose of generating profit, that properties are subjected to zakat.

However, in the case of the companies partly owned by government and partly owned by the private which established on the basis of profit oriented, the Nadwah Zakah Mua'sirah resolved that the public property (government shareholders should be subject to the Zakah as the private shareholders. Nonetheless, there are some jurists who do not oblige to these kind of property due to it mixed nature.<sup>45</sup>

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<sup>36</sup> al-Sarakhsi, al-Mabsut, vol. 3, p. 52, al-Dasuqi, Hashiyah al-Dasuqi, vol. 1, p.487, al-Sharbini, Mughni al-Muhtaj, vol. 1, p.412, Matalib Uli al-Nuha, vol. 2, p. 16.

<sup>37</sup> Al-Zuhayli, Wahbah, Hukm al-Zakat fi Amwal Manshaat al-Qita' al-Amm al-Hadifah li al-Ribh wa Hukm Zakat al-Sharawat al-Batinah wa al-Sanadat al-Hukumiyyah, Abhas wa 'Amal al-Nadwah al-Thalithat 'Ashara li Qadhaya al-Zakat al-Mu'asirah, Khourtum, Sudan, 8-11 Safar 1425/ 29 March - 1April 2004, p. 234-236.

<sup>38</sup> Al-Sarakhsi, al-Mabsut, 3/52

<sup>39</sup> See his commentary in Abhas wa 'Amal al-Nadwah al-Thaminah li Qadhaya al-Zakat al-Mu'asirah, Qatar, 23-26 Zul Hijjah 1418 – 20-23 April 1998, p. 420-421

<sup>40</sup> See his commentary in Abhas wa 'Amal al-Nadwah al-Thaminah li Qadhaya al-Zakat al-Mu'asirah, Qatar, 23-26 Zul Hijjah 1418 – 20-23 April 1998, p. 422-424

<sup>41</sup> See his commentary in Abhas wa 'Amal al-Nadwah al-Thalithat 'Ashara li Qadhaya al-Zakat al-Mu'asirah, Khourtum, Sudan, 8-11 Safar 1425/ 29 Mac - 1April 2004, p. 310.

<sup>42</sup> See his commentary in Abhas wa 'Amal al-Nadwah al-Thalithat 'Ashara li Qadhaya al-Zakat al-Mu'asirah, Khourtum, Sudan, 8-11 Safar 1425/ 29 Mac - 1April 2004, p. 317-318

<sup>43</sup> See his commentary in Abhas wa 'Amal al-Nadwah al-Thalithat 'Ashara li Qadhaya al-Zakat al-Mu'asirah, Khourtum, Sudan, 8-11 Safar 1425/ 29 Mac - 1April 2004, p. 320-321

<sup>44</sup> See his commentary in Abhas wa 'Amal al-Nadwah al-Thalithat 'Ashara li Qadhaya al-Zakat al-Mu'asirah, Khourtum, Sudan, 8-11 Safar 1425/ 29 Mac - 1April 2004, p. 322-323

<sup>45</sup> Al-Bayan al-Khitami, wa al-Fatawa wa al-Tawsiyyat, al-Nadwah al-Thalithat 'Ashara li Qadhaya al-Zakat al-Mu'asirah, Khourtum, Sudan, 8-11 Safar 1425/ 29 March - 1April 2004, p. 414

Perhaps the opinion of Muhammad Ibn al-Hasan al-syaibani can be considered in certain circumstances for the contemporary needs since the beneficiary of zakat will be for the benefit of Islam and Muslims.

### **3-ZAKAH OBLIGATIONS ON LEGAL ENTITY OWNED COMPLETELY OR PARTIALLY BY NON-MUSLIMS.<sup>46</sup>**

As discussed earlier, there has been ijma' of Muslim jurists that non Muslims are not obligated to pay zakat . In this light, majority of Muslim scholars hold that non-Muslims are not obliged to perform acts of worship such as *salah* and *zakat*; i.e., however in the hereafter they will be punished in failure to abide by them, additional to the the punishment for refusing to believe.

In a special muzakarah on imposing zakat on the legal entity recently, Dr. Aznan Hasan suggested that it is allowable to impose zakat on non-Muslim shareholders similar to Muslim shareholders.<sup>47</sup> This is the view of some contemporary scholars like Sheikh Qurrah Daghi, Dr Yusuf al-Qardawi, Dr Hannan 'Abd al-Rahman Abu Mukh<sup>48</sup>. To quote from Dr Hannan:

"علي أن للشركة التي تريد أن تزكي أموالها أن تضع ضمن شروط عقد المساهمة معها أنها تأخذ مقدار الزكاة من جميع أموال المساهمين في الشركة، وعندئذ إذا وافق المساهم غير المسلمين علي هذا الشرط فلا حرج أن تؤخذ من المساهمين غير المسلمين ولا حرج أن تصرف في مصارف الزكاة، وإن لم تسم الزكاة بالنسبة لهم شرعا".

This same opinion has been asserted by al-Qurrah Daghi.<sup>49</sup> According to him in general it is not permissible to impose zakat to non-Muslim shareholders however if they agree to

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<sup>46</sup> In this particular issue of government and government link companies zakat, the researcher refers extensively with some modifications to the unpublished paper wrote by Aznan Hassan "Zakat on Shakshiyah i'tibariyyah, Workshop on Zakat for Islamic Financial BNM Lanai Kijang, 3 May 2011.

<sup>47</sup> Dr Aznan bin Hasan, Zakat on Shakshiyah i'tibariyyah, Workshop on Zakat for Islamic Financial Institutions, BNM Lanai Kijang, 3 May 2011.

<sup>48</sup> Abu Mukh, Hannan 'Abd al-Rahman, Zakat al-Sharikat fi al-Fiqh al-Islami, Dar al-Ma'mun, Amman, 1<sup>st</sup> Edition, 2007, p. 137. Taken from Dr Aznan's paper.

<sup>49</sup> Al-Qurrahdaghi, al-Syaksiyyah al-I'tibariyyah wa Ahkamuha fi al-Dawlah al-Islamiyyah.,p,240.

follow the company policy as required by law in paying zakah, then there is nothing wrong with that. In this case zakat is imposed on the gross income of the company regardless of the religions of the share holders. This is based on the ground of exemption isti'nas (rules of thumb) as per what Umar al-Khattab decided for jizyah taken from Bani Taghlib where they refused to pay jizyah. This is established on the basis of agreement of each shareholder as difficult to desegregate between the shareholders stake as well the company shares has been listed on bourse.

Dr Aznan refers to a report by Abu 'Ubayd<sup>50</sup> when Umar intended to take jizyah from the Christians of Bani Taghlib, al-Nu'man bin Zar'ah (or Zar'ah bin al-Nu'man) said to Umar: "Oh Amirul ukminin, Bani Taghlib are Arab. They are dismayed at the word jizyah. They do not have money. They are people of agriculture and cattle and they can be instigated by our enemy. Please do not help your enemy by drifting them away." Umar then reconciled with them on the condition that they pay double the amount of zakat." As said by al-Zayla'i, this payment of sadaqah is not jizyah<sup>51</sup>:

واستثنى في البدائع نصارى بني تغلب لأن عمر صالحهم من الجزية على الصدقة المضاعفة فإذا أخذ العاشر منهم ذلك سقطت الجزية

Even al-Kasani has gone further by stating that what was taken from Bani Taghlib took the same ruling like zakat. The only different is that the amount is more<sup>52</sup>. He noticed<sup>53</sup>:

"... لأن المأخوذ من بني تغلب يسلك به مسلك الصدقات لا يفارقها إلا في التضعيف

"For whatever taken from Bani Taghlib takes the rules of zakat except the additional amount"

<sup>50</sup> Abu 'Ubayd, Kitab al-Amwal, Dar al-Kutub al-'ilmiyyah, Beirut, 1<sup>st</sup> Edition, 1986, p. 33

<sup>51</sup> al-Zayla'i, al-Bahr al-Ra'iq, vol. 2, p. 250.

<sup>52</sup> It should be noted here that this opinion is a matter of dispute among the jurists. Some jurists disagree to this opinion and maintain that the money shall be distributed to others, not the beneficiaries (asnaf) of zakat (see: Abu Ubayd, Kitab al-Amwal, p. 540. I believe whilst this amount can be used for other things as well, there is no harm in distributing the amount to the beneficiaries of zakat.

<sup>53</sup> Al-Kasani, Bada'i al-Sana'i, vol. 2, p.38

Dr Aznan asserted from the above discussion, that it is allowed for Islamic financial institutions to pay the whole amount as zakat without even deducting the portion of non Muslim. Whilst on the portion of the Muslim the payment is considered zakat, the portion of non Muslim, though does not take the rules of zakat, in term of rewards, but as said by al-Kasani, can still take the rules of zakat in term of distribution.

He concluded that it seems that Umar (rd) took from them the amount under the name of sadaqah (zakat). Though some jurists tend to limit this application on the case of Bani Taghlib only, he said he believes that there is no harm of extending the same principle to the payment of zakat on Islamic financial institutions, simply because there is a need for that, and there is no harm in doing so.

Dr Aznan remarked that Shaykh Yusuf al-Qardhaqi did not directly discuss this matter. He did not discuss the issue of *al-shakhsiyyah al-I'tibariyyah* (legal entity) in his important book, *fiqh al-zakat*. Nevertheless, he did discuss the imposition of the equivalent amount of zakat to be paid by non Muslim under different name. He is of the opinion that nothing wrong in Shariah to impose such a payment. He referred extensively to the story of Bani Taghlib in supporting his argument on that. If we were to apply the same on our case, we can use the same argument. Whilst zakat is imposed on the Muslims shareholders, the same amount is also imposed on the non-Muslim shareholders, by whatsoever name. To ensure consistency in the financial report and the give the effect of *shakhsiyyah I'tibariyyah* (legal entity), I believe there is no harm to use only one term, i.e., zakat in the financial reporting for both the ownership of the Muslim and the non Muslims alike.<sup>54</sup>

However this humble paper would suggest that it is permissible to impose zakat on Islamic financial institution but only on the shares owned by Muslim shareholders for their respective shares and the non Muslim shareholder is not counted at all. But if they insist to pay zakat, or if it is legally required by the authority, the payment can be accepted but

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<sup>54</sup> Dr Aznan bin Hasan, Zakat on Shakshiyyah i'tibariyyah, Workshop on Zakat for Islamic Financial Institutions, BNM Lanai Kijang, 3 May 2011.

should be treated as a charitable donation not zakat.

This is for a number of reasons:

a) Non believers are not obligated (*ghair mukallaf*) to perform zakat, if they perform it, it is not valid. Because zakat is an act of worship (*ibadah*) which has pillars and conditions among others, intention, full ownership by specific Muslim owners and only obligatory on the Muslims. Any act of performance of worship by non Muslim is void such as prayers and fasting. The same rule applies to zakat. If we were to impose zakat on non Muslim, why not imposing other acts of worship like five daily prayers, fasting and hajj.

b) The validity of analogy (*qiyas*) with Bani Taghlib Christians can be challenged as original case of *qiyas* cannot be an exceptional case for rules of exceptional circumstances cannot be extended to a new case. The tribe was actually paying double amount as compared to other tribes who took a truce. They would prefer to call that financial commitment (*jizyah*) as *sadaqah* similar to the Muslims. To Omar R.A., as long as they paid their *jizyah* which is totally different from zakat even in calculation, then they can call whatever they like. It is argued that zakat has its own salient features and can be used interchangeably with *sadaqah* even though the word *sadaqa* is more general. Similarly by analogy, a non Muslim can fast if they like, and they can be proud of it, but is that valid or is he rewarded for that? And of surety they are not obligated to fast in the month of Ramadan and no Muslim authority can force them to pray, fast or perform hajj.

c) If zakat is levied on Islamic Financial Institution owned by non Muslim as a legal entity, then any legal entity for halal business is also obligated to pay zakat.

d) The *taklif Sharie* (religious obligation) of companies is questionable as they themselves are owned by their respective owners. One should not confuse himself between the term legal capacity as widely used in the modern legal terms to reflect the individual qualification in entering into a contract which also includes a legal entity. This is because *taklif* is about religious obligation with which one is answerable before Allah in this world and hereafter. Hence the owners are religiously and legally accountable, not the legal entity. The legal

entities are not accountable before Allah in the day of Judgment like human being. Even if these legal entities do not pay zakat, still the individual Muslim owners held liable for paying zakat on their property.

## **ZAKAT OF DIFFERENT ASSET CLASSIFICATION AT ISLAMIC FINANCIAL INSTITUTIONS**

### **1-ZAKAH ON THE CURRENT ACCOUNT**

In this issue, the ruling of zakah shall be considered as zakah on debt (dayn) which the debtor has full capacity to pay back in any time. This is because the concept of current account is established on the based of debt. Hence, the relation between the bank and the depositors could be considered as the debtor and creditor. In this case, the depositors as the creditor should be to pay the zakah on their debt and not to the bank. Thus, the depositors are borne to pay the zakah for his amount in the current account even the money still on the hand of the debtor (bank). This is because the bank almost has full capacity be able to pay the debt back at anytime. Therefore, the depositors (creditor) in this light, shall be to pay the zakah for his current account amount once satisfy all the zakah requirements such attains the certain nisab as well hawl.<sup>55</sup>

As such it is not the bank's responsibility to pay zakat on behalf of depositors. The principle of khultah cannot be used here. This is because all the deposits taken from the depositors are based on principle of loan. The creditors responsible to pay their zakat provided that all the conditions of zakat are met. The bank should not pay zakat on behalf of current account depositors.

### **2. Zakat on Mudarabah Based Account**

Mudarabah has been extensively used for general investment account, special investment account, saving account investment funds and sukuk.

From the classic fiqh perspective, it is agreed upon that in case of mudarabah the capital

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<sup>55</sup> al-Ghufali, Abdullah Mansur, Nawazil al-Zakah, Bank al-Bilad,2008 ,pp 169-170.

providers are responsible to pay zakat on the capital of the venture. However the jurists differ on who will be liable to pay zakat on the accrued profit.

The Hanafite opines that the mudarib has to pay zakat if there is any accrued profit provided that it meets the nisab.<sup>56</sup>

The Malikites hold that the capital providers shall pay the zakat of the capital and his portion of the accrued profit every year in case retail traders. As to the mudarib, he is only obligated to pay zakat after distribution of profits for only one year<sup>57</sup>. This happens when the tenure of Mudharabah is over a number of years.

The Shafites hold that the zakat for both the capital and profit shall be borne by the capital provider. If it is taken from the mudarabah fund it shall be taken from the the gross profit because it is regarded as the expenses of the operation. This is because he is the owner of the fund. The mudarib however does not own anything except after distribution of the profit. This is based on the assumption that the mudarib does not own the profit constructively except after realizing during distribution.<sup>58</sup>

The Hanbalis hold that zakat is on the capital provider on the asset entirely except for the portion of the mudarib because this portion belongs to him, and the capital provider should not be accountable for the others obligation. At the point of distribution, the mudarib actually starts his calculation for the new financial year.<sup>59</sup>

In this light of classic fiqh opinion, one may suggest that in case of mudarabah based account which is normally used for general investment account, saving account, special investment account and recently for the current account it is the responsibility of mudarib to pay zakat for their capital. It is submitted that the mudarabah as per deliberated by the Jurists in the past was based on mudarbah issue alone which is not associated with khultah as most of the jurists who hold the view of khultah (mixed asset) did not apply the rule to

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<sup>56</sup> Fath al-Qadir, vol.1, pg 531.

<sup>57</sup> Sharh al-Zarqani 'ala mukhtasar Khalil, vol.2, pg 160.

<sup>58</sup> Hashiat Qalyubi wa Umairah, vol.2, pg31.

<sup>59</sup> Ibn Qudamah, *al-Mughni*, vol.3, pg.38.

other than livestock.

Even if we adopt the opinion of khultah, there are still a number of conditions should be met for example the all the owners are Muslim.<sup>60</sup>In case of Mudarabah accounts, not all the investors or depositors are Muslims. Therefore the validity to impose zakat on the mudarabah depositors is still questionable.

Alternatively the bank can pay zakat on behalf of the depositors provided that all the conditions of zakat is considered like segregation of the Muslim and non Muslim's fund. This looks impossible. If it is required by law for Islamic banks to pay zakat on behalf of depositors, there must be a clear notification to the depositors so that they are aware and hence give consent to authorize the bank to pay zakat.

### **3. Zakat on Wakalah Bi al-Istithmar Based Account**

It is appointing bank as the investment agent where the depositors as principals authorize the bank to invest their moneys and the bank is entitled to get a fee for the services rendered. The service is normally charged upfront also based on the performance incentives. This principle is also used for Islamic investment fund and Islamic mutual funds or unit trust where the investors as unit holders are the principles and the fund manager is the investment agent. However most of the unit trust fund managers only charge the fee upfront. Therefore they already get their remuneration regardless of the performance of the fund. In other words, there is nothing that push them to work hard to maximize the profit in the investment as there will be no incentives for them. Perhaps the only pushing factor is the performance figure to impress the new investors.

As far as zakat is concerned, based on the principle of khultah, according to Abu Hanifah and some Malikites zakat is obligated on every respective individual investors. As it is individual commitments, one has to know his nisab and does the calculation and also pays zakat on his own. It is suggested that the responsibility of zakat payment is almost similar to

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<sup>6060</sup> Al-Mawardi, Abu al-Hasan Ali bin Muhammad, Al-Hawi al-Kabir, vol. 3, pg. 140.

investors or capital providers of mudharabah. Since they are the owners of the fund, they are responsible to pay zakat.

However if it is the policy of the investment fund or it is required by law, than it should be clearly stipulated in the prospectus or through notifications to the investors. Perhaps a better alternative is to make it optional to every individual or constitutional investors to decide whether they opt to authorise the investment agent to pay zakat on behalf of them. Or perhaps it is also fine to leave the responsibility of zakat to the each investor as some investors are non Muslim and some of them did not invest only a little amount of money which does not reach the nisab.

As to the investment agent either the bank or fund manger, they are liable only to pay zakat for their fees which are collected upfront plus the performance incentives.

#### **4. Zakat on Savings at Tabung Haji**

The interesting part of deposit taking at Tabung Haji is that the contributions come from only Muslims. It is observed that among the significant condition of zakat is that the owner of the zakatable asset is a Muslim regardless of his/her ages. The principle of khultah can be applied here. The entire pool of fund can be treated as one asset, one nisab regardless of how much is the contribution of respective depositors. However the depositors must be clearly informed either in the application form, notice or other means of communication to authorize the management to pay zakat on behalf of them. This is so if we treat the contractual relationship between the depositors and the management as mudarabah or wakalah bi al-istithmar.

Yet, other unresolved Shariah issue with regards to the deposits at Tabung Haji is to define what contract used for the deposit taking. It is not stated at all whether it is wadiah, qard, mudarabah or wakalah bi al-istihmar.

## 5. Zakat of Takaful Funds

As for takaful shareholders account, they are accountable to pay zakat individually or collectively based on the principle of khultah as discussed above. As for the participant personal investment account, the accountability of zakat will be similar to mudarabah or *wakalah bi al-istithmar* account as discussed above where the owner of the fund shall bear the responsibility.

As for the Tabarru' fund (risk fund), the question is who is the owner of the mixed donated fund? If it is stated in the takaful contract that the contribution of the participant is a complete pure donation, then this would fall under categories of charities which is not zakatable and at the same time they are not entitled for the surplus sharing. Any surplus shall be retained by the fund. However if it is based on the principle of *al-iltizam bi al-tabarru'* (a promise to donate), then the participants retain the ownership of the fund. Since the owner is known, they are obligated to pay zakat. They may appoint takaful operator to do it on behalf of them. As for surplus sharing, yes they are entitled to it since it is their money.

It is always worth nothing that there should be two different accounts at takaful; one belongs to the shareholders and the other is for the tabarru' (risk fund) representing the pool of contributions of the participants.

### Conclusion and Recommendation

- The authority can levy any kind of tax for goods and services which includes Islamic banking and takaful services owned by non Muslim shareholders but it should not be called zakat.
- In some countries like Malaysia, there is no issue of injustice in imposing zakat on the individual Muslim shareholders income since they will get tax exemption.
- There should not be double zakat i.e when the zakat is already paid by the

institution, the share holders are no longer obligated to pay zakat on their respective share.

- IFIs are not obligated to pay zakat for Deposits taken from depositors whether they are based on Mudharabah, wadiah or qard. The rabb al-mal is responsible to pay zakat not mudarib. As for the mudarib portion, he is bound to pay zakat after the distribution of profit and after holding it for one year. As for wadiah and qard the owner of the fund who are the creditors (depositors) to the bank are responsible to pay zakat on their own. However, they can pay zakat on behalf of the depositors provided that all rules of zakat are followed and with a clear consent from the owners of the fund.

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## Attachments

### STATISTIC FOR ZAKAH ON COMMERCIALS BUSINESSES COLLECTION IN MALAYSIA 2007-2010.<sup>61</sup>

STATES	2007	2008	2009	2010
Selangor	43,745,324.00	46,109,153.00	51,852,929.00	60,517,310 .00
<b>Wilayah Persekutuan</b>	<b>23,326,23 4.39</b>	<b>28,702,94 7.32</b>	<b>29,114,25 7.40</b>	<b>33,622,33 0.60</b>
Johor	22,710,586.96	33,373,484.91	34,012,220.66	37,144,115 .67
Pahang	15,233,825.34	24,286,185.66	34,358,939.17	36,358,818 .26
Terengganu	15,037,326.72	20,470,497.81	21,627,115.12	20,696,100 .16
Perak	13,668,194.29	23,768,317.08	27,763,399.26	

<sup>61</sup> Special thanks given to officer in Pusat Pungutan Zakat Wilayah Persekutuan for providing the statistic update till date.

				26,832,317 .99
Kedah	11,276,500.60	16,170,728.20	14,176,138.09	16,431,006 .03
Kelantan	10,462,905.44	18,602,371.80	16,861,500.35	14,512,380 .97
Pulau Pinang	8,295,846.71	6,595,708.00	9,563,587.76	8,342,887. 62
Sabah	8,136,279.09	10,248,160.57	9,594,348.01	14,957,871 .97
Negeri Sembilan	6,115,142.45	9,055,100.32	8,948,204.46	11,321,245 .93
Melaka	5,774,729.72	7,168,162.76	7,731,375.72	8,045,943. 87
Sarawak	4,370,124.94	11,940,418.17	8,737,606.91	8,844,620. 25
Perlis	3,286,732.00	3,791,501.00	3,157,448.10	4,183,866. 00
<b>TOTAL</b>	<b>191,439,7 52.65</b>	<b>260,282,7 36.60</b>	<b>277,499,0 70.01</b>	<b>301,810,8 15.32</b>

**STATISTIC FOR ZAKAH ON COMMERCIALS BUSINESS'S PAYERS IN WILAYAH PERSEKUTUAN 2007-2010.**

<b>STATES</b>	<b>2007</b>	<b>2008</b>	<b>2009</b>	<b>2010</b>
Johor	3,280	-	3,309	3,401
Pahang	1,948	1,970	2,180	2,272
Terengganu	1,657	-	-	2,019
Melaka	1,079	1,114	1,225	1,248
<b>Wilayah</b>	<b>1,062</b>	<b>1,169</b>	<b>1,302</b>	<b>1,429</b>

<b>Persekutuan</b>				
Kelantan	957	1,132	1,257	1,341
Negeri Sembilan	917	986	1,085	1,097
Kedah	898	1,302	1,508	1,676
Pulau Pinang	722	698	767	819
Sabah	220	287	338	476
Sarawak	198	213	602	319
Perlis	193	243	229	183
Selangor	-	-	3,685	-
Perak	-	-	-	-
<b>TOTAL</b>	<b>13,131</b>	<b>9,114</b>	<b>13,802</b>	<b>16,280</b>

**STATISTIC FOR ZAKAH ON COMMERCIALS BUSINESS'S CATEGORIES IN WILAYAH PERSEKUTUAN 2007-2010.**

<b>CATEGORIES OF ZAKAT</b>	<b>2007 (RM)</b>	<b>2008 (RM)</b>	<b>2009 (RM)</b>	<b>2010 (RM)</b>
INCOME	109,800,306.20	137,571,807.25	167,483,687.12	192,723,071.57
<b>COMMERCIAL</b>	<b>23,326,234.39</b>	<b>28,702,947.32</b>	<b>29,114,257.40</b>	<b>33,622,330.60</b>
SAVING	13,670,863.27	15,063,180.16	18,373,003.78	20,843,849.85
QADHA	281,230.27	545,092.67	431,875.29	477,109.07
PROPERTIES	21,500,920.34	23,680,791.26	25,689,049.19	26,928,829.61
OTHERS	637,679.18	697,328.62	874,787.44	1,040,234.23
<b>TOTAL</b>	<b>169,217,233.65</b>	<b>206,261,147.28</b>	<b>241,966,660.22</b>	<b>275,635,424.93</b>

Based on the above mentioned statistics, we can sum up that the total collection of zakah in Malaysia for 2010 is up to 301,810,815.32. With special reference given to the Wilayah Persekutuan State statistic of the year 2010, the zakat on business have contributed up to RM 33,622,330.60 compared to total of RM 275,635,424.93 zakah collection in which represents 12.1 percent out of the total percentages. This is the second largest payers for

the Zakah payment after the Zakah on the income in which represent 69.91 percent from the total percentages with the amount of RM 192,723,071.57. The number of payers for the zakah on business as reported by PPZ Wilayah Persekutuan as at 2010 is about 1429 institutions or legal entities.