



Islami Bank Bangladesh Ltd. vs. Commissioner of Taxes, Companies Circle-19, ITCLD (AD) (2008) [24]

Date of Decision: April 8, 2008

Our Citation: ITCLD (AD) (2008) [24]

Equivalent Citation: 14 BLC (AD) (2009) 145 ; 29 BLD (AD) (2009) 139; VI ADC (2009) 832; 37 CLC (AD) [3439]

Supreme Court of Bangladesh

Appellate Division

(Civil)

Islami Bank Bangladesh Ltd.....Petitioner (In all petitions)

-Versus-

Commissioner of Taxes, Companies Circle-19.....Respondent (In all petitions)

Civil Review Petition Nos. 10-12 of 2008.

(From the Judgment and Order dated September 3, 2007 passed by the Appellate Division in Civil Petition for Leave to Appeal No. 823, 824 and 828 of 2005).

Hon'ble Judge(s) Present:

Md. Ruhul Amin CJ, MM Ruhul Amin J, Md. Joynul Abedin J, Md. Hassan Ameen J, Md. Abdul Matin J

Counsel(s) Appearing:

Abdur Razzaq, Senior Counsel, Supreme Court of Bangladesh, instructed by Mvi Md Wahidullah, Advocate-on-Record—For the Petitioner.

Not represented— the Respondent

Disposition:

The Review petitions are dismissed.



Head Note:

The Income Tax Ordinance, 1984 (Ordinance No.XXXVI of 1984)

Section 29(1)(XXVII)

Islamic law does not accept the concept of fictitious persons created by decree, contract or testament, i.e., legal subjects who are virtual but not living people, and although this principle cannot be found directly in Qur'an or Sunnah, still it is the firm result of a development in Islamic jurisprudence and therefore, the petitioners can neither pay zakat on behalf of their account holders nor they can claim exemption under section 29(1)(XXVII) of the Income Tax Ordinance.....and since the petitioners are under no obligation to pay any zakat as juridical persons they are also not authorised to pay zakat on behalf of their account holders and therefore, they are not entitled to any exemption of taxes from their income within the meaning of section 29(1)(XXVII) of the Income Tax Ordinance, 1984.

.....(61 & 62)

Judgment

Md. Ruhul Amin CJ: These 3 (three) petitions have been filed seeking review of the judgment dated September 3, 2007 passed in Civil Petition for Leave to Appeal Nos. 823, 824 and 828 of 2005 dismissing the said civil petitions for leave to appeal.

2. The civil petitions were filed against the common judgment of the High Court Division dated April 27, 2004 passed in Income Tax Reference Application Nos. 31 of 2000, 32 of 2000 and 24 of 1997 answering the question in the first two reference cases in the affirmative and in the last mentioned reference case in the negative and thereby upholding the order of the Taxes Appellate Tribunal dated February 14, 2000 and September 4, 1995 affirming the order of the Appellate Joint Commissioner of Taxes dated October 29, 1998 and January 26, 1994 and the assessment order of the Deputy Commissioner of Taxes for the year ending on December 31, 1996 (assessment year 1996-1997), (1997-1998) and for the year ending on December 31, 1990 (assessment year 1991-1992).

3. The facts of the Reference cases need not be re-stated in disposing of the review petitions since narration of the facts made in the judgment sought to be appealed and sought to be reviewed was quite elaborate and no exception has been taken by the petitioner as to narration of the facts in the judgments.

4. The question of law that was made the subject matter of Reference cases is, whether the expenditure on the head 'Zakat' is covered by the provisions of section 29(1)(XXVII) of the Income Tax Ordinance, 1984. It was contended on behalf of the petitioner herein that the payment of 'Zakat' by it is covered by the provision of section 29(1)(XXVII) of the Income Tax Ordinance, 1984 (the Ordinance), but the said contention was not accepted by the High Court Division and the Revenue as well as the Tribunal and other appellate bodies.

5. The High Court Division rejected the contention of the petitioner herein holding that the 'Zakat' paid by it does not come within the purview of the provision of section 29(1)(XXVII) of the Ordinance and thereupon answered the questions of law formulating whereof the references were filed in the manner as stated here-inabove.

6. As against the judgment and order of the High Court Division the petitioner herein filed the aforementioned Petitions for Leave to Appeal.

7. It was submitted on behalf of the petitioner in the Petitions for Leave to Appeal that "the High Court Division acted illegally by drawing non-existent distinctions between natural and juridical person in relation to payment of 'Zakat' although no such distinction existed in the Income Tax Ordinance, 1984 or any other law and when, in fact, the only consideration for exemption of payment of income tax under section 29(1)(xxvii) of the said Ordinance was whether the payment of 'Zakat' was in the nature of a business expenditure expended wholly and exclusively for the purpose of the business of the petitioner; that the Income Tax Ordinance, 1984 being a secular law was only concerned as to whether the payment of Zakat was wholly and exclusively for the purpose of business of the petitioner and not with the religious and moral aspects and consequences of 'Zakat'; that according to the principles of Islamic Shariah and the Memorandum and Articles of Association, the petitioner, being the custodian of the fund is liable to pay 'Zakat' for the same, thus 'Zakat' expended wholly and exclusively for the purpose of conducting its business is in the nature of allowable expenditure, that the payment of 'Zakat' by the petitioner attracts a significant number of depositors who invest their money with the belief and object that a portion of the profit of the bank will be contributed for the payment of 'Zakat' and therefore, such object has ultimately resulted in a profit-making mechanism of the applicant and thus the expenditure in connection with 'Zakat' is definitely a deductible expense within the meaning of section 29(1) (XXVII) of the said Ordinance; that the expenditure incurred in the form of 'Zakat' by the applicant has a direct nexus to its carrying on the business as part of its commercial expediency generating income/profit/revenue, and, as such,, the said expenditure falls under section 29(1)(XXVII) of the Ordinance".



8. This Division dismissed the said Petitions for Leave to Appeal upon observing "we are of the view that 'Zakat' as a concept and a pillar of Islam is not applicable to a juristic person like the Bank".
9. The learned Counsel for the petitioner, in support of the prayer for review has submitted that this Division disposed of the Civil Petitions for Leave to Appeal on theological point of view and that the provision of section 29(1) (XXVII) of the Ordinance was not considered from the point of the concept that the business by corporate body, to which artificial personality is attributed or, in other words, in the eye of law is being considered as a person and in that capacity having had paid the 'Zakat' as against the money deposited by the account holders this Court was required to consider this aspect of the matter to hold that the expenditure so made was solely for the purpose of business. It has also been submitted by the learned Counsel that the institution of 'Zakat' and that the payment of 'Zakat' is the concept of a time when there was no concept of running business by the corporate body with the object of earning profit for itself and also for the benefit of the person who this way or that way associates with the business of the corporate body and in the modern concept the corporate body, being a person in the eye of law and that payment in question i.e. 'Zakat', as was made in respect of the deposits of the depositors, the payment so made ought to have been considered by this Division as the expenditure incurred in connection with the business of the petitioner and that expenditure so incurred is covered by the provision of section 29(1)(XXVII) of the Ordinance. The learned Counsel also submitted that this Division was in error by drawing non-existent distinction between natural and juridical person as regard the payment of 'Zakat/ although no such distinction exists in the provision in question of the Ordinance or in any other provision of the Ordinance or any other law and that the moot question as to which a decision was sought for in the References was that "whether the payment of Zakat was in the nature of a business expenditure expended wholly and exclusively for the purpose of the business of the petitioner".
10. It was also submitted by the learned Counsel that this Division was in error in holding that the matter of payment of 'Zakat' was not obligatory for a juristic person although under section 29(1)(XXVII) of the Ordinance, "the obligatory or non-obligatory nature of 'Zakat' was not of any relevance" as the sole question was whether payment made by the petitioner on account of 'Zakat' "was in the nature of the business expenditure expended wholly and exclusively for the purpose of the business of the petitioner." It was also submitted that this Court was in error "by making a theological finding as to whether 'Zakat' was payable by a juridical person or not when such question was not an issue" in reference. Lastly, it was submitted that this Court was in error in not holding "the expenditure incurred in the form of payment of 'Zakat' by the petitioner has a direct nexus to its business and further as a part of its commercial expediency generates income/profit/revenue, and, as such, the said expenditure falls under section 29(1) (XXVII) of the Ordinance".
11. It may be mentioned that the contentions raised in the petitions seeking review were also the contentions at the time of hearing of the petitions for leave to appeal as is evident from the submissions made at the time of hearing of the Petitions for Leave to Appeal and as stated hereinbefore. At the time of hearing of the petitions for Leave to Appeal it was contended that the High Court Division acted illegally by drawing non-existent distinctions between natural and juridical person in relation to payment of 'Zakat' although no such distinction existed in the Income Tax Ordinance, 1984 or any other law and that there should have been only consideration for exemption of payment of income tax under section 29(1) (XXVII) of the Ordinance whether the payment of 'Zakat' was in the nature of a business expenditure expended wholly and exclusively for the purpose of business of the petitioner and that the Income Tax law, being a secular law was only concerned as to whether the payment of 'Zakat' was wholly and exclusively for the purpose of business of the petitioner and that there was absence of religious and moral aspects of nonpayment of 'Zakat' and consequences of non-payment of 'Zakat', that the petitioner being the custodian of the fund of the account holders, who pay 'Zakat', is under obligation to pay the same in the light of the principles of Islamic Shariah and the Memorandum and Articles of Association of the Bank and, as such, amount expended on account of 'Zakat' wholly and exclusively for the purpose of conducting its business is in the nature of allowable expenditure. It was also the contention of the petitioner for Leave to Appeal that payment of 'Zakat' by the petitioner attracts a significant number of persons who invest their money with the belief and object that a portion of the profit of the Bank will be contributed for the payment of 'Zakat' and therefore, such object has ultimately resulted in a profit mechanism of the applicant and thus the expenditure incurred in connection with payment of 'Zakat' is definitely a deductible expense within the meaning of section 29(1)(XXVII) of the Ordinance and that the expenditure incurred in the form of 'Zakat' by the applicant has a direct nexus to its carrying on the business as part of its commercial expediency in generating income/profit/ revenue, and, as such, the said expenditure falls under section 29(1)(XXVII) of the Ordinance.
12. So it is apparent that the grounds raised in the petitions filed seeking review were in fact the contentions made at the time of hearing of the leave petitions and this Division having had already considered the grounds raising which petitions for Leave to Appeal were filed and that there being no error apparent on the face of the judgment, sought to be reviewed, in considering the contentions making which petitions for leave to appeal were filed, the grounds raised in the review petitions being common to the contentions have already been considered while dismissing the leave petitions, the review petitions are not competent in that the review petitions have been filed with the object of re-hearing of the Petitions for Leave to Appeal.
13. I am of the view that the petitions for review, in the afore state of the matter merit no consideration.
14. The other contention that this Division dismissed the Petitions for Leave to Appeal, on theological point of view is also of no merit since the grounds which is raising the Petitions for Leave to Appeal were filed, show that the contention of the petitioner in the review petitions that expenditure incurred by them was wholly and exclusively for the purpose of their business and, as such, is covered by the provision of section 29(1)(XXVII) of the Ordinance was considered while the Petitions for Leave to Appeal were heard and this Court held that payment of 'Zakat' on behalf of the account holders or depositors is not covered by the provision of section 29(1)(XXVII) of the Ordinance.
15. I am of the view the contention of the petitioner, that it has paid 'Zakat' for the depositors or account holders as their custodian of deposits is of no merit, since payment of 'Zakat' by the account holders or depositors was individual or personal matter of the depositors and that even if the petitioner has paid any money as 'Zakat' for the account holders that would certainly be adjusted on the account of the account holders and by no stretch of imagination can be considered as payment by the Bank, the petitioner, or that the amount so paid out of the profit of the Bank and not adjusted against the account of the depositors the amount so paid as 'Zakat' for the depositors cannot be considered business expenditure of the Bank since the Bank, as juristic person was not under obligation, to pay 'Zakat' for itself or for any person who has obligation to pay 'Zakat'. It has been contended because of payment of 'Zakat' on behalf of the depositors/account holders that the business of



the Bank flourished or expanded and, as such, payment made is very much covered by the Provision of section 29(1)(XXVII) of the Ordinance is also of no substance since there is nothing on record to show that the payment said to have been made on account of 'Zakat' if would not have been made, then the business of the petitioner would not have flourished.

16. I am of the view that the payment as claimed by the petitioner on the head of 'Zakat' on behalf of the depositors or account holders for flourishing of the business has no nexus to carry on his business and, as such, the exemption claimed in respect of the amount said to have been paid on the head 'Zakat' does in no way come within the provision of section 29(1) (XXVII) of the Ordinance.

17. In that view of the matter, this Division, while dismissing the Petitions for Leave to Appeal filed against the judgment and order of the High Court Division, was of the view the High Court Division was not in error in rejecting the contention of the petitioner, that amount as expended on account on the head of 'Zakat' was for the purpose of business and that is covered by the provision of section 29(1) (XXVII) of the Ordinance.

18. In the background of the submission of the learned Counsel for the petitioner in the review petitions, it will suffice to say that time is not ripe enough to think or consider that according to Islamic injunction payment of 'Zakat' which is personal obligation of a rich person, in whom life has been infused into, of the Muslim Community of the Society at a specified rate in respect of the surplus wealth at the end of the year can also be considered in the representative concept or as in the instant case payment made, and termed as 'Zakat', by a corporate body, which has been designated as 'person', though no life has been infused into, by the worldly law/man-made law, for and on behalf of its account holders/depositors as well as in respect of the persons associated with the corporate body in the matter of running or management of its business as 'Zakat' in the present concept of institution of 'Zakat', and in the background of consensus view relating to payment of 'Zakat' by a person in whom life has been infused. My view is that such payment, termed as 'Zakat', by the corporate body, on behalf of its depositors/customers, cannot be considered to have been made towards 'Zakat' which said to have led to flourishing of its business and for that cannot be considered covered by the provision of section 29(1) (XXVII) of the Ordinance.

19. "Ijmaa" and "Qiyas" on the Muslim Law as well as regarding the different Islamic institutions, including institution of 'Zakat', has not reached to a stage of the present advanced thought on Muslim law and institutions or that flow of time is not towards a direction where from it can be reasonably thought, considered/perceived/inferred that payment, by a corporate body, as claimed in the instant case, as 'Zakat' for its depositors/account holders/ customers and others associated with the management of the business of the Corporate body, is to be considered as payment of 'Zakat' by an individual or, in other words, by the depositors/account holders or others associated with the business of the corporate body. My view is that such payment by the corporate body is in way payment of 'Zakat' by its depositors/account holders or person associated with the business of the corporate body or with management or in carrying on the business of the corporate body and has no nexus to the business of the corporate body, herein the petitioner, as such, does not come within the provision of section 29(1) (XXVII) of the Ordinance.

20. On consideration of the facts and circumstances of the case as well as the discussions made hereinbefore and because of the provision of law, I am of the view that reasonings assigning which this Division dismissed the leave petitions were quite correct and that there was no error in any respect in the judgment of this Division in dismissing the leave petitions and, in that state of the matter, the judgment sought to be reviewed calls for no review.

21. As the review petitions have no merit, the same are dismissed.

MM Ruhul Amin J: I have gone through the judgment proposed to be delivered by the learned Chief Justice. While agreeing with the learned Chief Justice I like to add a few words of my own. As the facts of the case were narrated in detail in the main judgment, I do not like to restate the same.

23. The pertinent point for consideration in this case is whether the expenditure on the head of 'Zakat' is covered by the Provisions of section 29(1) of the Income Tax Ordinance, 1984 and whether the petitioner, a Bank Company is entitled to get rebate on this count i.e., in respect of payment of 'Zakat'.

24. 'Zakat' in order to become obligatory, the following eight essential conditions are required to be fulfilled. Of these eight conditions, the first four conditions are in respect of the person on whom Zakat is obligatory and the remaining four conditions are in respect of the wealth on which Zakat is obligatory:

1. The person concerned must be a Muslim i.e. he must have complete and absolute faith in the oneness of Allah, the Almighty and his Prophet Hazrat Muhammad (Peace be upon him).
2. He must be an adult person, not being a minor, (In case of a minor if he has wealth up to 'Nisab' his guardian would pay the Zakat.)
3. He must be a freeman not being a slave,
4. He must be a person of sound mind not being a lunatic. (In case of a lunatic if he has wealth upto 'Nisab' his guardian would pay the Zakat.)
5. The wealth must be upto 'Nisab' and the person upon whom Zakat is obligatory must not be indebted to the 'Nisab' amount of wealth.
6. He must have complete ownership over the wealth, and
7. The wealth must remain with the person concerned for one complete year,
8. The wealth must be 'Sayema'



that is the wealth increases in value.

25. In this connection it is to be noted that Zakat is one of the five basic Pillars of Islam and these are binding and obligatory on the persons who are Muslims having absolute faith in the oneness of Allah, the Almighty and his Prophet Hazrat Muhammad (Peace be upon him).

26. The petitioner, a bank-company being a non-human being, the above eight conditions are not applicable to it.

27. A company is a 'person' by legal fiction but, in fact, it is not. A company being a non-human is always represented by its directors.

28. A bank is a dealer of other people's money. It has no ownership over the money/wealth kept in deposit by members of the public or in the share capital of the bank contributed by the share-holders/directors of the company.

29. Therefore, the basic and essential conditions on which Zakat becomes obligatory are not at all applicable to the petitioner, and, as such, the petitioner bank is not required to pay Zakat and hence not entitled to get exemption under section 29(1) of the Income Tax Ordinance, 1984 on account of payment of Zakat.

30. The review petitions are accordingly, liable to be dismissed.

Md. Abdul Matin J: I have had the privilege of going through the judgment delivered by learned Chief Justice. I am in respectful agreement with the finding of the learned Chief Justice that no case has been made out for reviewing the judgment of this Court dated 3-9-2007 in Civil Petition for Leave to Appeal Nos. 823, 824 and 828 of 2005 dismissing the civil petition for leave to appeal. But I wish to express my views on the question as under.

32. The pivotal question in this case is, whether the payment of Zakat by the petitioner, a bank, a juridical person, is in the nature of business expenditure expended wholly or exclusively for the purpose of the business of the petitioner and can be considered as an expenditure for which exemption of payment of income tax can be claimed under section 29(1) (XXVII) of the Income Tax Ordinance, 1984.

33. The contention of the petitioners is that there is no existing distinctions between natural and juridical person in relation to payment of Zakat and therefore the payment made as Zakat should have been exempted under section 29(1)(XXVII) of the said Ordinance.

34. In order to appreciate the contention raised, it is apposite to quote section 29(1) (XXVII) which runs as under:

29. Deductions from income from business or profession. (1) In computing the income under the head "Income from business or profession", the following allowances and deductions shall be allowed, namely:

(xxvii) any expenditure, not being in the nature of capital expenditure or personal expenses of the asses-see, "paid" out or expended wholly and exclusively for the purpose of the business or profession of the assessee."

35. The petitioner's claim is that the payment of Zakat is on behalf of the account holders and, as such, payment should have been deducted as being expended wholly or exclusively for the purpose of the business or profession of the bank as assessee.

36. Therefore, the precise questions are (a) what is Zakat? (b) Is the petitioner, a bank, under obligation to pay Zakat, (c) payment made by way of Zakat by the petitioner if can be considered a payment for the purpose of the business or profession so as to be deducted from the income under section 29(1)(XXVII) of the Income Tax Ordinance?

37. The word Zakat means growth or purification and sadaqa which is derived from the root sidq, means truth and signifies a charitable deed. But all sadaqas are not Zakat. The sadaqa which is obligatory is only Zakat. The word Zakat is derived from Zakat, which means it (a plant) grew. The other derivatives of this word, as used in the Holy Qur'an, carry the sense of purification from sins. The word Zakat is also used in the sense of purity from sin. According to Raghīb, Zakat is wealth which is taken from the rich and given to the poor, being so called because it makes wealth grow, or because the giving away of wealth is a source of purification.

38. The two commandments, to keep up prayer and to give Zakat, often go together, and this combination of the two is met within the earliest chapters of the Holy Qur'an, as well as in those which were revealed towards the end of the Holy Prophet's life. In the Quran at least in 27 passages salat has been mentioned in close connection with Zakat. For example in the Holy Quran Allah Almighty mandates:

"So establish regular prayer, give Zakat and hold fast to Allah. He is your Protector — The best to protect and the best to help. (Al-Hajj 22:78)"

39. In other places (the word Zakat though not used) sadaqa has been used to mean Zakat, for example Allah says:

"Alms are for the poor and the needy, and those employed to administer the (funds): For those whose hearts have been (recently) reconciled (To Truth); for those in bondage and in debt; in the cause of Allah; and for the wayfarer:(Thus is it) ordained by Allah. And Allah is full of knowledge and wisdom."

40. We have taken the translation from the revised and edited English translation of the Holy Qur'an by Alamo Abdullah You Ali, published by King Fahd Holy Qur'an Printing Complex, Medina in 1940 Hire. The original translation (first edition in 1934) was revised and edited by the Presidency of Islamic Researchers, IFTA, Call and Guidance and it is stated in the preface that as many as four successive committees have checked up the revised and edited translation both in respect of adopting the most accurate expression and in updating the notes.



41. In Note No.1318 of the said translation and commentary, the word Sadaqa has been explained as under:

"1318. Sadaqa = alms, that which is given in Allah's name, mainly to the poor and needy, and for the cognate purposes specified in the next verse but one: Zakat is the regular and obligatory charity in an organised Muslim community, usually 2½ per cent, of merchandise and 10 per cent, on the fruits of the earth. There is a vast body of literature on this subject. The main points may be studied in the *Hidaya til furu*, of Shaikh Burhanud-din 'Ali. As against Zakat the term sadaqa has a much wider connotation, and is inclusive of Zakat as in the verse 60 of this Sura."

42. Maulana Muhammad Ali in his book, "Religion of Islam" while writing about the problem of distribution of wealth with reference to Zakat wrote:

"One of the greatest problems facing humanity is undoubtedly the problem of the distribution of wealth, with which is also bound up the question of political power. The system of Capitalism which is the foundation-stone, so to say, of the materialistic civilisation of modern Europe, has led to the concentration of wealth in fewer and fewer hands and to the growing impoverishment of the masses. Political power has followed in the wake of wealth and at the bidding of the capitalist, the politician has to declare peace and war. The insatiable thirst for wealth on the part of the capitalists, who are the real controllers of political power, has reduced many nations of the world to a state of slavery, and regular plunder has been legalised under different high-sounding phrases such as colonization, occupation, mandate, sphere of influence, and so on. The Great Powers are only great capitalists on a national scale. They can afford to reduce other nations to the beggary to which the masses in their own countries are reduced."

43. The author termed Bolshevism as a reaction to Capitalism and went on to write:

"To Islam is due the credit of not only solving the wealth problem but, at the same time, developing the higher sentiments and building up character, on which alone can be laid the foundations of a lasting civilisation for the human race. Islam accomplishes both objects by its state institution of charity, which goes under the name of Zakat or poor-rate. Every possessor of wealth in the Islamic commonwealth is required to contribute annually one-fortieth of his wealth to a common fund, which is managed by the state, or by the Muslim community where there is no Muslim state, and this fund is utilised by the state or community for the amelioration of the condition of the poor. Zakat, therefore, acts not only as a levelling influence, but also as a means of developing the higher sentiments of man, the sentiments of love and sympathy towards his fellow-man; while the rigid system of state-ownership and equality of distribution helps to kill man's higher instincts. By this means, too, wealth is made to circulate in the body-politic of Islam, just as blood circulates in a living organism, a fixed portion of the wealth of the richer members being drawn to the centre, whence it is sent forth to those parts of the body-politic which need it most. The institution of Zakat thus becomes not only a levelling influence but also means for the upliftment of the nation as a whole."

44. According to the author, "Zakat is not simply obligatory charity. It is a state institution or where there is no Muslim state, a national institution. The individual is not at liberty to collect and spend his Zakat as he likes. It must be collected by the state or on a national basis, and spent by the state or community."

45. In the commentary of Quran referred to above Allama Yusuf Ali while explaining the heads of expenditure of zakat in note 1320 explained as under:

"1320. Alms or charitable gifts are to be given to the poor and the needy and those who are employed in their service. That is, charitable, funds are not to be diverted to other uses, but the genuine expenses of administering charity are properly chargeable to such funds. Who are the needy? Besides the ordinary indigent, there are certain classes of people whose need are great and should be relieved. Those mentioned here are: (1) men who have been weaned from hostility to Truth, who would probably be persecuted by their former associates, and require assistance until they establish new connections in their new environment: (2) those in bondage, literally and figuratively: captives of war must be redeemed: slaves should be helped to freedom; those in the bondage of ignorance or superstition or an unfavorable environment should be helped to freedom to develop their own gifts: (3) those who are held in the grip of debt should be helped to economic freedom: (4) those who are struggling and striving in Allah's cause by teaching or fighting or in duties assigned to them by the Islamic State, who are thus unable to earn their ordinary living: and (5) strangers stranded on the way. All these have a claim to charity. They should be relieved by individual or organised effort, but in a responsible way. In this verse, the word sadaqat refers to obligatory charity (Zakat)."

46. Zakat is an annual charge on property which remained in the possession of a person for a whole year, when its value reached a certain limit, called the nisab. Nisab differed with different kinds of property, the most important being 200 dirhams or 52½ tolas (nearly 21 oz.) in the case of silver, and twenty mithqals or 7½ tolas (nearly 3 oz.) in the case of gold. The nisab of cash was the same as that of silver or gold, according as the cash was held in silver or gold. In the case of merchandise of all kinds, the value was calculated on the basis of, and the nisab was judged by, the silver standard. In the case of ornaments, the nisab was that of silver if the ornaments were made of silver and that of gold if they were made of gold.

47. The author of the Religion of Islam as mentioned above while writing about how the Zakat should be spent refers to verse (9:60) quoted above and writes as under:

"The eight heads of expenditure spoken of here may be divided into three classes. The first relates to those who stand in need of help, including the poor, the needy, those hearts are made to incline to truth, captives, debtors and the wayfarer. Secondly, there are the officials appointed for collection and disbursement of the fund. And thirdly, a part of the Zakat is required to be spent in the way of Allah.

It will be seen that six kinds of people fall under the first head. The first are fuara', pl. of faqir, derived from faqir which means the breaking of the vertebrae of the back, and faqir therefore, means literally a man who has the vertebrae of his back broken or one afflicted by a calamity (LL). Apparently, it refers to disabled people who, on account of some defect, are unable to earn their living. The second are masakin, pl. of miskin, which is derived from sakana meaning it became still or motionless. Mis-kin therefore, signifies one caused by poverty to have little power of motion (LL.). There exists a good deal of difference as to the



real distinction between the two words *faqir* and *miskin*; but, keeping the literal significance in view, the real distinction appears to be that *faqir* is one who is disabled from earning on account of some physical disability, while *miskin* is one who, though fit to earn sufficient, is unable to do so on account of poverty or lack of resources. The *miskin* is the needy man who if given a little help can earn livelihood for himself. The unemployed would fall in this category.

These are the two chief classes for whose benefit the institution of *zakat* is maintained, and hence they are separated from others by a mention of the establishment. The other groups falling in this class are also of persons who stand in need of help for some sufficient reason. There are *al-mu'allafatiqu-lubu-hum*, those whose hearts are made to incline to truth, that is, people who are in search of truth but unable to find means to have access to it on account of poverty. In this category would also fall new converts to Islam, who are deprived of the means of their subsistence because of their conversion. Then there are the captives, or those who have been deprived of their liberty, and are unable to regain it by their own exertion. The freeing of slaves falls in this category. Then there are the debtors who are unable to pay their own debts, and, lastly, there are the travelers who are stranded in a foreign country or in a distant place, and are unable to reach their homes.

There are two other heads of expenditure of *zakat*, the first of which is the maintenance of an establishment and office for the collection of *zakat*. This shows that *zakat* was meant to be collected at some central place, and then distributed, and the maintenance of people who did this work was a charge under this head. The Holy Qur'an, therefore, does not allow the giving away or spending of *zakat* according to the individual's choice. The collection of *zakat*, in spite of the remuneration paid for it, is regarded as an act of merit, and according to one hadith, the collector of *zakat* is equal in merit to one who takes part in *jihad* or in a war to defend religion (AD.19:6; Tr.5:18)

The establishment charge being a corollary of the nationalisation of the institution of *zakat*, the only item of expenditure besides the help of those in need, for one reason or another, is, what is called, *fi sabili-llah*," or in the way of Allah, which is accepted generally as meaning warriors defending the faith (IJ-C.X,p.100). While such warriors are undoubtedly the most important national head of a community, it is equally true that they are an exception and not the rule, and hence the significance of the words *fi sabili-llah* cannot be limited to them. But there is another paramount need of the Muslim community which is called *jihad kabir*, or the great *jihad*, in the Holy Qur'an: "And if We had pleased, We would have raised a warner in every town. So do not follow the unbelievers, and strive against them a mighty striving (*jihad-an kabir-an*) with it" (25:51-52). The personal pronoun it, as the context clearly shows, refers to the Holy Qur'an and therefore, striving with the Holy Qur'an, or taking the message of the Holy Qur'an to distant corners of the world, is the greatest *jihad* of Islam. And the item of expenditure *fi sabili-llah* therefore, refers to both these paramount needs of national existence, that is, wars to defend religion and the propagation of Islam, the latter being the greatest need of this age. Hence it will be seen that the institution of *zakat*, while chiefly aiming at the amelioration of the condition of the poor, and redressing the wrongs inflicted by capitalism, has also in view the defense and advancement of the Muslim community as a whole."

48. Dr Muhammad Hamidullah in his book, "The Emergence of Islam" wrote about the current concept of *Zakat* in the following words:

"A question now arises: when did we develop the current concept of 'Zakat? We seem to believe that *zakat* means payment of two and a half per cent of our savings towards the end of the year to the poor individually rather than that it means the payment made to the State. During the days of the Prophet (peace be upon him) it was the state which collected *zakat*. The battle with the apostates during Abu Bakr's regime was fought on this issue for the people did not want to pay *zakat* to the government. Abu Bakr compelled them by force to do so.

How, then, did the practice change later? History traces it to the regime of Caliph 'Uthman. By 27 All Muslim armies had reached Europe-Andalusia and France on the one hand, and were knocking at the gates of China on the other. Within only fifteen years of the Prophet's demise, the Islamic state had spread to three continents —Europe, Africa and Asia. The overwhelming majority of the population was non-Muslim. The number of Muslims was small. We reckon that the Muslim population was no more than one per hundred square miles. A sudden conversion of the mass of population cannot be expected. Under the circumstances a very elaborate and expensive administration would be required to collect *zakat* from the three continents. The expenditure would have considerably exceeded the income. 'Uthman's finance minister must have suggested to him, therefore, that it should be left to Muslims to directly disburse *Zakat* which they knew was their religious obligation. They should be asked to distribute it on their own in accordance with the injunctions of the Qur'an. Had the government wanted to keep control over it the expenditure would have been forbidding and no sensible finance minister would have accepted it.

Perhaps it was under these circumstances that it was decided during 'Uthman's regime that the government would continue to collect *zakat* on agriculture, mining, etc., but would leave cash, gold and silver to the individual discretion of Muslim citizens who should distribute the sum in accordance with the Qur'anic injunction. The result was that we gradually forgot the meaning of *zakat* as it was understood during the days of the Prophet (peace be upon him) and his two successors. We began to look upon it as merely a charity which had to be given, once a year, on one's savings to the poor, even though the categories covered by the Qur'an are not confined only to the poor."

49. Some jurists termed *zakat* as a tax which is not correct. Dr Ahmad A Galwash in his book, "A Handbook of Muslim Belief" explained the eight heads of expenditure of *zakat* as under:

- i. The poor.
- ii. The needy.
- iii. Those in debt.
- iv. Ransoming of captives (prisoners of war).
- v. The wayfarer.



vi. The officials appointed in connection with the collection of zakat.

vii. Those whose hearts are to be harmonised by material support.

viii. The way of God.

50. The author added:

1. The poor are those who are unable physically or otherwise to earn their living.

2. The needy are those who may be able to earn their livelihood but lack the means, such as implements, etc., to do so.

3. By those in debt are meant persons who may be able to support themselves, but if they are in debt, their debts may be paid off from the zakat fund.

4. The captives are those who are taken prisoners in war. A portion of the zakat must go for their release.

5. The wayfarer is a traveller who, though in well-to-do circumstances, stands in need of help in a strange place or country; hence a part of the Zakat income must be spent on such a person.

6. The officials who collect Zakat are members of the staff appointed officially to manage its collection as well as the management of its expenditure; hence their wages are also to be paid out of the Zakat fund.

7. The last two heads mentioned in the Quran, namely, those whose hearts are to be harmonised in the way of God, refer to the propagation of the Faith. With respect to the preaching of a religion, there is always a class of people who are ready to listen and ready to embrace Islam when they are preached to. But who, in the meantime, have to forgo material advantages which it is very difficult for them to relinquish. These persons are spoken in the Quran as those whose hearts are to be harmonised or united by giving them such a portion of the zakat fund as will reassure them. By the way of God is meant the advancement of the cause of Islam or the defense thereof. Under this head, therefore, zakat may be spent for the propagation of the religion of Islam and to meet the objections advanced against it."

51. The author categorically said that Zakat is not a Tax in the following words:

"As already mentioned in the foregoing chapter, the scope of Zakat is clearly set forth in the Holy Quran, and therefore, must not be confounded with other forms of compulsory taxes imposed by the State on its Muslim and non-Muslim citizens alike.

In the first place, Zakat is not a tax imposed by the State. Nor is zakat a tax destined to the State as such. The very nature of the institution of zakat requires that the part which the State is to play in the function thereof is merely one of "supervision" and not of full control, as is the case where government taxes are concerned.

The difference between supervision and full control is that the latter would imply the right to increase or modify the tax, to extend or limit its scope, to suspend the imposition thereof, or even to abrogate it altogether, whereas, in its role of supervision, the State has the right only to enforce observance of the Divine Law as directed by the precepts of the Quran and the instructions of the Prophet."

52. According to Dr. Hammudah Abdalati, the author of "Islam In Focus" Zakat is a vivid manifestation of the spiritual and humanitarian spirit of responsive interactions between the individual and society. It is a sound illustration of the fact that though Islam does not hinder private enterprise or condemn private possessions, yet it does not tolerate selfish and greedy capitalism. It is an expression of the general philosophy of Islam which adopts a moderate and middle but positive and effective course between the Individual and the Society, between the Citizen and the State, between Capitalism and Socialism between Materialism and Spirituality.

53. Now the question is, whether zakat is obligatory on the bank, a juridical person?

Moulana Mohammad Abdur Rahim has left behind the translation of "Fiqhuz-Zakat" written by Allama Yusuf Al-Karjavi in Arabic in two volumes titled Islamar Zakat Bidhan—a monumental work. Explaining zakat the author wrote:

"ইসলামের বিশেষজ্ঞগণ এ ব্যাপারে সম্পূর্ণ একমত যে যাকাত কেবল মাত্র স্বাধীন, বয়স্ক মুসলমানদের উপর ধার্য কর, যার সুনর্দিষ্ট নবীর পরামর্শ সম্পদের মাপকাঠি রাখা হয়েছে।

অমুসলিমদের উপর যাকাত ফরয নয় বলে তখন যাকাত দেওঁটাও একটি ইবাদত হিসেবে সহীহ কাজ হতপারে না। কেবল ইবাদত কবুল হওয়ার প্রথম শর্ত ঈমান ও ইসলামই এখনে অনুপস্থিত।"

While explaining the State duty towards zakat Allama Yusuf Al-Karjavi held:

"যাকাত একটা প্রমাণিত ও সুনর্দিষ্ট অধিকার বিশেষ-তা আল্লাহ কর্তৃক ফরয করা হয়েছে। কিন্তু মূলত তা এমন অধিকারে জমিসি নয় যাব্যক্তদের উপর ছেড়ে দেয়া হয়েছে বলে মনে করলেও অতঃপর যাকে আল্লাহর সন্তুষ্টিও পরকালীন মুক্তাচিহ্ন, সে তা দায়েও অল্প পরকালে প্রতি প্রত্যয় দুর্বল, আল্লাহর ভয়ে মাত্রাক্ষী-অন্তর আল্লাহর মহব্বতের জুলনায় ধন-মানে মহব্বত প্রবল, সেতাদায়েসে। এরূপ মনোেকরার্থিক নয়।

না যাকাত করে ব্যক্তিগত অসুস্থ হবা দয়ার ব্যাপার নয়। তা একটা সামষ্টিক সংগঠনের সায়ে গভীরভারে স্ফলিষ্ট। রাষ্ট্র-সরকারই এই সংগঠন ও তৎস্ফলিষ্ট ব্যাপারাদি আয়তম দেয়ের জন্য দায়িত্বশীল। তা একটা সুগঠিত প্রাচীণ ঐতিহাসিক পদ্ধতিপোষনীয়। সরকারই এ অনন্য দায়িত্ব পালনে জন্য একমত ভারদেয়ী। যার উপর যাকাত ফরয তার কাছ থেকে সরকারই তা আদায় ও সংগ্রহ করবে এবং এভাবে তা প্রাপ্য, তাদের মধ্যে তাসুষ্ঠু বন্টনের দায়িত্বও সরকারের উপর অর্পিত।"

54. On scrutiny of the above mentioned opinion of the jurists and scholars in Islam, it is manifestly clear that Zakat is one of



the five pillars of Islam and a mandatory and obligatory duty of the persons having wealth to the extent of nisab held in possession for a lunar year. It is not a charity to the poor rather it is a right of the poor in the wealth of the rich. Zakat is an institution and is to be collected by the State from those Muslims who are liable to pay and distribute the same amongst the poor who are entitled to receive it as per the mandate of Quran. The individual collection is not approved; payment individually is also not approved as is being done today with a show or demonstration of wealth causing death to the recipients who rush to receive it in hundreds and thousands. It is a state institution and state responsibility.

55. It is clear, therefore, that there is no obligation on the part of a juridical person to pay zakat. For a juridical person the question of faith in Allah Almighty does not arise and therefore, it cannot perform any ibadat in the form of salat and zakat and therefore, the petitioners are not authorised to collect or disburse zakat and claim exemption under section 29(1) (XXVII) of the Ordinance. In view of the preamble of our Constitution pledging that the high ideals of absolute trust and faith in the Almighty Allah.....socialism meaning economic and social justice—shall be the fundamental principle of the Constitution and in view of Article 8(1) providing the principles of absolute trust and faith in the Almighty Allah and socialism meaning economic and social justice and further providing that absolute trust and faith in Almighty Allah shall be the basis of all actions, it is the duty of the State to make zakat an institution and take up the responsibility of

its collection and disbursement in accordance with the mandate of Islam.

56. Eradication of poverty for ameliorating the sufferings of the poor people has been our state policy without any tangible success. This challenge cannot be solved by following the economic thought of Adam Smith, David Ricardo, Thomas Malthus, Karl Marx, John Maynard Keynes or Paul A Samuelson whose prescriptions have been proved to be economic errors and therefore, Islamic zakat system may be reintroduced to combat this national menace.

57. On the question if a juridical person can be recognised as a person liable to pay zakat we could not decipher any provision either in Quran or Sunnah or in the Ijma of the jurists.

58. According to a Hadith reported in Abu Dawood and also in Tirmizy, the Holy Prophet permitted the use of Qiyas in deciding cases. It is reported that when the Apostle of God sent Mu'az Bin Jabal to Yemen he asked him as to how he would decide cases brought before him. Mu'az replied:

"I will judge by the Qur'an."

The Prophet said, "if you do not find any solution in the Book of God."

Mu'az replied, "then I will decide in accordance with the Traditions of the Holy Prophet."

The Prophet said, "and if thou do not find anything in the Traditions."

Mu'az replied, "then I will decide according to my own judgment and will not slacken effort."

Thereupon the Prophet said: "Praise be to God who has caused the Messenger of the Apostle of God to agree with what the Apostle of God likes."

59. After the Holy Prophet, the Khulafa-e-Rashidin also followed the same lofty principles of administration of justice. During the Khilafat of Hazrat Abu Bakr, Hazrat Umar was appointed the Qazi but the people were so contented and honest that according to the author of Seerat-us-Siddique (M Habib-ur-Rahman Khan) not a single case was filed in the Court of Umar. In this period, however, the use of the Ijma and Ijtihad were introduced.

60. Following this Hadith we can safely hold that since there is nothing in the Quran and Sunnah or in the Ijma of the jurists on this point we are authorised to give our own judgment on the subject.

61. Therefore, it is our considered view that Islamic law does not accept the concept of fictitious persons created by decree, contract or testament, i.e., legal subjects who are virtual but not living people. Although this principle cannot be found directly in Qur'an or Sunnah, still it is the firm result of a development in Islamic jurisprudence and therefore, the petitioners can neither pay zakat on behalf of their account holders nor they can claim exemption under section 29(1)(XXVII) of the Income Tax Ordinance.

62. Since the petitioners are under no obligation to pay any zakat as juridical persons they are also not authorised to pay zakat on behalf of their account holders and therefore, they are not entitled to any exemption of taxes from their income within the meaning of section 29(1)(XXVII) of the Income Tax Ordinance, 1984.

63. In the result, I will dismiss the review petitions.

Order of the Court

The Review petitions are dismissed.

Ed.