



Islami Bank Bangladesh Limited vs. Commissioner of Taxes, ITCLD (HCD) (2015) [370]

Date of Decision: January 11, 2015

Our Citation: ITCLD (HCD) (2015) [370]

Supreme Court of Bangladesh

High Court Division

(Statutory Original Jurisdiction)

Islami Bank Bangladesh Limited, Head Office-40, Dilkusha C/A, Dhaka-1000.....Applicant in all the cases

-Versus-

The Commissioner of Taxes, Audit Wing, Large Taxpayer's Unit, Dhaka.....Respondent in all the cases

Income Tax Reference Application No. 20 of 2005

(Rule No. 132 (Ref) of 2011)

With

Income Tax Reference Application No. 21 of 2005

(Rule No. 142 (Ref) of 2011)

Income Tax Reference Application No. 22 of 2005

(Rule No. 133 (Ref) of 2011)

Income Tax Reference Application No. 23 of 2005

(Rule No. 144(Ref) of 2011)

Income Tax Reference Application No. 24 of 2005

(Rule No. 141 (Ref) of 2011)

Income Tax Reference Application No. 156 of 2006

(Rule No. 143 (Ref) of 2011)

Hon'ble Judge(s) Present:

Zinat Ara J, Md. Habibul Gani J



Case(s) Cited:

Islami Bank Bangladesh Ltd. vs. Commissioner of Taxes, Companies Circle-19, 14 MLR (AD) 337.

Counsel(s) Appearing:

Rafiq-ul Huq with Ahsanul Karim, Ehsan A. Siddiq—For the applicant

Razik-Al-Jalil, DAG with Mahfuza Begum, AAG, Nurun Nahar, AAG—For the respondent

Questions formulated for determination:

Income Tax Reference Application No. 20 of 2005

(Assessment year 2003-2004)

(a) Whether, in the facts and circumstances of the case, the Taxes Appellate Tribunal was justified in upholding the orders of the Commissioner of Taxes (Appeals) and the Deputy Commissioner of Taxes in disallowing Zakat as an expenditure laid out or expended wholly and exclusively for the purpose of the business or profession of the applicant for the assessment year 2003-2004 as laid down in section 29(1)(XXVII) of the Income Tax Ordinance, 1984?

(b) Whether, in the facts and circumstances of the case, the Taxes Appellate Tribunal was justified in upholding the orders of the Commissioner of Taxes (Appeals) and the Deputy Commissioner of Taxes in treating the applicant's contributions to the approved Provident Fund as perquisites and hence taxable under section 30(e) of the Income Tax Ordinance, 1984?

(c) Whether, in the facts and circumstances of the case, the Taxes Appellate Tribunal was justified in upholding the orders of the Commissioner of Taxes (Appeals) and the Deputy Commissioner of Taxes in holding that the assessment of depreciation allowance on the basis of Fair Value of Assets is not permissible, the same not being a recognized accounting procedure under the Income Tax Ordinance, 1984?

Income Tax Reference Application No. 21 of 2005

(Assessment year 1998-1999)

(a) Whether, in the facts and circumstances of the case, the Taxes Appellate Tribunal was justified in upholding the orders of the Commissioner of Taxes (Appeals) and the Deputy Commissioner of Taxes in disallowing Zakat as an expenditure laid out or expended wholly and exclusively for the purpose of the business or profession of the applicant for the assessment year 1998-1999 as laid down in section 29(1) (XXVII) of the Income Tax Ordinance, 1984?

(b) Whether, in the facts and circumstances of the case, the Taxes Appellate Tribunal was justified in upholding the orders of the Commissioner of Taxes (Appeals) and the Deputy Commissioner of Taxes in holding that the assessment of depreciation allowance on the basis of Fair Value of Assets is not permissible the same not being a recognized accounting procedure under the Income Tax Ordinance, 1984?

Income Tax Reference Application No. 22 of 2005

(Assessment year 1999-2000)

(a) Whether, in the facts and circumstances of the case, the Taxes Appellate Tribunal was justified in upholding the orders of the Commissioner of Taxes (Appeals) and the Deputy Commissioner of Taxes in disallowing Zakat as an expenditure laid out or expended wholly and exclusively for the purpose of the business or profession of the applicant for the assessment year 1999-2000 as laid down in section 29(1) (XXVII) of the Income Tax Ordinance, 1984?

(b) Whether, in the facts and circumstances of the case, the Taxes Appellate Tribunal was justified in upholding the orders of the Commissioner of Taxes (Appeals) and the Deputy Commissioner of Taxes in holding that the assessment of depreciation allowance on the basis of Fair Value of Assets is not permissible the same not being a recognized accounting procedure under the Income Tax Ordinance, 1984?

Income Tax Reference Application No. 23 of 2005



(Assessment year 2000-2001)

(a) Whether, in the facts and circumstances of the case, the Taxes Appellate Tribunal was justified in upholding the orders of the Commissioner of Taxes (Appeals) and the Deputy Commissioner of Taxes in disallowing Zakat as an expenditure laid out or expended wholly and exclusively for the purpose of the business or profession of the applicant for the assessment year 2000-2001 as laid down in section 29(1) (XXVII) of the Income Tax Ordinance, 1984?

(b) Whether, in the facts and circumstances of the case, the Taxes Appellate Tribunal was justified in upholding the orders of the Commissioner of Taxes (Appeals) and the Deputy Commissioner of Taxes in that the assessment of depreciation allowance on the basis of Fair Value of Assets is not permissible the same not being a recognized accounting procedure under the Income Tax Ordinance, 1984?

Income Tax Reference Application No. 24 of 2005

(Assessment year 2001-2002)

(a) Whether, in the facts and circumstances of the case, the Taxes Appellate Tribunal was justified in upholding the orders of the Commissioner of Taxes (Appeals) and the Deputy Commissioner of Taxes in disallowing Zakat as an expenditure laid out or expended wholly and exclusively for the purpose of the business or profession of the applicant for the assessment year 2001-2002 as laid down in section 29(1) (XXVII) of the Income Tax Ordinance, 1984?

(b) Whether, in the facts and circumstances of the case, the Taxes Appellate Tribunal was justified in upholding the orders of the Commissioner of Taxes (Appeals) and the Deputy Commissioner of Taxes in that the assessment of depreciation allowance on the basis of Fair Value of Assets is not permissible the same not being a recognized accounting procedure under the Income Tax Ordinance, 1984?

Income Tax Reference Application No. 156 of 2006

(Assessment year 2004-2005)

(a) Whether, in the facts and circumstances of the case, the Taxes Appellate Tribunal was justified in upholding the orders of the Commissioner of Taxes (Appeals) and the Deputy Commissioner of Taxes in disallowing Zakat as an expenditure laid out or expended wholly and exclusively for the purpose of the business or profession of the applicant for the assessment year 2004-2005 as laid down in section 29(1) (XXVII) of the Income Tax Ordinance, 1984?

(b) Whether, in the facts and circumstances of the case, the Taxes Appellate Tribunal was justified in upholding the orders of the Commissioner of Taxes (Appeals) and the Deputy Commissioner of Taxes in treating the applicant's contributions to the approved Provident Fund as perquisites and hence taxable under section 30(e) of the Income Tax Ordinance, 1984?

Disposition:

The question (a) to Income Tax Reference Applications No. 20 of 2005, 21 of 2005, 22 of 2005, 23 of 2005, 24 of 2005 and 156 of 2006 formulated for determination is answered in the affirmative in favour of the department-respondent and against the assessee-applicant.

The question (b) to Income Tax Reference Applications No. 20 of 2005 formulated for determination is answered in the affirmative in favour of the department-respondent and against the assessee-applicant.

No answer to question (c) to Income Tax Reference Applications No. 20 of 2005.

No answer to question (b) to Income Tax Reference Applications No. 21 of 2005, 22 of 2005, 23 of 2005, 24 of 2005 and 156 of 2006.

Head Note:

The Constitution of the Peoples Republic of Bangladesh, 1972

Article 2A

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

Sections 2(1)(viii) & 44

Any sum paid by the assessee as Zakat to the Zakat Fund established by the Zakat Ordinance, 1982 is only exempted from tax liability and there is no scope to presume that the Zakat paid by the Bank would be tax exempted in view of the provision



of article 2A of the Constitution.

.....(17)

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

Sections 2(45) and 2(58)

The Income Tax Rules, 1984

Rule 33(1)

Perquisites includes any sum payable by the employer, whether directly or indirectly, to effect a contract for an annuity for the benefit of, the assessee or his spouse or any of his dependent child as well as any sum paid by an employer in respect of any obligation of an employee. The amount contributed by the assessee in the contributory provident fund of the office employee, thus, falls within the definition of perquisites. Moreover, under the definition of "salary", salary includes any fees, commission, allowance, perquisite or profit in lieu of, or in addition to, salary or wages and under sub-rule (1) of the rule 33 of the Rules for the purpose of determining the valuation of perquisites, allowances and benefits. "Basic Salary" means the pay and allowances payable monthly or otherwise, but does not include Perquisites, Annuities and Benefits referred to in sub-rule (1) of rule 33 of the Rules. Therefore, 'perquisites' is included within the salary, but it is not within the basic salary under rule 33 of the Rules. So, the contributions to contributory provident fund by the employer in the relevant assessment years were within the meaning of perquisites of the employee.

.....(23)

Section 30(d)

Under section 30(d) of the Ordinance any payment to the provident fund or other funds established for the benefit of the employees would only be admissible, if the employer has made effective arrangement to secure that tax shall be deducted at source from any payment made from the fund which are taxable income falling under the head 'salary.' Unless such arrangement is made, employer's contributions would not be admissible at all, but this admissibility is subject to the provision of section 30(3) of the Ordinance which provides that so much of the expenditure by an assessee on the provision of perquisites or other benefits to any employee as exceeds one lakh and fifty thousand taka such deduction shall not be admissible.

.....(24)

Judgment

Zinat Ara, J. More or less similar facts and questions of law are involved in Income Tax Reference Applications No. 20 of 2005, 21 of 2005, 22 of 2005, 23 of 2005, 24 of 2005 and 156 of 2006 under sections 160 and 161 of the Income Tax Ordinance, 1984 (hereinafter referred to as the Ordinance) and the parties to the income tax reference applications are same. Therefore, these income tax reference applications have been heard together and are being disposed of by this common judgment.

2. Income Tax Reference Application No. 20 of 2005 (assessment year 2003-2004) has arisen out of the order dated 25.10.2004 passed by the Taxes Appellate Tribunal, Division Bench-3, Dhaka (the Tribunal, in short) in Income Tax Appeal No. 631 of 2004-2005.

3. Income Tax Reference Applications No. 21 of 2005 (assessment year 1998-1999), 22 of 2005 (assessment year 1999-2000), 23 of 2006 (assessment year 2001-2002) and 24 of 2005 (assessment year 2000-2001) have arisen out of a common order dated 30.09.2004 passed by the Taxes Appellate Tribunal, Division Bench-1, Dhaka (shortly, the Tribunal) in Income Tax Appeals No. 146 of 2004-2005 (assessment year 1998-1999), 147 of 2004-2005 (assessment year 1999-2000), 148 of 2004-2005 (assessment year 2000-2001) and 149 of 2004-2005 (assessment year 2001-2002).

4. Income Tax Reference Application No. 156 of 2006 (assessment year 2004-2005) has arisen out of the order dated 26.02.2006 passed by the Tribunal in Income Tax Appeal No. 2024 of 2005-2006.

5. The facts of the above mentioned income tax reference applications (hereinafter mentioned as the reference applications) are more or less same and therefore, to avoid unnecessary repetition, the facts of the cases are summarized together as under:-

The assessee-applicant—Islami Bank Bangladesh Limited (hereinafter stated as the assessee) is a banking company incorporated under the Companies Act, 1913. The assessee has been carrying on banking business according to the principle of Islami Sharia. The assessee has been paying income tax regularly and it submitted its income tax returns (the return/the returns) for the assessment years 1998-1999, 1999-2000, 2000-2001, 2001-2002 and 2004-2005 before the Deputy Commissioner of Taxes, Audit Wing, Large Taxpayer's Unit, Dhaka (shortly, the DCT) deducting various expenditures including Zakat from its income as business expenditure under section 29(1)(xxvii) of the Ordinance for the above mentioned



assessment years. The DCT disallowed Zakat as an allowable expenditure under section 29 of the Ordinance for the aforesaid assessment years.

Being aggrieved, the assessee preferred Income Tax Appeals Patra No. 98/LTU/2003-2004 for the assessment year 2003-2004 before the Commissioner of Taxes (Appeals), Taxes Appeal Zone-2, Dhaka (briefly stated as the CTA). The CTA, upon hearing, by order dated 13.07.2004 affirmed the order of the DCT.

The assessee, not being satisfied with the order of the CTA, preferred a second appeal being Income Tax Appeal No. 631 2004-2005 before the Tribunal. The Tribunal, upon hearing, by order dated 25.10.2004 allowed the appeal in part, but maintained the order of the CTA regarding perquisite, disallowance of Zakat as well as depreciation.

The assessee preferred other four appeals being Income Tax Appeals Patra 73, 74, 75, 76/LTU/2003-2004 for the assessment years 1998-1999, 1999-2000, 2000-2001, and 2001-2002 before the CTA. The CTA took up the appeals for hearing together and by a common order dated 25.05.2004 allowed the appeals in part but affirmed the orders of the DCT relating to non-allowing Zakat expenditure under section 29 and non-allowing depreciation.

Being aggrieved, the assessee preferred four second appeals being Income Tax Appeals No. 146 of 2004-2005, 147 of 2004-2005, 148 of 2004-2005 and 149 of 2004-2005 before the Tribunal. The Tribunal took up the appeals for hearing together and by a common order dated 30.09.2004 allowed the appeals in part, but affirmed the order of the CTA as well as the DCT relating to disallowance of the assessee's Zakat expenses under section 29 of the Ordinance and non-allowing depreciation in excess of original written down value.

The assessee filed another appeal being Income Tax Appeal Patra No. 73/LTU/2004-2005 for the assessment year 2004-2005 before the CTA relating to disallowance of Zakat expenses under section 29 and addition under section 30(e) of the Ordinance. The CTA also rejected these grounds and affirmed the order of the DCT relating to these grounds but he allowed partial benefit relating to perquisites.

Against the said order of the CTA, the assessee filed another second appeal being Income Tax Appeal No. 2024 of 2005-2006 (assessment year 2004-2005) before the Tribunal raising question against the disallowance of Zakat expenses as well as some other expenses. The Tribunal by order dated 26.02.2006 allowed the appeal in part but affirmed the disallowance of Zakat expenses of the assessee under section 29 and action taken under section 30(e) of the Ordinance.

In the backdrop of the aforesaid facts and circumstances, the reference applications have been filed raising the following questions for answer by the court:-

Income Tax Reference Application No. 20 of 2005

(Assessment year 2003-2004)

(a) Whether, in the facts and circumstances of the case, the Taxes Appellate Tribunal was justified in upholding the orders of the Commissioner of Taxes (Appeals) and the Deputy Commissioner of Taxes in disallowing Zakat as an expenditure laid out or expended wholly and exclusively for the purpose of the business or profession of the applicant for the assessment year 2003-2004 as laid down in section 29(1)(XXVII) of the Income Tax Ordinance, 1984?

(b) Whether, in the facts and circumstances of the case, the Taxes Appellate Tribunal was justified in upholding the orders of the Commissioner of Taxes (Appeals) and the Deputy Commissioner of Taxes in treating the applicant's contributions to the approved Provident Fund as perquisites and hence taxable under section 30(e) of the Income Tax Ordinance, 1984?

(c) Whether, in the facts and circumstances of the case, the Taxes Appellate Tribunal was justified in upholding the orders of the Commissioner of Taxes (Appeals) and the Deputy Commissioner of Taxes in holding that the assessment of depreciation allowance on the basis of Fair Value of Assets is not permissible, the same not being a recognized accounting procedure under the Income Tax Ordinance, 1984?

Income Tax Reference Application No. 21 of 2005

(Assessment year 1998-1999)

(a) Whether, in the facts and circumstances of the case, the Taxes Appellate Tribunal was justified in upholding the orders of the Commissioner of Taxes (Appeals) and the Deputy Commissioner of Taxes in disallowing Zakat as an expenditure laid out or expended wholly and exclusively for the purpose of the business or profession of the applicant for the assessment year 1998-1999 as laid down in section 29(1) (XXVII) of the Income Tax Ordinance, 1984?

(b) Whether, in the facts and circumstances of the case, the Taxes Appellate Tribunal was justified in upholding the orders of the Commissioner of Taxes (Appeals) and the Deputy Commissioner of Taxes in holding that the assessment of depreciation allowance on the basis of Fair Value of Assets is not permissible the same not being a recognized accounting procedure under the Income Tax Ordinance, 1984?

Income Tax Reference Application No. 22 of 2005

(Assessment year 1999-2000)

(a) Whether, in the facts and circumstances of the case, the Taxes Appellate Tribunal was justified in upholding the orders of the Commissioner of Taxes (Appeals) and the Deputy Commissioner of Taxes in disallowing Zakat as an expenditure laid out or expended wholly and exclusively for the purpose of the business or profession of the applicant for the assessment year 1999-2000 as laid down in section 29(1) (XXVII) of the Income Tax Ordinance, 1984?



(b) Whether, in the facts and circumstances of the case, the Taxes Appellate Tribunal was justified in upholding the orders of the Commissioner of Taxes (Appeals) and the Deputy Commissioner of Taxes in holding that the assessment of depreciation allowance on the basis of Fair Value of Assets is not permissible the same not being a recognized accounting procedure under the Income Tax Ordinance, 1984?

Income Tax Reference Application No. 23 of 2005

(Assessment year 2000-2001)

(a) Whether, in the facts and circumstances of the case, the Taxes Appellate Tribunal was justified in upholding the orders of the Commissioner of Taxes (Appeals) and the Deputy Commissioner of Taxes in disallowing Zakat as an expenditure laid out or expended wholly and exclusively for the purpose of the business or profession of the applicant for the assessment year 2000-2001 as laid down in section 29(1) (XXVII) of the Income Tax Ordinance, 1984?

(b) Whether, in the facts and circumstances of the case, the Taxes Appellate Tribunal was justified in upholding the orders of the Commissioner of Taxes (Appeals) and the Deputy Commissioner of Taxes in that the assessment of depreciation allowance on the basis of Fair Value of Assets is not permissible the same not being a recognized accounting procedure under the Income Tax Ordinance, 1984?

Income Tax Reference Application No. 24 of 2005

(Assessment year 2001-2002)

(a) Whether, in the facts and circumstances of the case, the Taxes Appellate Tribunal was justified in upholding the orders of the Commissioner of Taxes (Appeals) and the Deputy Commissioner of Taxes in disallowing Zakat as an expenditure laid out or expended wholly and exclusively for the purpose of the business or profession of the applicant for the assessment year 2001-2002 as laid down in section 29(1) (XXVII) of the Income Tax Ordinance, 1984?

(b) Whether, in the facts and circumstances of the case, the Taxes Appellate Tribunal was justified in upholding the orders of the Commissioner of Taxes (Appeals) and the Deputy Commissioner of Taxes in that the assessment of depreciation allowance on the basis of Fair Value of Assets is not permissible the same not being a recognized accounting procedure under the Income Tax Ordinance, 1984?

Income Tax Reference Application No. 156 of 2006

(Assessment year 2004-2005)

(a) Whether, in the facts and circumstances of the case, the Taxes Appellate Tribunal was justified in upholding the orders of the Commissioner of Taxes (Appeals) and the Deputy Commissioner of Taxes in disallowing Zakat as an expenditure laid out or expended wholly and exclusively for the purpose of the business or profession of the applicant for the assessment year 2004-2005 as laid down in section 29(1) (XXVII) of the Income Tax Ordinance, 1984?

(b) Whether, in the facts and circumstances of the case, the Taxes Appellate Tribunal was justified in upholding the orders of the Commissioner of Taxes (Appeals) and the Deputy Commissioner of Taxes in treating the applicant's contributions to the approved Provident Fund as perquisites and hence taxable under section 30(e) of the Income Tax Ordinance, 1984?

6. The respondent-Commissioner of Taxes contested the reference applications by filing separate affidavits-in-reply supporting the orders passed by the Tribunal and stating that the questions of law raised in the reference applications have already been settled finally by the Appellate Division in favour of the Taxes Department and, as such, there is no scope to decide the same questions of law afresh by this Division.

7. Mr. Rafiq-ul Huq, the learned Advocate for the assessee-applicant appearing with Mr. Ahsanul Karim and Mr. Ehsan A. Siddiq, takes us through the reference applications and the connected materials on record and, at the very outset, submits that on similar facts and on identical questions of law the assessee had filed Income Tax Reference Applications No. 24 of 1997 and 31 of 2000 and 32 of 2000 and those reference applications have been decided by the High Court Division by judgment dated 27.04.2004 in favour of the department and the assessee filed Civil Petition for Leave to Appeal Nos. 823,824 and 828 of 2005 against the said judgment which was dismissed by the Appellate Division by judgment dated 3.9.2007 and the assessee then filed Civil Review Petition Nos. 10-12 of 2008 for review of the said judgment before the Appellate Division which was also dismissed by judgment dated 8.4.2008 reported in 14 MLR (AD) 337. He next submits that he does not press the grounds taken by the assessee in those settled reference applications in view of the fact that the Appellate Division finally decided the matter on those grounds. He submits that in the reference applications he would raise a new ground on law, which is founded on the Constitution of the People's Republic of Bangladesh. He adds that in the Constitution under article 2A, the State religion of the Republic is Islam and so, the Zakat is an allowable expense in the light of article 2A of the Constitution which was inserted in the Constitution by the Constitution (Eighth Amendment) Act, 1988 (Act XXX of 1988) in the year 1988. He submits that the said provision is still in operation. Mr. Huq places before us the Guideline being BRPD Circular No. 15 dated 09.11.2009 (the Guideline, in brief) issued by Bangladesh Bank and submits that Zakat obligation has been recognized by Bangladesh Bank by the Guideline and therefore, the assessee is entitled to have its Zakat expenses as allowable expenses under section 29 of the Ordinance. However, he admits that the Guideline was circulated on 09.11.2009 and therefore, Zakat is an allowable expense under the Guideline from 09.11.2009. He also submits that the DCT, the CTA and the Tribunal have not allowed depreciation allowance on the basis of Fair Value of Assets although the same is a recognized accounting procedure all over the Globe. He further submits that in the assessment years 2003-2004 and 2004-2005 the assessee's contribution to provident fund was included within perquisites illegally, as the provident fund expenditure falls within the purview of section 30(d) and not under section 30(e) of the Ordinance and so, tax imposed on excess perquisites under section 30(e) of the Ordinance is unlawful. He lastly submits that the Tribunal without considering the above legal aspects of the case unlawfully affirmed the order of the CTA relating to Zakat contribution, provident fund within perquisites and non-allowing depreciation allowance on Fair Value of Assets and in such view of the matter, the questions posed in the



Reference Applications ought to be answered in the negative on the new grounds placed by the assessee.

8. In reply, Mr. Razik-Al-Jalil, the learned Deputy Assistant Attorney General appearing with Ms. Mahfuza Begum and Ms. Nurun Nahar, the learned Assistant Attorney Generals, on behalf of the respondent, contends as under:

(1) question (a) raised in this reference application has already been decided by the Appellate Division in Civil Petition for Leave to Appeal Nos. 823, 824 and 828 of 2005 and as the question has been finally decided by our Apex Court, there is no scope to take an additional ground and to decide the same question of law once again;

(2) the Guideline was circulated on 9.11.2009 and the present reference applications are relating to the assessment years 2005-06 and 2006-07 and therefore, the Guideline has no manner of application in the instant case;

(3) as no specific date regarding retrospective effect of the Guideline has been mentioned in paragraph C(E) of the Guideline it cannot be taken into consideration in the instant reference applications. Moreover, from the Guideline it is clear that it has not been mentioned anywhere that Zakat is to be paid by the banks;

(4) Zakat liability is a personal obligation of share-holders/owners of the banks professing the religion of Islam and it cannot be treated as business expenditure of the assessee, a bank and if any Zakat is paid by the assessee the same would be the personal expenditure of the bank;

(5) Bangladesh Bank has neither any authority nor any jurisdiction to issue any Guideline/circular which will have any effect on the income tax laws as Bangladesh Bank has no jurisdiction on taxes legislation. Moreover, Guideline cannot override the principal legislation 'the Ordinance' enacted by the legislature relating to income tax matters;

(6) article 2A of the Constitution does not provide that the State is to pay Zakat on its income and the State is not paying any Zakat and so, this argument has no nexus in the reference application but simply a device to drag the matter for an indefinite period;

(7) in order to get Zakat as an allowable business expenditure under section 29 of the Ordinance, Zakat must be paid in accordance with the provisions as laid down in section 44 read with paragraph 13 of part B of 6th schedule of the Ordinance, otherwise it cannot be treated as a business expenditure of the assessee;

(8) the Tribunal was also legally justified in affirming the order not allowing depreciation inasmuch as under the provisions of section 29(1)(viii) read with Paragraphs 9(1) and 11(5) of 3rd Schedule of the Ordinance, the depreciation allowances in respect of any asset shall not exceed the original cost of the asset and it must be on written down value;

(9) the provident fund contribution falls within perquisites under the then provision of section 2(45) and (58) of the Ordinance and rule 33 of the Income Tax Rules, 1984 (the Rules, in short). In the relevant assessment years, in the definition of perquisites provident fund contribution was not excluded. So, the Tribunal legally affirmed the action taken under section 30(e) of the Ordinance;

(10) The orders passed by the Tribunals are in accordance with law and the question formulated in reference applications may be answered in the positive in favour of the department.

9. We have perused the reference applications, the affidavits-in-reply, supplementary affidavits, the assessment orders, first appeal orders passed by the CTA and the second appeal orders passed by the Tribunals. We have further studied the relevant provisions of the Constitution, the Ordinance, the Rule as well as the Guideline carefully. We have also studied the judgments of both the Divisions of the Supreme Court of Bangladesh, on the identical question of law relating to Zakat as placed before us by Mr. Huq.

10. It is admitted that the present assessee-applicant earlier filed income tax reference applications No. 24 of 1997, 31 and 32 of 2000 with the same question of law on Zakat expenses before the High Court Division.

11. It transpires from the judgment dated 27.4.2004 passed by this Division in those reference applications, in which one of us was a party, that, - "..... the expenditure made by the assessee under the head Zakat does not come within clause (XXVII) of section 29(1) of the Ordinance, 1984, therefore, the same cannot be a deductible amount in assessing income of the assessee company. Consequently the benefit of section 44 and paragraph 13, of part B of 6th Schedule of the Ordinance, 1984 as argued by Mr. Rafiqul cannot be extended to the assessee company.".

12. Against the aforesaid judgment admittedly the assessee filed Civil Petition for Leave to Appeal Nos. 823, 824 and 828 of 2005. In those appeals, by judgment dated 3rd September 2007 the Appellate Division has held that 'Zakat' as a concept and a pillar of Islam is not applicable to a juristic person like bank.

13. Admittedly, the assessee-applicant preferred review applications before the Appellate Division and from the judgment of the said review applications, it transpires that those were also rejected holding that, - ".... the petitioners are under no obligation to pay Zakat, as juristic persons, they are not also authorized 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."

14. The question about the application of the principle relating to the Guideline was raised by the assessee in Income Tax Reference Applications No. 31 of 2008 and 465 of 2008 and this Division by judgment dated 17.05.2010 decided as under:-

We have studied this Guidelines to the best of our ability and after having considered the submissions of the learned Advocates for the assessee (applicant) and the learned Assistant Attorney Generals, our considered view is that Zakat can not be treated as a business expenditure of the assessee-bank. The reasons are,-



(i) the Zakat obligation is within sub-paragraph (E) of paragraph C of section 11 of the Guidelines which is a provision relating to conversion of conventional commercial banks into Islamic bank and as there is no case of conversion of the assessee-bank in accordance with the Guidelines this provision has no manner of application in this case.

(ii) in paragraph C(E) of the Guidelines it has not been stated that Zakat is to be paid by the banks rather it has been stated that the Zakat liability is for the previous owners/ new owners/share-holders. Therefore, it is evident that Zakat is the personal liability of the owners or share-holders of the Islamic banks and it is not the liability of the assessee - Islami Bank Bangladesh Limited.

(iii) the assessee neither required to furnish Statements in the form of Appendix II of the Guidelines for the assessment years under consideration nor it can be used for getting any benefit on income tax.

(iv) the Guideline was neither in force nor was placed before the Tribunal for its consideration in the appellate stage.

(v) Zakat is a personal liability of the owners share-holders of the bank and it cannot be treated as a business expenditure of the assessee- bank.

(vi) the Ordinance is a legislation enacted by the parliament for the purpose of income tax and therefore, Bangladesh Bank has neither any authority nor jurisdiction to prescribe any guidelines which will have any effect directly or in directory on the taxation laws.

(vii) by a circular, in the nature of a Sub-ordinate legislation, the provisions of a principal legislation cannot be over ruled.

(viii) it has already been settled by the Appellate Division that Islami Bank Limited is neither authorized to pay Zakat on behalf of its account holders nor entitled to any tax deduction on payment of Zakat within the meaning of section 29(1)(XXVII) of the Ordinance.

So, the above question having been settled by this Division earlier, it is not necessary to discuss further on the ground of Zakat. As this question has been finally decided by the Appellate Division/the High Court Division on most of the grounds relating to Zakat in the above mentioned reference applications, we shall confine ourselves only on the new ground pressed for the assessee-applicant on Zakat.

15. In doing so, let us first examine the relevant provision of article 2A of the Constitution, sections 29(1)(viii), 44 and paragraph 30 of Part-B of 6th Schedule of the Ordinance. For the convenience of our discussions, those are quoted below:-

"Article 2A. The State religion of the Republic is Islam, but the State shall ensure equal status and equal right in the practice of the Hindu, Buddhist, Christian and other religions."

"Section 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 assessee, laid out or expended wholly and exclusively for the purpose of the business or profession of the assessee.
....."

(Underlined, emphasis given)

" Section 44 Exemption.-

(1) Notwithstanding anything contained in this Ordinance, any income or class of income or the income of any person or class of persons specified in Part A of the Sixth Schedule shall be exempt from the tax payable under this Ordinance, subject to the limits, conditions and qualifications laid down therein and shall be excluded from the computation of total income under this Ordinance.

(2) Subject to the provisions of this Ordinance and the limits, conditions and qualifications laid down in Part B of the Sixth Schedule,--

(a) Tax shall not be payable by an assessee in respect of any income or any sum specified in paragraphs 15 and 16 of the said Part B; and

(b) an assessee shall be entitled to a credit from the amount of tax payable on his total income of an amount equal to ten percent of the sums specified in all paragraphs excluding paragraphs 15 and 16 of the said Part B."

"Part -B of the 6th schedule--

.....
13. any sum paid by an assessee as Zakat to the Zakat Fund or as donation or contribution to a charitable fund established by or under the Zakat Fund Ordinance, 1982 (XI of 1982)."



16. Article 2A of the Constitution is within Part-A of the Constitution. It has been enunciated that the State religion of the Republic is Islam, but the State shall ensure equal status and equal right in the practice of the Hindu, Buddhist, Christian and other religions.

17. Our considered view is that this provision was inserted in the Constitution as majority of the population of this country are professing Islam, but it has also ensure equal status and equal right in the practice of other religions i.e. this provision is basically to ensure equal status and right in professing the religion in the country. Further, Mr. Huq fails to show us that due to insertion of this article in the Constitution in the year 1988, the State has been paying Zakat on its revenue earnings. Since there is no evidence before us that the State is paying Zakat on the revenue collected by it, there is no scope to decide on the basis of article 2A of the Constitution that the Bank is to pay Zakat on the basis of article 2A of the Constitution. Therefore, on combined reading of article 2A of the Constitution and sections 2(1)(viii) & 44 and Paragraph 13 of Part-B of the 6th Schedule of the Ordinance, our considered view is that any sum paid by the assessee as Zakat to the Zakat Fund established by the Zakat Ordinance, 1982 is only exempted from tax liability and there is no scope to presume that the Zakat paid by the Bank would be tax exempted in view of the provision of article 2A of the Constitution.

18. Now, let us turn our eyes to the next question i.e. question (b) to Income Tax Reference Applications No. 20 of 2005 (assessment year 2003-2004) and Income Tax Reference Application No. 156 of 2006 (assessment year 2004-2005).

19. This question is relating to treating the provident fund within the definition of 'perquisites.' On examination of the assessment order, first appellate order and second appellate order in Income Tax Reference Applications No. 156 of 2005, it transpires that excess perquisites and other benefits amounting to Tk. 1,67,50,250/- was added as excess perquisites and other benefits under section 30(e) of the Ordinance. From the order of the CTA, it transpires that on examination of the record, he observed that উপ কর কমিশনার বাড়ী ভাড়া ভাতা চাকরিসভাভাতাও বিশেষ ভাতা (special allowance) পারকুইজিট হিসাবে বসিয়েছেন। Thus, it is evident that the provident fund contribution was not added as perquisites in the assessment year 2004-2005, although such ground was taken before the Tribunal perhaps due to bonafide mistake. Since provident fund was not added under section 30(e) of the Ordinance in the year 2004-2005, it is not necessary to decide question (b) in Income Tax Reference Application No. 156 of 2006.

20. Now, let us examine this question so far as it relates to Income Tax Reference Application No. 20 of 2005.

21. To decide this question, it is necessary examine the relevant provisions of sections 2(45) and 30(d) & (e) of the Ordinance and rule 33 of the Income Tax Rules, 1984 (the Rules, in short).

22. For better understanding, the said provisions as was prevailing in the relevant assessment year 2003-2004 are quoted below:-

"Section 2. Definitions.-

In this Ordinance, unless there is anything repugnant in the subject or context,-

(45) "perquisite" includes—

- (a) the value or rent free accommodation;
- (b) the value of any concession in the matter of rent respecting any accommodation;
- (c) any sum payable by the employer, whether directly or indirectly, to effect an insurance on the life of, or to effect a contract for an annuity for the benefit of, the assessee or his spouse or any of his dependent child;
- (d) the value of any benefit provide free of cost or at concessionary rate; and
- (e) any sum paid by an employer in respect of any obligation of an employee.

(58) "salary" includes—

- (a) any wages;
- (b) any annuity, pension or gratuity;
- (c) any fees, commissions, allowances, perquisites or profits in lieu of , or in addition to, salary or wages;
- (d) any advance of salary;
- (e) any leave encashment."

"Section 30. Deduction not admissible in certain circumstances.-

Notwithstanding anything contained in section 29, no deduction on account of allowance from income from business or profession shall be admissible in respect of the following, namely:-



(a) Any payment to a provident fund or other fund established for the benefit of the employees unless the employer has made effective arrangements to secure that tax shall be deducted at source from any payments made from the fund which are taxable being income falling under the head "Salary";

(b) so much of the expenditure by an assessee on the provision of perquisites or other benefits to any employee as exceeds one lakh and fifty thousand taka

"Rule 33. Valuation of perquisites, allowances benefits.

(1) For the purpose of computing the income chargeable under the head "salary", the value of perquisites, allowances and benefits includable in the said income shall be determined in accordance with the provision of the rule 33A to rule 33J whichever is applicable.

(2) For the purpose of determining the value of perquisites, allowances and benefits under sub-rule (1)—

(a) "basic salary" means the pay and allowances payable monthly or otherwise, but does not include—

(i) dearness allowance or dearness pay unless it enters into the computation of superannuation or retirement benefits of the employee concerned;

(ii) employer's contribution to a recognized provident fund or a fund to which the Provident Funds Act, 1925 (XIX of 1925), applies and the interest credited on the accumulated balance of and employee in such fund;

(iii) allowances which are exempt from the payment of tax; and

(iv) allowances, Perquisites, Annuities and benefits referred to in sub-rule (1)

(b) The expression "employee" does not include a shareholder of a company."

23. On combined reading of the above quoted provision of law, it is evident that perquisites includes any sum payable by the employer, whether directly or indirectly, to effect a contract for an annuity for the benefit of, the assessee or his spouse or any of his dependent child as well as any sum paid by an employer in respect of any obligation of an employee. The amount contributed by the assessee in the contributory provident fund of the office employee, thus, falls within the definition of perquisites. Moreover, under the definition of "salary", salary includes any fees, commission, allowance, perquisite or profit in lieu of, or in addition to, salary or wages and under sub-rule (1) of the rule 33 of the Rules for the purpose of determining the valuation of perquisites, allowances and benefits. "Basic Salary" means the pay and allowances payable monthly or otherwise, but does not include Perquisites, Annuities and Benefits referred to in sub-rule (1) of rule 33 of the Rules. Therefore, 'perquisites' is included within the salary, but it is not within the basic salary under rule 33 of the Rules. So, the contributions to contributory provident fund by the employer in the relevant assessment years were within the meaning of perquisites of the employee.

24. Under section 30(d) of the Ordinance any payment to the provident fund or other funds established for the benefit of the employees would only be admissible, if the employer has made effective arrangement to secure that tax shall be deducted at source from any payment made from the fund which are taxable income falling under the head 'salary.' Unless such arrangement is made, employer's contributions would not be admissible at all, but this admissibility is subject to the provision of section 30(3) of the Ordinance which provides that so much of the expenditure by an assessee on the provision of perquisites or other benefits to any employee as exceeds one lakh and fifty thousand taka such deduction shall not be admissible. Therefore, our considered view is that it cannot be said that the Tribunal unlawfully included the contribution to the provident fund within the perquisites so as to answer this question in favour of the assessee-applicant. Accordingly, we find no merit to this question as well.

25. In the result, our answer to question (a) to Income Tax Reference Applications No. 20 of 2005, 21 of 2005, 22 of 2005, 23 of 2005, 24 of 2005 and 156 of 2006 is in the affirmative in favour of the department-respondent and against the assessee-applicant.

26. Our answer to question (b) is in the affirmative in favour of the department-respondent and against the assessee-applicant and no answer to question (c) to Income Tax Reference Applications No. 20 of 2005.

No answer to question (b) to Income Tax Reference Applications No. 21 of 2005, 22 of 2005, 23 of 2005, 24 of 2005 and 156 of 2006.

No costs.

The Registrar, Supreme Court of Bangladesh, is directed to take steps under section 161(2) of the Income Tax Ordinance, 1984.

Md. Habibul Gani, J. I agree.