

HIBAH OF TABUNG HAJI DEPOSIT ACCOUNT: THE IMPLICATION OF ITS CONTINUOUS PRACTICE AND SOME RECOMMENDATIONS

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ABSTRACT

This paper aims to serve as a pre-emptive explanation on the potential problems pertaining to the issue of dividend (Hibah) paid out from the deposit account by Lembaga Tabung Haji (TH). The recent announcement made by TH in regards to the Hibah of deposit account for 2017 has once again triggered the discussion among the public which includes the method of Hibah calculation. Although the method has been revised which eventually secured more advantage to the depositors, the disposition to construe the Hibah-giving as an obligation on TH side raises concern since the deposit account offered takes Wadiah Yad Dhamanah as its underlying structure which entails, inter alia, prohibition to promise any additional return to its holder. Failing to adhere the same will potentially jeopardise the validity of the contract used in the eye of Islamic commercial law since it is tantamount to Riba. Other identified issues from the continuous practice of giving Hibah are from the perspective of justice as well as breeding the 'unhealthy culture'. Several recommendations are put forward to address this issue with the aspiration to safeguard the validity and integrity of the Shariah-compliant business conducted as well to spread the awareness among the public to align the nature of the expected return with the correct business avenue.

Keywords: *Hibah, Deposit account, Wadiah Yad Dhamanah*

1.0 INTRODUCTION

In its press release dated 7 February 2018, TH had announced the *Hibah* payment to its depositors for 2017 which amounting to RM2.7 billion at the rate of 4.50 % (annual dividend) with an additional of 1.75% to the depositors who are yet to perform *Hajj* (which makes the total *Hibah* rate to be received 6.25%). The entitlement of each depositor to this *Hibah* is calculated based on his minimum yearly balance ("Tabung Haji Umum *Hibah* Sebanyak 6.25%", 2018). However, this announcement was followed by another press release two days later (9 February 2018) mentioning on the revised method of *Hibah* calculation which effectively superseded the former method. By virtue of this revised method, the entitlement of *Hibah* calculated is no longer to be calculated based on the minimum yearly balance but shall be based on the minimum average monthly balance instead ("Pengiraan *Hibah* TH 2017", 2018). Such revision is believed to take place as a result of negative response received from the public on the earlier announcement. To the dissatisfaction of many, the former method of calculation will only account the lowest amount in the saving account which will result in the lesser amount of *Hibah*. For instance, if a depositor had maintained RM7000 in his account for the first eleven months of the year and withdrew RM6000 at the beginning of the 12th month, the *Hibah* calculation will disregard any amount other than RM1000 (this is also by assuming the amount of RM1000 is maintained until the end of the month). Nevertheless, by taking the minimum average monthly balance as per the revised method into account, the entire performance of the saving for the year will be regarded in the calculation which likely to result in the higher amount of *Hibah*.

On the one hand, such move is something commendable as it illustrates the responsive attitude by TH as well as its capability to meet the expectation set by the public, especially the depositors. This quality is vital for TH's reputation as a Government-linked company (GLC) which is entrusted, among others, with the responsibility to manage the public fund. On the other hand, the dissatisfaction manifested through the public response which eventually led to the revision of the method of calculation is instead a matter of concern. The disapproval of the less-than-expected return (let alone no-return at all) from the saving account somehow gives the perception that TH is obliged to make such payment, failing of which would be considered as a failure from TH side. Not only such perception is inaccurate from *Shariah* and legal standpoints, but the approach of making *Hibah* payment on the continuous basis in order to meet the expectation until it may be perceived as an obligation (like dividend payment in conventional saving account) may also render several negative impacts. This study seeks to identify these impacts and propose some recommendations to address the same.

2.0 TH: A BRIEF HISTORY

As stated on its official website, the history of TH was started back from 1963 with the establishment of Perbadanan Wang Simpanan Bakal-Bakal Haji (PWSBH), a corporation placed under the Ministry of Rural Development. Prior to this, there was no designated channel for the Muslim community to place their saving for the purpose of performing *Hajj* pilgrimage. Notwithstanding the existence of several banks at that time, Muslims were reluctant to deposit their money with them as these banks are operating the conventional banking system which mainly based on *Riba* (loosely translated as usury) which is severely condemned by *Shariah*. To their mind, putting money which is meant for the act of worship like *Hajj* pilgrimage in such illegitimate place would put such worship at the risk of not being accepted hence defeats the very purpose of it. Driven by this concern, PWSBH took the initiative to open

counters for collecting deposits from prospective Hajj pilgrims in *the Shariah-compliant* manner thus educated Muslims on the need to make saving at an early age as an integral part of the preparation for their *Hajj*.

In 1969, PWSBH was merged with the Pejabat Urusan Hal Ehwal Haji which had been operated in Penang since 1951. This new setup used the brand name Lembaga Urusan Tabung Haji (LUTH) and later in 1955 was renamed as Lembaga Tabung Haji, abbreviated as Tabung Haji (TH). Throughout these developments, its role in coordinating the expanding savings and Hajj management are impressively strengthened. Today, it stands as a reputable corporate entity with numbers of subsidiary covering various segments such as plantation, banking, information technology, hospitality, services and property development and construction.

3.0 TH DEPOSIT ACCOUNT: LITERATURE REVIEW

As mentioned above, among the primary services offered by TH is deposit taking with the purpose of saving towards the pilgrimage of the individual to the Holy Land or for investment or any other permitted purpose ("Tabung Haji Act 1995"). This allows TH not only to act as 'the keeper' to the deposited monies but also to play the role as financial intermediary. This is done by channeling the taken monies into various segments of investment. From *Shariah's* point of view, savings made at TH is in the form of *Al-Wadiah Yad-Dhamanah* ("Savings"). This concept is the extended version of the classical *Wadiah*, termed as *Wadiah Yad al-Amanah* or simply *Wadiah*. Literally, the word '*Wadiah*' means to leave, lodge or deposit (Dusuki, 2011, p. 269). It is the term used to refer any belongings left by the owner or his representative with somebody to take care of them (Dusuki, 2011, p. 269). *Wadiah* falls under the rubric of *Uqud al-Amanah* (contract entered based on trust) since the custodian (*al-Mustawdi*) is assigned to keep safe the property surrendered to him by the original owner (*al-Mudi*) based on the trust of the latter towards the former. This classification renders several effects to the involved parties in *Wadiah* arrangement, especially the custodian. One of these effects is the custodian has the duty to protect the property from being lost or damaged according to customary practice although he does not have to compensate for any damage or loss occurred unless such occurrence is due to his negligence (Ahmad, 1997, p. 257). Since the custodian is only entrusted to safeguard the property, he has no right to use (*Tasarruf*) or get benefit from it. Any benefits accrued from the property, therefore, solely belong to the original owner and the custodian is obliged to return the property to the owner upon his request (Dusuki, 2011, p. 271). Having such requirements, this kind of arrangement clearly does not suit with the features of the deposit account as understood from the perspective of financial intermediary function. This is due to the fact that the financial institution (the custodian), acting on its capacity as the financial intermediary, needs to use the deposited monies for various purposes such as channeling them as the financial provision to the entrepreneurs for their business as mentioned earlier. Therefore, the application of *Wadiah* for the purpose of saving account needs for some 'modification' hence *Wadiah Yad Dhamanah* was introduced.

In *Wadiah Yad Dhamanah*, the element of trust is now replaced by the element of guarantee (Mansour Qaed, 2014). This guarantee refers to the responsibility held by the custodian to refund the property and to ensure the refund upon request. As a result, the custodian in *Wadiah Yad Dhamanah* has now the right to utilise the property as much he is entitled to any income derived from the utilisation of deposited property (and is liable for any damage or loss) (Dusuki, 2011, p. 271). Having these features, *Wadiah Yad Dhamanah* appears to be more practical to be used as the underlying structure of deposit account.

The changes in nature *Wad Yad Dhamanah* as mentioned above entails different governing rules and requirements, mainly from *Shariah* standpoint. Although it is still branded as a form of *Wadiah* which commonly renders the impression that it is a 'safe keeping', the fact that the custodian (in this case, TH) has the right to use the deposited money with the responsibility to give back the money upon request by the depositor and is solely entitled to the profit arises from it turns the whole arrangement to another form of contract which has similar attributions namely *Qard* (loan). As a result, the applicable rules and requirements in such case are similar to the ones applicable in a loan contract. This is by virtue of the legal maxim (*Qawaid Fiqhiyyah*) that says '*Al-ibrah fi al-uqud li al-maqasid wa al-ma'ani la li al-alfaz wa al-mabani*' - In contracts, greater weight is given to intention and meaning than words and forms. Originally, a contract is to be understood and applied based on the words used in it as it reflects the intent of the contracting parties. However, there are also instances in which the intent does not conform with the used words (like in this case, although the words used is *Wadiah* which means to keep safe the real intention, based on the arrangement consequences, is to loan out the money). In such case and alike, the intent takes precedence over the form since it determines the arrangement legal status and consequence (Laldin, 2013, p. 47). This position is similar to the well-known financial principal 'substance over form' as adopted by the International Financial Report Standard (IFRS) issued by International Accounting Standard Board (IASB) where it refers to the principle of recording a transaction based on its economic substance or financial reality which may not be necessarily similar to its legal form (Shaharuddin et al., 2013, p. 8). A similar position is also held by various *Shariah* Authorities all over the world including Bank Negara Malaysia (BNM). By virtue of clauses 16.1 (a) and (b) of its *Wadiah* Guideline, *Shariah* Advisory Council (SAC) of BNM rules that *Wadiah* contract shall be construed as *Qard* contract and therefore governed by the principles of *Qard* in the event where the property in question is a fungible asset (*Mal Mithli*) such as money and the custodian has the right to utilise the same ("Wadi'ah", 2016). Similarly, the Jeddah-based Islamic Fiqh Academy in its resolution no. 86/3/95 resolved that current accounts are considered as loan and shall apply the rulings of loan ("Resolutions and Recommendations of the Council of the Islamic Academi 1985-2000", 2000). The Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI), in its *Shariah*

Standard no. 19 has also construed current account¹ as a loan. In its justification, the position is held on the basis that the bank (financial institution) owns the deposits and has the right to undertake transactions in them. It also becomes its obligation to return a similar amount on demand; the attributions of which similar to *Qard* ("Shariah Standards", 2015, P. 530).

3.1 HIBAH FROM TH SAVING ACCOUNT

TH made an unequivocal statement pertaining to the profits it earns using the depositors' money. Since it is construed as a loan, the depositor cannot expect any repayment more than the principal amount. Any agreement for the additional payment would tantamount to *Riba* by virtue of the maxim '*Kullu qardin jarra naf'an fahuwa riba*' - every loan rendering benefit is considered as *Riba* (Abd. Rahman, 2008, p. 32). Hence, as far as profits are concerned, they are wholly owned by TH and should they be distributed, it is done at the full discretion of TH ("Savings"). This is why the payment, if any, is given as *Hibah* which literally means gift rather than dividend (or interest) since the latter may give an impression that such payment is legally contracted or compulsory as in the conventional saving account offered by the conventional banks hence triggers the case of *Riba*.

4.0 HIBAH PAYMENT: THE POTENTIAL NEGATIVE IMPACTS

Up to this juncture, it is established that from *Shariah* and legal standpoints, TH is not obliged to make *Hibah* payment or any additional payment out of the saving account. Should *Hibah* is contracted or guaranteed, it would tantamount to *Riba*. As such, the trend of imposing pressure on TH to make *Hibah* payment (or instead, to pay it at the expected rate) until it becomes TH's business norm appears to be inappropriate and may be detrimental from various angles.

From *Shariah's* point of view, this situation may eventually lead to *Shariah* non-compliant event. It might be argued since the *Hibah* payment is given at discretion and no payment rate whatsoever is contracted. Therefore *Riba* would not occur in any case. Such claim, however, is inaccurate due to the fact that such payment, despite its non-obligatory nature, might become (or instead, has become) a customary practice by TH out of, inter alia, the pressure received. In such situation, the non-obligatory payment will carry the same effects as the stipulated terms of one particular contract by virtue of the maxim '*Al-ma'ruf urfan ka al masyrut syartan*' - A matter recognised by custom is like a contractual stipulation. According to this maxim, any prevalent and well-recognised practice among the people in a transaction does not need to be specified or mentioned in the agreement. Rather, such practice brings the similar effect as the stipulated condition in the agreement does (Laldin, 2013, p. 143). Therefore, *Hibah* payment, which now turns to be TH's commitment, would be construed as similar to the dividend paid out of the conventional saving account. Undoubtedly, this is impermissible due to *Riba* and would render the loan contract void (*Batil*) or voidable (*Fasid*). As an entity which is founded with the intention to carry out its businesses on the *Riba*-free basis, such situation is undoubtedly uncalled for as it will jeopardise *Shariah* compliancy of its business as well tarnishes its reputation as an Islamic business entity.

Another negative impact can also be observed from the perspective of justice. Under Islamic finance, an investment can take place mainly in the form of *Musharakah* or *Mudharabah* where in both cases, profit ratio of each party needs to be fixed up front. As for loss (the case during which the capital/principal is depleted), partners in *Musharakah* are to assume the loss in proportionate to their capital contribution ratio whereby in *Mudharabah*, the capital provider (*Rabbul Mal*) is to bear the financial loss. The entrepreneur (*Mudharib*) on the other hand is considered to bear the loss in the different form; his time and workmanship were spent without generating profit. Having such arrangement, both forms are considered as fair since every party needs to assume certain degree of risk (depletion of principal capital) in order for them to be entitled to profit if any. This corresponds to the maxim '*Al-Ghurum bi al-ghunm*' - Loss entails profit.

However, in the case of loan, the creditor is not entitled to any profit since he is guaranteed with the principle amount. The performance of the business, therefore, will not have any impact on the obligation of the payment. Here lies the oddness in the current trend of TH *Hibah* payment. The depositors on their capacity as the creditors neither have involvement whatsoever in TH investments or business engagements nor expected to assume any degree of risk. Nevertheless, TH is expected to 'share' its profit with the depositors (and this is done through the *Hibah* payment) although they are not the stakeholders in the investments or businesses. This certainly goes against with the principal 'loss entails benefit' as mentioned earlier. The situation could be worse in the event where TH is experiencing loss for that particular year while still need to fulfill the expectation of depositors to pay *Hibah*. It is simply unjust and goes against the higher objectives of *Shariah* (*Maqasid Shariah*) to uphold the justice for one party to bear the risk of loss (or actually bearing loss) while another party is guaranteed with profit or demands for the profit to be guaranteed.

¹ The difference between the saving account and the current account is immaterial in this respect as it only refers to the facility offered by virtue of each account (chequebook is offered to current account holder) while both maintain the same characterisations.

From another point of view, it is given that a deal, especially the one with the commercial element is better entered and concluded by a written agreement. This is because by doing such, each of contracting parties would be well informed about his rights and obligations arising from the contract. In fact, the Quran has emphasised the obligation to fulfill the contract² and the importance of having a clearly defined contract; it is more just in the sight of Allah, stronger as evidence and more likely to prevent doubt between the contracting parties.³ As such, to demand TH to discharge ‘additional duty’ (i.e. paying the *Hibah*) which does not constitute any part of the contract while both parties (TH and depositors) are made to know that the contract is a loan contract defeats the purpose of having a contract.

The continuous practice of *Hibah* payment might also serve as a catalyst for breeding the ‘unhealthy’ culture of expecting return while avoiding risk among the depositors. It is known that all savings made at TH deposit account backed by the Government of Malaysia (“Savings”). As such, it can be safely claimed that the chance of losing the money while being placed at TH is slim to none. As much as it is appealing to the depositors, it is also logical as the platform is offered for the purpose of safekeeping the money rather than investing it. Nevertheless, the steady annual payment of *Hibah* might instigate the idea to treat such account as a ‘good investment platform’; zero-risk exposure and guaranteed profit in return. This situation is certainly uncalled for as it retains the similar idea in the *Riba*-based loan where the sum of money is loaned in the present for a larger sum in the future without having the property rights over the principal being transferred from the lender to the borrower. Instead, the creditor reserves the claim to the property rights over an excessive amount to be paid (interest) as the ‘rental amount’ of the money. Such claim established as soon the loan contract is concluded and the lender is guaranteed with the return (principal amount together with interest) regardless the outcome of the enterprise that uses the money. Should there is no action being taken to rectify this situation, it will be gradually endangering the good values in business management conduct for the purpose of securing the success of the business as well as active participation concerning overseeing the business since the capital provider no longer has interest in the business performance. As a result, the skill of labour will not be improvised, and the promotion of productivity and creativity will be decreasing. This certainly not in line with the spirit of protection of property as rules by *Maqasid Shariah* which entails protection of wealth through management and distribution (Mohd. Ariffin, Kassim & Abdul Razak, 2015, p. 241).

Furthermore, such understanding can also be deemed as misleading since loan, from *Shariah* standpoint, falls under the rubric of charitable contracts (*Uqud Tabarruat*) with the intention to help out the needy rather than making the profit out of it. By leaving the understanding of expecting profit out of charitable arrangement unrectified, high literacy of Islamic finance knowledge and its spirit will become harder to achieve.

5.0 CONCLUSION & RECOMMENDATIONS

From the above discussion, three possible negative implications were identified should the practice of *Hibah* giving to is allowed to become the norm in TH business practice; not complying with *Shariah* by committing *Riba*, rendering injustice which incompatible with *Maqasid Shariah* and breeding the unhealthy culture of expecting return with risk-averse mentality. Looking at the seriousness of these implications, several things are recommended to be undertaken to mitigate the same.

It is understood that giving out the dividend to the depositors is rather essential for TH to do as it will maintain its competitiveness in Malaysian financial market. As such, it is recommended for TH, rather than using *Wadiah Yad Dhamanah*, to invoke another *Shariah* concept such as *Mudharabah* (profit sharing) or *Murabahah* (cost-plus) as the underlying concept for its Saving Account. Not only the application of these concepts for saving account is provenly workable based on the experience of many of Islamic banks (local and foreign), the risk of committing *Riba* through dividend payment is eliminated since such payment is to be done on the capacity of investment profit (in the case of *Mudharabah*) or sale profit margin (in the case of *Murabahah*) rather than giving it out of a loan contract.

In addition, TH also needs to intensify its awareness program with a special concentration on the *Shariah* technicalities involved in its businesses. As an Islamic corporate entity, educating the society and instilling good values in them should be among its main agendas other than generating profit. Through this program, the accurate information pertaining to the Saving account and all related matters (such as *Hibah* payment) can be effectively disseminated hence countering any misunderstanding or preventing disappointment. It can also be the best forum to train people to choose the right channel to make placement of their money in according to their expectation; saving account for no risk and no guaranteed return and investment fund for higher risk with the projection of return.

² Quran [Al-Maidah 5: 1]

³ Quran [Al-Baqarah 2 : 282]

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