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Analysis of *Ta'widh* Law in *Murabahah* Financing from the Perspective of Islamic Law and Positive Law

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Abstract: Analysis of the law of *ta'widh* in *murabahah* financing is an in-depth study of the application of the concept of *ta'widh* in sharia financial transactions, especially in the type of *murabahah* financing. This study involves two main perspectives, namely the perspective of Islamic law and positive law. The case study at KSPPS BMT At-Tunnisa Jumapolo Branch is used as a context to obtain a more concrete and applicable understanding regarding the implementation of *ta'widh* in sharia financial practices. From the perspective of Islamic law, *ta'widh* is seen as an important mechanism for ensuring fairness in financial transactions. The principle of justice (*Al-'Adl*) and the prohibition of usury are the main foundations for implementing *ta'widh*. The application of *ta'widh* in concrete cases at KSPPS BMT At-Tunnisa Jumapolo Branch will be evaluated from a sharia perspective to assess whether the policies and practices of *ta'widh* are in accordance with the principles of Islamic law. Meanwhile, from a positive legal perspective, *ta'widh* is seen as part of the compensation mechanism in contracts regulated by statutory regulations. The analysis will involve a study of regulations in the financial sector, such as OJK regulations, which regulate fines in sharia financing. The implementation of *ta'widh* in BMT cases will also be evaluated from a positive legal perspective to ensure compliance with applicable regulations. BMT's internal policies regarding *ta'widh*, loss calculation procedures, cases involving *ta'widh*, and conformity with sharia principles and positive law are the objects of in-depth analysis. The method used in this research is qualitative with a case study method. It is hoped that the results of this analysis will provide a comprehensive understanding of the application of *ta'widh* in sharia financial practices, as well as recommendations for improving policies and practices in accordance with the principles of Islamic law and positive law.

Keywords: Islamic law; Positive Law; *Murabahah*; *Ta'widh*.

INTRODUCTION

Humans are social creatures and have various needs that must be met. As time goes by, human needs become increasingly diverse and greater. Options for meeting these needs are also increasingly limited. Therefore, buying and selling is one way to meet these needs.¹ To fulfill these needs, humans are given boundaries and rules set by God. Allah reminds humans to take care of their own needs and not harm each other. In fulfilling life's needs, they strive to achieve progress in life. Muamalah is an activity related to worldly matters, regulating human relationships with others such as business transactions.²

Muamalah Islamic law regulates one important aspect of Sharia Financial Institutions. According to the Sharia Financial Institution, muamalah is a relationship between people.³ With the existence of Muamalah, financial institutions continue to develop through new innovations and interactions between individuals in order to carry out economic activities based on Islamic principles. Law Number 10 of 1998 concerning Amendments to Banking Law Number 7 of 1992 regulates that the activities of Sharia Commercial Banks (BUS) are to provide financing based on sharia principles in accordance with Central Bank of Indonesia regulations. Banks are institutions that collect funds and distribute them to people in need. The distribution of these fund allocations must be lawful and in appropriate locations.⁴

Apart from sharia banks, there are also other sharia microfinance institutions which function as intermediaries for the lower middle class and are supporting factors for the development of the Indonesian economy.⁵ One of the microfinance institutions based on sharia principles is *Baitul Maal Wa Tamwil*. BMT is one of the simplest sharia financial institution models. BMT is not only a financial institution that operates in the economic sector, but also operates in the field of religion and *da'wah* for its members.⁶

The financing carried out by BMT is financing services and services, namely, collecting funds from the community and then distributing them to people who need them. One of the financing provided by BMT is

¹ Taqyudin An-Nabani, *Building an Alternative Economic System from an Islamic Perspective*, Vol. 8 translation of Muhammad Magfur Wachid (Surabaya: Risale Gusti, 2009), p. 149

² Muhammad, *Legal Aspects in Muamalah*, (Yogyakarta: Graha Ilmu, 2017), p. 13.

³ Karim, A, *Islamic Bank Analysis of Fiqh and Finance*. (Jakarta: PT. Grafindo Persada, 2004), p. 105.

⁴ Ali, M, *Statistics I Research on Islamic and Social Economics*, (Jakarta: PT. Prima Heza Lestari, 2006), p. 80

⁵ Ernanda K Dewi and Widiyanto, "The Role of Mudharabah Financing in Developing Micro Business Performance in the Case of BMT Sumber Mulia, & Assaadah and BMT Hubbul Wathon in Semarang Regency," *Ekobis Journal*, Vol. 19 Number 1, (2018), p. 16-34.

⁶ Azizah and Suprayogi, "Optimal Analysis of Baitul Maal Functions in Islamic Microfinance Institutions," *Jestt Journal*, Vol. 1 Number 12, (2014), p. 841-852.

murabahah financing. *Murabahah* is a financing contract for goods where the purchase price is confirmed to the buyer and the buyer pays the higher price as an agreed profit. Because it is called "agreed profit" in the definition, the characteristic of *murabahah* is that the seller must inform the buyer of the purchase price of the goods and state the amount of profit added to the cost.⁷

Murabahah financing is financing provided to members with the aim of meeting production needs. For this transaction, BMT, especially KSPPS BMT At-Tunnisa Jumapolo Branch, obtains a number of benefits that have been agreed between BMT and prospective members. In its efforts to find members for financing, KSPPS BMT At-Tunnisa Jumapolo Branch not only competes with fellow sharia financial institutions, but also with conventional financial institutions. Financing carried out by KSPPS BMT At-Tunnisa Jumapolo Branch has the advantage of good service and easy and fast conditions, especially for the people of Jumapolo where the majority of the population works as farmers. What is of concern in this case is that there will be default or default when BMT distributes funds or provides loans to members. This happens if there are capable members who deliberately neglect or delay their obligations to the detriment of BMT, or members who are unable to pay installments on time due to poor business performance.

As a form of compensation for real costs that have been incurred by BMT due to default which causes the payment process to be extended, BMT applies *ta'widh* or compensation. In Islamic law, there is the term *dhamam al-'aqd*, namely the responsibility to carry out the contract.⁸ In PBI No. 7/46/PBI/2005 in the compensation provisions of article 19 point (a) states that real losses can be clearly calculated to the customer, then in point (e) states that the clause for imposing compensation must be clearly stated in the contract and understood by the customer.⁹ Then explained in the DSN MUI fatwa no. 43/DSN-MUI/VIII/2004, states in general provisions point (2) that losses that can be subject to *ta'widh* as intended in paragraph 1 are real losses that can be calculated clearly.¹⁰ *Ta'widh* in this case is the loss actually incurred by the BMT in the context of collection that should have been received from the member.

Based on this, it shows that KSPPS BMT At-Tunnisa Jumapolo Branch is allowed to apply *ta'widh* to members who are negligent in

⁷Fajriyatul Lailiyah, "Implementation of Ta'widh for Defaulting Customers in Murabahah Financing at KSPPS BMT NU East Java Ajung Jember Branch", Thesis, UIN Kyai Haji Achmad Siddiq Jember, (2023), p. 3

⁸Syamsul Anwar, "Sharia Agreement Law", (Jakarta: Rajawali Press, 2010), p. 330

⁹Fajriyatul Lailiyah, "Implementation of Ta'widh for Defaulting Customers in Murabahah Financing at KSPPS BMT NU East Java Ajung Jember Branch", Thesis, UIN Kyai Haji Achmad Siddiq Jember, (2023), p. 3

¹⁰Ibid, p. 3

fulfilling their obligations, resulting in losses for the BMT. These losses are real losses such as administration fees, renewal fees, billing fees, and overhead costs. KSPPS BMT At-Tunnisa Jumapolo Branch has helped the community's economy, especially the Jumapolo community and its surroundings, one of which is through *murabahah* financing. Of the many BMTs in the Jumapolo sub-district, KSPPS BMT At-Tunnisa has the potential to be able to further develop with progress according to the times, because this BMT is more in demand by the people of Jumapolo apart from its strategic location because it is in the middle of the sub-district and near public roads, the large amount of funding available needed by the community and also does not complicate the process of applying for financing. KSPPS BMT At-Tunnisa Jumapolo Branch is one of the sharia-based BMTs, so the contract contains no elements of usury and is in accordance with Islamic law. Apart from that, BMT has also implemented *ta'widh* in accordance with Bank Indonesia fatwas and regulations. For this reason, researchers chose BMT as the research object because it was different from previous research.

For example, in the results of previous research conducted by Fajriyatul Lailiyah with the title "Implementation of *Ta'widh* for Defaulting Customers in *Murabahah* Financing at KSPPS BMT NU East Java Ajung Jember Branch" which explains that the implementation of *ta'widh* for defaulting customers in *murabahah* financing applies a system of discounts and payment extensions.¹¹ Meanwhile, KSPPS BMT At-Tunnisa does not apply a discount system for members who have difficulty paying. Apart from that, research conducted by Yesi Purwandari with the title "Review of Islamic Law on the Practice of *Ta'widh* in *murabahah* contracts (Case Study in KPR BTN Platinum IB at BTN Syariah Semarang Branch)" explains that in practice the *ta'widh* fee is only charged to customers who are late in making payments, but the imposition of *ta'widh* fees must increase according to the day of late payment based on the payment due date, there is no further explanation regarding the imposition of *ta'widh* fees for customers who are in a force majeure situation.¹² Apart from that, research conducted by Nurizzidni Rodhiya with the title "*Ta'widh* Hasanah Card Payment Mechanism (Case Study of Bank BNI Syariah Jambi City)" explains that the determination of *ta'widh* fees imposed by Bank BNI Syariah on IB Hasanah Cards is in accordance with the DSN fatwa MUI No. 43/DSN_MUI/VIII/2004, namely the *ta'widh* fee charged to customers who are late in paying their obligations is

¹¹*Ibid*, p. 4

¹²Yesi Purwandari, "Review of Islamic Law on the Practice of *Ta'widh* in *murabahah* contracts (Case Study in KPR BTN Platinum IB at BTN Syariah Semarang Branch)", Thesis, UIN Walisongo Semarang, (2018), p. 95

a real cost that can be traced. However, this research did not use the Civil Code as a comparison with the MUI DSN Fatwa.¹³

From the explanation of previous research, it can be seen that previous researchers analyzed that the application of *ta'widh* in sharia banking was not in accordance with applicable regulations. This is different from the results of research findings that the author conducted. In practice, KSPPS BMT At-Tunnisa is in accordance with applicable regulations, but it is still not in accordance with several provisions in Islamic law and positive law. This research aims to analyze how *ta'widh* law is applied in *murabahah* financing at KSPPS BMT At-Tunnisa Jumapolo Branch and its implications for Islamic law and conformity with positive legal regulations in Indonesia.

Based on the description above, the author will conduct research with a study focus on two things, namely: (1) Application of *ta'widh* in *murabahah* financing at KSPPS BMT At-Tunnisa Jumapolo Branch. (2) Analysis of the implementation of *ta'widh* on *murabahah* financing based on Islamic law and positive law.

RESEARCH METHODS

This research uses field research with a qualitative approach. A qualitative approach is a research process that seeks to understand social phenomena and human problems, emphasizing the meaning behind these social phenomena.¹⁴The author chose this approach for the reason of knowing the case of *ta'widh* in *murabahah* financing implemented at KSPPS BMT At-Tunnisa Jumapolo Branch, apart from that by relying on this case it can reveal other cases that accompany it.

Data collection was carried out by interviews, observation, documentation. Interviews were used to obtain valid data regarding *ta'widh* in *murabahah* financing at KSPPS BMT At-Tunnisa Jumapolo Branch, information was obtained from interviews with the Director of Human Resources (DSI) KSPPS BMT At-Tunnisa Jumapolo Branch. Observations were made by observing financing activities in *murabahah* when following up cases of late payments which resulted in *ta'widh* occurring. Meanwhile, documentation is carried out by analyzing policy documents or regulations related to the case. Document analysis is also carried out on journal manuscripts or other literature to strengthen research findings.

¹³Nuruzzidni Rodhiyah, "*Ta'widh* Hasanah Card Payment Mechanism (Case Study of Bank BNI Syariah Jambi City)", Thesis, UIN Sulthan Thaha Saifuddin Jambi, (2019), p. 95

¹⁴Juliansyah Noor, "Research Methodology: Theses, Theses, Dissertations and Scientific Work", (Jakarta: Fajar Interpratama Mandiri, 2017), p. 34

RESULTS AND DISCUSSION

Understanding Murabahah

Linguistically, *murabahah* comes from the word *rihb* which means growth from developing in commerce. In sharia terms, the concept of *murabahah* has various formulations of different definitions according to the opinions of scholars. Among other things, according to Utsmani, *murabahah* is a form of buying and selling which requires the seller to provide information to the buyer about the costs incurred to obtain the commodity (cost of purchase) and the desired additional profit which is reflected in the selling price.¹⁵

In terms of terminology, previous scholars defined *murabahah* as buying and selling with capital plus a known profit. Meanwhile, *murabahah* in Bank Indonesia regulations is defined as buying and selling goods at the cost of the goods plus the agreed profit margin.¹⁶

Murabahah is a sale and purchase transaction of goods between the bank and the customer, the goods purchased serve as collateral. The price of goods in a *murabahah* agreement is paid by the customer (buyer) in installments. Ownership changes proportionally according to the installments paid. Additional costs (profits) for the bank are negotiated and determined in advance between the bank and the customer.¹⁷

Ta'widh from an Islamic Law Perspective

The word *al-Ta'widh* comes from the word *'iwadha* which means to replace or replace, while the word *Ta'widh* itself has the linguistic meaning of replacing.¹⁸ According to the term, covering losses that occur as a result of *ta'widh* in the context of Islamic law is compensation or compensation given to parties who suffer losses due to non-compliance or negligence of other parties in a contract. In the perspective of Islamic law, *ta'widh* must be understood and applied in accordance with sharia principles.

The National Sharia Council-Indonesian Ulema Council as the supervisory institution for Sharia Banks in Indonesia has provisions related to compensation or *Ta'widh*. These provisions are stated in the National Sharia Council fatwa no. 43/ DSN-MUI/VIII/2004 concerning compensation (*Ta'widh*). This fatwa provides provisions or rules for sharia

¹⁵ Ismail Nawawi, "Classical and Contemporary Muamalah Jurisprudence", (Bogor : Ghalia Indonesia. 2012), p. 91

¹⁶ Isnawati Rais and Hasanudin, *Fiqh Muamalah and its Application in Sharia Financial Institutions*, (Ciputat: UIN Syarif Hidayatullah Research Institute Jakarta, 2011), p. 87

¹⁷ Adrian Sutedi, *Sharia Banking Overview and Several Legal Aspects*, (Jakarta: Ghalia Indonesia. 2009), p.95

¹⁸ Tim Khasiko, *Complete Indonesian Arabic Dictionary*, (Surabaya: Kashiko, 2000), p. 449.

financial institutions that apply compensation so that they carry out their operational activities in accordance with the principles of Islamic law.

***Ta'widh* from a Positive Law Perspective**

Ta'widh in civil law terms it is called compensation, namely covering losses for all expenses that have actually been incurred by one party and losses due to damage to goods belonging to the creditor caused by the debtor's negligence as well as losses in the form of lost profits (interest). which has been calculated by the creditor. There are two reasons why compensation arises, namely compensation due to breach of contract and unlawful acts.¹⁹

The incurrance of fines or compensation can be caused by failure to fulfill performance by one of the parties bound by a contract or agreement. Article 1234 of the Civil Code explains that what is meant by achievement is someone who delivers something, does something or does not do something.²⁰

However, not all losses can be compensated for. The law in this case limits it by determining only losses that can be estimated or suspected at the time the agreement is made and which can truly be considered as a direct result of the debtor's negligence. For this reason, the creditor must first confirm whether the loss he is requesting really occurred due to the debtor's negligence or not. Because if the debtor succeeds in proving the existence of a force majeure situation, then the creditor's claim will be rejected by the judge and the debtor will be free from punishment, whether in the form of punishment for fulfilling the agreement or punishment for paying compensation.²¹

Application of *Ta'widh* in *Murabahah* Financing at KSPPS BMT At-Tunnisa Jumapolo Branch.

KSPPS BMT At-Tunnisa Jumapolo Branch has several types of financing, one of which is of interest to the public is *murabahah* financing. The provider of the object in the contract purchased and ordered by the member is *murabahah* buying and selling financing. The object of the contract, the selling price and the purchase price of the bank to members, including the acquisition of BMT related to profits and the member's agreement, where the member agrees to pay the selling price determined by the BMT is clearly stated in the *murabahah* contract.

One of the risks that occurs in financing with a *murabahah* contract is delays in installment payments. This can cause losses for BMT. In

¹⁹ Salim HS, Contract Law, (Jakarta: Sinar Graphics, 2006), cet. IV, p. 100.

²⁰ Abdul R. Saliman, Business Law for Companies, (Jakarta: Kencana Persada Media Group, 2011), cet. VI, p. 47-48

²¹ Azharuddin Lathif and Nahrowi, Introduction to Business Law, (Jakarta: UIN Syarif Hidayatullah Research, 2009), p. 51

dealing with payment failures committed by members, BMT proposes to members to receive *ta'widh* (compensation).

The compensation referred to is that BMT suffers losses caused by delays in customer payments, for these losses BMT charges compensation. According to the explanation from the Director of SDI KSPPS BMT At-Tunnisa Jumapolo Branch, his party gave *ta'widh* to members when indeed the BMT had exhausted all means to resolve problems related to members being late in making payments and members being unable to complete the installments. This compensation applies when a member cannot fulfill his obligations on time and there are costs incurred by BMT in handling the member's case. BMT implements a flexible fine system, meaning that BMT looks at the background of members who experience delays in paying installments. If it turns out that the reason for not being able to pay is due to illness or bankruptcy, BMT will not burden members and will give them more time.

KSPPS BMT At-Tunnisa Jumapolo Branch always ensures the member's background, for example if they are sick then the burden of *ta'widh* is not given to the member and they are only asked to return the loan principal without returning the profit sharing. This does cause losses, but BMT has a social mission in carrying out its operations.

Basically, the amount of *ta'widh* must be determined at the beginning. However, KSPPS BMT At-Tunnisa stated that *ta'widh* is an act of compensation for the actual costs of BMT's actions to overcome customer negligence in delays in fulfilling their obligations as members. BMT only conveys it directly to the customer when signing the *murabahah* financing contract and there is nothing in the contract or proof of agreement to be willing to pay *ta'widh* in written form.

The system used by KSPPS BMT At-Tunnisa Jumapolo Branch, every time the due date or the day the member's financing installment is due, the BMT, especially the AO (Account Officer) will issue a warning or bill notification to the member when it is time to pay the financing installment. During this process, BMT is charged a fee for warning members by visiting by telephone or directly at the member's residence.

The *ta'widh* funds collected will later be put into social funds. This was chosen because not much social funds were collected by KSPPS BMT At-Tunnisa Jumapolo Branch. Even though it is different from other banks' policies, KSPPS BMT At-Tunnisa Jumapolo Branch said that this was not seen as a big problem, as long as laws and regulations were not violated and sharia corridors were not violated. Furthermore, the reason for this is that KSPPS BMT At-Tunnisa Jumapolo Branch is a way to promote its BMT. As one of the bank's marketing strategies to the public to attract people so they can become members of the KSPPS BMT At-Tunnisa Jumapolo Branch. By including *ta'widh* funds into social funds, social

funds will increase so that KSPPS BMT At-Tunnisa Jumapolo Branch can use these funds to provide social assistance to the community, thereby generating sympathy from the community.

Analysis of *Ta'widh* Implementation of *Murabahah* Financing Based on Islamic Law and Positive Law

Ta'widh or compensation for losses incurred by breach of contract, has a strong basis in both Islamic law and positive law. Although both legal systems have the same goal, namely ensuring justice and fair compensation for injured parties, there are differences in their principles, mechanisms and implementation. Here is the comparison:

The basic principles in Islamic law include, *firstly*, justice (*Al-'Adl*). Justice emphasizes fairness by ensuring that the compensation given is fair and in accordance with the real losses experienced. *Second*, the prohibition of usury. Compensation must not contain elements of usury (interest), so that only real losses can be compensated. *Third*, certainty (*Yaqin*). Certainty to avoid the element of *gharar* (uncertainty) in determining *ta'widh*. Meanwhile, the basic principles in positive law include, *firstly*, legal certainty. Ensure that the rights and obligations of the parties are clearly explained in the contract. *Second*, justice. Ensure that the injured party receives compensation in accordance with the losses suffered. *Third*, transparency. Requires clarity and transparency in determining and implementing compensation. In this case, KSPPS BMT At-Tunnisa is in accordance with the principles of Islamic law and positive law, because there are no burdensome elements when providing *ta'widh* to members. However, there should be a black and white agreement so that members are not negligent.

The foundation of Islamic law in the Al-Quran and Hadith regulates the importance of justice and resolving disputes in a fair manner; Ulama Fatwa: A consensus of ulama that provides guidance on the application of *ta'widh*; Ijma' and Qiyas: Principles of scholarly agreement and legal analogies used to interpret the provisions of *ta'widh*. Meanwhile, the positive legal basis includes, among other things, Legislation: Laws that regulate contracts, such as the Civil Code (KUHPerdata) and the Consumer Protection Law; Financial Sector Regulations: Special regulations issued by authorities such as the Financial Services Authority (OJK) for Islamic financial institutions; Court Rulings: Legal precedents from previous cases that provide guidance on the application of compensation. Based on this, KSPPS BMT At-Tunnisa is in accordance with the fatwa and statutory regulations.

Implementation in contracts under Islamic law, namely, *Ta'widh* Clause: Must be explained in the contract in detail regarding the conditions that cause *ta'widh*, the amount of compensation, and how to

calculate it; Calculation of Losses: Based on actual losses that can be proven. There must be no element of speculation or uncertainty; Transparency: All provisions regarding *ta'widh* must be agreed upon by both parties from the start. Meanwhile, implementation in contracts of positive law includes, among other things, Contract Clauses: Clauses regarding compensation are usually explained in written agreements, regulating the terms and amount of compensation; Calculation of Losses: Based on evidence of real losses that can be measured objectively; Dispute Resolution Procedures: There are clear procedures for resolving disputes, such as through mediation, arbitration, or court.

Case Study at KSPPS BMT At-Tunnisa Jumapolo Branch on Islamic law, namely, Sharia Compliance: *Ta'widh* policies and practices must comply with sharia principles, including the prohibition of usury and gharar. Every *ta'widh* policy must obtain approval from the Sharia Supervisory Board; Case Handling: An example of the case presented above is late payment by a member. BMT will evaluate the actual losses experienced and determine the appropriate *ta'widh*. Meanwhile, the case study at KSPPS BMT At-Tunnisa Jumapolo Branch is on positive law, namely, Compliance with Regulations: *Ta'widh* policies must comply with applicable laws and regulations. For example, OJK regulations governing fines and compensation in sharia financing; Enforcement Procedures: Dispute resolution procedures involving courts or arbitration institutions in the event of a dispute regarding *ta'widh*.

CONCLUSION

Based on the explanation above, it can be concluded that the application of *ta'widh* in *murabahah* financing at KSPPS BMT At-Tunnisa Jumapolo Branch is carried out by always paying attention to the reasons for failure to pay by members. BMT does not impose *ta'widh* on members because it has a social mission. The *ta'widh* funds collected will later be put into social funds. This is in accordance with Islamic law and positive law as regulated in the DSN MUI fatwa no. 43/DSN-MUI/VIII/2004 concerning compensation (*ta'widh*) and inPBI No. 7/46/PBI/2005 concerning compensation. Analysis of the implementation of *ta'widh* on *murabahah* financing based on Islamic law and positive law shows the results that KSPPS BMT Muamalat Jumapolo has fulfilled the provisions, it's just that BMT did not include a written agreement regarding *ta'widh*. What is different from previous research is that in this research there is a lack of firmness from the KSPPS BMT At-Tunnisa Jumapolo Branch because it is only concerned with BMT's popularity and social mission without caring about the losses that have been incurred. This causes BMT's income to decrease. If KSPPS BMT At-Tunnisa Jumapolo Branch

does not review its *ta'widh* implementation system, there is a possibility that this BMT will not develop.

Based on the research results described above, the researcher provides several suggestions regarding the implementation of *ta'widh* towards *murabahah* financing as follows: (1) For KSPPS BMT At-Tunnisa Jumapolo Branch, it would be better to be more selective in selecting and determining prospective members in order to prevent there is a default. (2) It is hoped that people who wish to finance at KSPPS BMT At-Tunnisa Jumapolo Branch will first seek information regarding the financing offered. (3) The results of this research are only able to explain the application of *ta'widh* in *murabahah* financing based on Islamic law and positive law only, therefore it is recommended for future researchers to be able to explain more variedly the various forms of financing that exist at KSPPS BMT At-Tunnisa Jumapolo Branch and contains more data regarding problematic members.

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