BUSINESS HALACHA INSTITUTE מכון להושן משפט

BUSINESS WEEKLY

THE WERDIGER EDITION

Restoring the primacy of Choshen Mishpat

Issue #451 | Parshas Vayikra | Friday, March 15, 2019 | 8 Adar II 5779

UNDER THE AUSPICES OF HARAV CHAIM KOHN, SHLITA

STORY LINE

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RIBBIS IN A LOAN DOCUMENT

Mr. Neuman and Mr. Pincus were litigating before Rabbi Dayan.

"It's an open-and-shut case," said Mr. Neuman. "I lent Mr. Pincus money, and he hasn't paid me back. He owes me $11,000."

"What do you claim?" Rabbi Dayan asked Mr. Pincus.

"I don't owe him $11,000," said Mr. Pincus.

"Do you have any evidence?" Rabbi Dayan asked Mr. Neuman.

"Sure, I have a loan document, signed by witnesses," said Mr. Neuman.

"I have reason to believe that the loan document is disqualified," said Mr. Pincus.

"What's wrong with it?" exclaimed Mr. Neuman. "Here it is." He presented the document to Rabbi Dayan.

Rabbi Dayan examined the loan document. When he read it, he frowned.

"The initial loan was only $10,000 two years ago," Rabbi Dayan said. "This agreement calls for an interest payment of 5 percent per annum. This is a prohibited *ribbis* clause. You are not allowed to collect $1,000 interest."

"Mr. Pincus still owes the $10,000 principal," insisted Mr. Neuman.

"Do you have other evidence of this loan?" asked Rabbi Dayan.

"No," said Mr. Pincus. "I saw no reason for additional proof when I had the loan document."

"What do you say?" Rabbi Dayan asked Mr. Pincus. "Did you borrow the money?"

"I did," acknowledged Mr. Pincus. "However, since the loan document is invalid, I shouldn't have to repay the loan."

"Where's the logic in that?" argued Mr. Neuman. "Even if the *ribbis* clause is invalid, the rest of the document remains intact. You should certainly pay the $10,000 principal, even without your admission. The signed witnesses testify to that!"

"Once the document is problematic," replied Mr. Pincus, "those witnesses are meaningless." The two turned to Rabbi Dayan to hear his ruling.

"There is a dispute between the *Tanna'im* (*B.M*. 72a) regarding a loan document that includes *ribbis*," replied Rabbi Dayan. "Rav Meir maintains that we fine the lender and he does not collect even the principal, whereas the Sages maintain that he collects the principal based on the document.

"Many *Rishonim*, followed by the *Shulchan Aruch*, explain that is the case when the *ribbis* is listed separately," continued Rabbi Dayan. "However, if the *ribbis* were

DID YOU KNOW?

Did you know that signing a service contract that includes a late fee that accrues monthly is a Ribbis violation?

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MISHLOACH MANOS: A MATTER OF INTEREST?

Q. I wanted to buy a house, but did not have enough credit to secure a mortgage. A relative offered to allow me to use money from his open line of credit, as long as I would pay the interest he would owe the bank for the money borrowed. In order to avoid the prohibition of *ribbis*, we drew up a *heter iska* between ourselves.

Am I allowed to send this relative *mishloach manos*, or is it considered *ribbis* on the loan?

A. First of all, we commend you for drawing up a *heter iska* with your relative, because it was absolutely necessary in this case.

Whether you will be allowed to send this relative *mishloach manos* depends on two factors, which we will explain in depth:

1) How the *heter iska* was drawn up
2) Whether you always sent *mishloach manos* to this relative, or you want to start doing so now because he helped you buy your home

A *heter iska* generally works as follows: The borrower/recipient does not receive the full sum as a loan. Rather, half of the sum is considered venture capital (*iska* means *business*), and the recipient is paid a small amount for his "investment" work, while the lender/investor yields profits from the investment that exceed the amount he invested, if the venture is profitable. The other half is an interest-free loan. Consequently, both parties share profits and losses.

In regard to the principal, if it is proven, through valid witnesses, that the investment lost money, the borrower would not be required to return the half that was an investment. In regard to the profits, if he swears that there was no profit, he would have to return the principal but no more. But there is also a clause in the *heter iska* absolving the borrower from making this oath if he pays an agreed upon amount, which in our case would be the full amount the bank demands from the lender (see *Business Weekly* 355 and 357).

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not listed separately, but rather included in the lump sum, the Sages concede that the document is completely disqualified lest the lender collect the *ribbis* as well based on it. Even so, if the borrower admits the loan, he must pay the principal according to almost all authorities, since we do not fine the lender, according to the Sages" (*C.M*. 52:1; *Shach* 52:4; Y.D. 161:11).

"Even when the *ribbis* is distinct, how can we rely on the document?" asked Mr. Pincus. "Don't the witnesses become disqualified?"

"It is true that witnesses of *ribbis* also transgress," replied Rabbi Dayan. "Nonetheless, *Tosafos* explains that the witnesses do not become disqualified on account of this, since most people are unaware that they violated a *mitzvah* by signing such a document. Alternatively, *Ketzos* (52:1) explains that the witnesses do not become disqualified until after they sign, so that this document remains valid" (*Y.D*. 160:1; *Pischei Choshen*, *Shtaros* 3:34-36).

"*Shach* quotes other *Rishonim* who explain the *Gemara's* case the opposite way, that the *ribbis* was not listed separately," continued Rabbi Dayan. "Thus the witnesses are not disqualified since they were unaware of the *ribbis*, but if it *was* listed separately, they and the document become disqualified. *Shach* concludes that it is a *sefeka d'dina* (unresolved dispute). Thus, if the borrower does not admit, and we would need to rely on the document, it is questionable whether we would able to extract from the borrower who is in possession (*muchzak*)" (*Sma* and *Shach* 52:1; *Mishneh Lamelech*, *Malveh V'loveh* 4:6).

"Thus, in this case, when the borrower admits the loan," concluded Rabbi Dayan, "the lender can collect his principal. If the borrower were to deny the loan, it is questionable whether the lender could collect the principal based on the loan document."

MONEY MATTERS

(Based on writings of Harav Chaim Kohn, shlita)

WEIGHTS AND MEASURES #4

Application of the Halacha to Non-Jews

Q: Does the prohibition against using inaccurate measures apply also to non-Jews?

A: This prohibition applies also when measuring to non-Jews. While *onaah* (unfair pricing) does not apply to gentiles, because there the customer is aware of the price that he is being charged, in this case the non-Jew relies on the store owner to measure, so that cheating him is considered theft (*C.M.* and *Sma* 231:1).

Similarly, a non-Jew is obligated to use accurate measures, since measuring inaccurately is included in the prohibition against *gezel* — theft, which is one of the *sheva mitzvos bnei Noach* (*Minchas Chinuch* 258:3).

Chazal emphasize that it is almost impossible to properly make restitution for theft through inaccurate measures, since it involves stealing from the public, and the store owner cannot know from whom he stole and how much.

Furthermore, *Sefer Hachinuch* (#258) writes that one violates this prohibition even with a value less than a *perutah*, unlike in other monetary matters. *Minchas Chinuch* disagrees, but concedes that it is still not allowed, like any other *chatzi shiur* (partial amount) (*Aruch Hashulchan* 231:19; *Pischei Choshen*, *Geneivah* 14:1-3).

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Now, if you would ordinarily send *mishloach manos* to this relative, continuing to send would not be an issue, because a borrower is allowed to continue benefitting the lender in any manner he did prior to the loan, as long as he does not specifically intend to do so at this point in consideration of the loan (*Shulchan Aruch Yoreh Dei'ah* 160:7).

If this is the first year you will send him a *mishloach manos*, however, it is obvious that you're sending it in consideration of the loan, which makes it *ribbis*.

Although sending *mishloach manos* is a *mitzvah*, it is still not permitted, since there is no *halachah* mandating that *mishloach manos* be sent to any specific recipient. Since the borrower is sending *mishloach manos* to the lender only in appreciation for the loan, it is considered *ribbis*, just as it would be considered *ribbis* for the borrower to teach the lender Torah despite it being a mitzvah (ibid. 160:10; *Shulchan Aruch Harav, Ribbis se'if* 9; see *Bris Yehudah* ch. 11, fn. 40).

The existence of a *heter iska* doesn't make sending *mishloach manos* any less problematic, because, as we explained, the sum transferred between the parties is part loan and part investment. In order to free himself of the obligatory oath, the borrower agreed to certain terms, such as paying back the amount the bank demands from the lender. Since *mishloach manos* was not included in that deal, it is obviously being given in appreciation of the loan, which renders it *ribbis* (see *Shulchan Aruch Harav, Ribis* 39).

There is, however, a form of *heter iska* that turns the entire transaction into an investment. This form of heter iska is called *kulo pikadon*. In this format, if there are witnesses testifying that the investment lost money, the investor would lose his capital, and if not for terms specifying otherwise, he would also be entitled to all profits yielded by the investment. Since there is no loan under this agreement, the recipient of the funds may send the investor *mishloach manos* (*Bris Yehudah, Ikrei Dinim* 29:12).

Furthermore, even where the transaction is part loan, if the lender sent the borrower a *mishloach manos* first, the borrower may follow social convention and reciprocate, as long as he does not send the *mishloach manos* specifically in appreciation for the loan, and he does not send a more elaborate *mishloach manos* than he sends to all others on his list (*Mishnas Ribbis* 3:15).

For questions on monetary matters, arbitrations, legal documents, wills, ribbis, & Shabbos, Please contact our confidential hotline at 877.845.8455 or ask@businesshalacha.com