

BUSINESS WEEKLY



RESTORING THE PRIMACY OF CHOSHEN MISHPAT UNDER THE AUSPICES OF HARAV CHAIM KOHN, SHLITA

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CASE FILE

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לע"נ הרב אהרן בן הרב גדליהו ע"ה

USD/USD LOAN

In last week's article, we explained that there are halachic limitations on loans in foreign currency, which is considered a commodity, but it is permitted to

calculate the value of the loan in local currency and return that value.

Thus, Mrs. Fine, who had made *aliyah* many years ago and was renovating her home, borrowed dollars from her parents, who had also retired to Israel, and arranged to repay them the NIS value of the dollars at the time of the loan.

The Fines had initially budgeted a certain sum for the renovations, but as they progressed, needed more money.

Mr. Fine turned to his brother, who also lived in Israel, for a loan. "I can give you \$10,000 as a loan," the brother said.

"That would be great," said Mr. Fine. "We initially borrowed from my in-laws, and arranged to pay back shekels according to the dollar value of the loan."

"That may have worked for your in-laws," Mr. Fine's brother replied. "However, the dollar is at a historical low. I've been avoiding converting dollars for the past few months, and am only doing this since you need the money now. I expect that in a few months the dollar will recover - the exchange rate tends to swing significantly every half-year or so, and want the money back in dollars."

"But Rabbi Dayan said that this can be problematic," said Mr. Fine. "The foreign currency is considered a commodity and the Sages prohibited lending commodities for precisely this reason; perhaps the value will rise and it will seem like *ribbis* when receiving back greater value!"

"Check with him whether there is a way you can repay me in dollars," Mr. Fine's brother said.

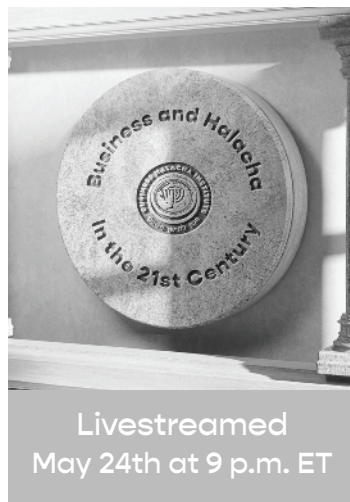
Mr. Fine called Rabbi Dayan and asked:

"Is there a way I can borrow and repay foreign currency?"

"Since foreign currency is halachically considered a commodity," replied Rabbi Dayan, "a loan of foreign currency is subject to the rules of borrowing a commodity."

"In general, *Chazal* prohibited borrowing a commodity to repay the commodity, when not evaluated at its monetary value, lest the commodity rise in value, and the borrower will return greater value than he received (*se'ah b'se'ah*). Nonetheless, they allowed it in a number of situations, one which applies also to foreign currency, and one which is questionable.

"The first situation is when the borrower already



Livestreamed
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לע"נ ר' שלמה ב"ר ברוך וזוג' מרת רייכלה בת החבר יעקב הלוי ע"ה ווייל

DEVALUED CREDIT

Q: I borrowed money from a friend, and I gave him a credit slip I had from a certain store as collateral. A rumor recently spread that this store is about to go out of business. I contacted my lender and asked him to return the credit slip so I could use it before it would become worthless. He refused, insisting that since he received it as a *mashkon* (collateral), he is not required to return it until I repay the loan.

Is he correct? And if the store does close down, does he take the loss for refusing to allow me to salvage the credit while I was able to?

A: To answer your question, we must examine the *halachos* of a *shomer* (guardian) who realizes that the *pikadon* (item placed in his care) is about to get ruined.

If a *shomer* was tasked with guarding produce, and he realizes that it is starting to spoil and if he doesn't sell it, it will all go bad, he is obligated, under the *mitzvah* of *hashavas aveidah* (returning a lost item), to sell the produce in order to spare the owner loss. Similarly, if the *pikadon* is *chametz* and Pesach is approaching, the *shomer* should sell it so it isn't rendered worthless (*Shulchan Aruch, C.M. 292:15-17*).

Applying this *halachah* to your case, on the chance that the credit slip, which has the same halachic status as a *pikadon*, will lose its value if the store closes down, the lender should either sell it or exchange it for a different *mashkon*.

The question remains what happens if he fails to do so.

The *poskim* deliberate what the *halachah* is if a *shomer* doesn't sell a *pikadon* that is in danger of getting ruined, and it ends up losing its value.

Some *poskim* write that he is considered negligent in his duty as a *shomer* for failing to sell it, and he is responsible for the loss (*Magen Avraham 443:5, Shu"t Chasam Sofer, O.C. 105*). Others argue that a *shomer chinam* (unpaid guardian) is not liable, because this is not considered negligence, but a *shomer sachar* (paid guardian) is liable (*Chok Yaakov, ibid. 8*).



CASE FILE

possesses some of the commodity, known as *yesh lo*. In this case, we can view each part of the loan as correlating to the commodity that the borrower currently possesses, even though it is only a small amount relative to the loan. If the borrower does not own any of the commodity, the lender can give him a little, and based on that – grant the loan” (Y.D. 162:2).

“Thus, if the borrower owns some of the foreign currency – such as if Mr. Fine in Israel owns some dollars, or if the lender gives him one – he can borrow the foreign currency also to repay that amount of foreign currency, even if its value should rise” (Toras Ribbis 19:5).

“The second situation is when the commodity is readily available at a fixed price, known as *yatza hashaar*. In this case, the borrower could easily acquire an equivalent amount of the commodity, so that it is comparable to *yesh lo*” (Y.D. 162:3; Bris Yehudah 17:16[44]).

“Some authorities apply this to foreign currency, since one can easily acquire foreign currency at a currency exchange and there is a fixed rate” (Shevet Halevi 3:109).

“However, many authorities question this, since we require a stable, fixed price, whereas currency rates fluctuate daily,” concluded Rabbi Dayan. “Therefore, some maintain that the leniency of *yatza hashaar* does not apply to foreign-currency loans, only those of *yesh lo*” (Bris Yehudah 20:3; Bris Pinchas 16:7; The Laws of Ribbis 14:14).

Verdict: A person may borrow foreign currency on condition to return foreign currency only if he owns some. But some allow it generally since it is readily available at a fixed price (at a currency exchange).



MONEY MATTERS

Based on writings of Harav Chaim Kohn, shlita

BAR METZRA #18
(Bordering Property)
Prior Consultation

לע"נ ר' יחיאל מיכל ב"ר חיים וזוג' ח"י בת ר' שמואל חיים ע"ה

Q: Before buying a property, I consulted with the bar-metzra and he recommended that I buy it. Can he claim his rights afterward?

A: Even if the *bar-metzra* advised the outside party to buy the property, he does not forgo his rights. He can claim that he suspected that the seller might demand from him a greater price and therefore advised the buyer to buy the property, with the intention of afterward taking it from him. However, if the *bar-metzra* made a *kinyan suder* deferring to the buyer or stated before witnesses that he forwent his rights – he loses them (C.M. 175:29; Sma 175:50).

Furthermore, after the outside buyer bought the property, if the *bar-metzra* indicated that he forgoes his rights, e.g., by assisting the buyer or renting from him, or saw the buyer using or renovating the property and didn't protest, or served as the middleman, he forgoes his rights and cannot take the property from the buyer, even without a *kinyan* (C.M. 175:30; Sma 175:54; Mishmeres Shalom 175:30).



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The majority of *poskim* rule, however, that even a *shomer sachar* isn't liable, because a *shomer* accepts upon himself to guard the *pikadon* and return it to its owner intact, but not to sell it, which would constitute removing it from its owner's possession. The only obligation to sell the *pikadon* stems from the *mitzvah* of *hashavas aveidah* (Shulchan Aruch Harav, *ibid.* 8 and Mishnah Berurah 12; see *Pischei Choshen, Pikadon*, ch. 2, fn. 103), but someone who fails to fulfill that *mitzvah* is not obligated to compensate the owner for his loss (Mishnah Berurah *ibid.*; see BHI issue 449).

Even the *poskim* who do mandate payment for failure to sell an item that is about to lose value agree that if the *pikadon* is *chametz* that is still intact after Pesach, the *shomer* is allowed to return the *chametz* as is to the owner and say *harei shelcha lefanecha* (roughly: here is your object), since the loss of value is not tangible (Shach 363:7, in dispute with the Maharshal, B.K. 10:20).

The *poskim* discuss whether the same would apply to returning an *esrog* after Sukkos, because it is obvious to all that there is little value to an *esrog* after Sukkos (see *Pischei Teshuvah* 363:1).

In the case of a *pikadon* that is also a *mashkon*, the halachah is different.

Although it is true that a lender is a *shomer* on the *mashkon*, and in that capacity, according to most *poskim*, he is not liable for loss of value (see C.M. 301:1), we still consider the *mashkon* tied directly to the loan, so if the loss of value is due to his negligence, he forfeits his right to demand repayment of the loan. A borrower gives a *mashkon* to a lender with the understanding that he will not have to repay the loan unless he receives the *mashkon* back. If the *mashkon* is lost or ruined due to an *ones* (unpreventable circumstance), then the borrower is still required to pay, but if the loss to the *mashkon* was a result of the lender's laziness or neglect, he cannot demand repayment for the loan against a *mashkon* that has no value because of his negligence (Shulchan Aruch Harav and Mishnah Berurah *loc. cit.*, according to Shach, C.M. 72:20).

In your specific scenario, however, there is an additional factor to consider. According to some of the *poskim* who rule that if the loss of value is not due to physical damage, then the *shomer* is not obligated to pay for that loss, the lender might be permitted to return the credit slip to you and say *harei shelcha lefanecha*, and he does not forfeit the right to demand repayment (Taz, *ibid.* 4 and Shulchan Aruch Harav, *ibid.*). But other *poskim* (Magen Avraham and Mishnah Berurah, *ibid.*) are uncertain about this, because there is room to argue that since the *mashkon* is collateral, and if the lender loses it, he loses the right to demand payment, it's as though the borrower expressed clearly that if the lender doesn't return a valid credit slip he loses his right to demand payment, so he may not say *harei shelcha lefanecha* (Bigdei Yesha 443 and Mekor Chaim 6).

Since you are currently the *muchzak* (in possession) of the money, you are entitled to hold onto it if the credit slip indeed loses its value due to the lender's negligence – especially since you warned the lender not to cause the credit slip to become devalued.

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

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