

# 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

## CASH VALUE

Moshe was visiting his friend, Hillel, for the afternoon. Although it was chilly outside, the sun was shining. "My winter coat is too heavy for this sunny weather," Moshe said. "Do you have an extra sweatshirt?" "I do," replied Hillel. "I bought two a while back, but I barely use the other one."

"That's funny," replied Moshe. "I also have a spare sweatshirt that I barely wear. I use it only when I forget my regular one in yeshivah!"

The two headed outside and spent the afternoon together. As it grew dark, Moshe looked at his watch. "Oh my! It's late!" he exclaimed. "I've got to get home!"

The boys returned to Hillel's house. Moshe threw on his coat and rushed home. His mother greeted him. "Welcome home," she said. "Where's that sweatshirt from?"

"I borrowed it from Hillel," Moshe explained. "I was in such a rush to get home that I forgot to take it off and leave it there."

A week later, Hillel asked for his sweatshirt. Moshe searched for it but could not find it. "I'll give you a similar sweatshirt," Moshe offered Hillel. "I told you that I also have a spare one."

"The truth is, I barely used that sweatshirt," replied Hillel. "If you lost mine, I'd rather you pay me its value. I'm almost the next size already."

"I also don't need two sweatshirts," said Moshe. "Why should I have to pay cash? For me it's a waste. You owned an extra sweatshirt anyway."

"What I had I had," replied Hillel. "Now that the sweatshirt's gone, though, and you can't return it, I don't want yours!"

"A sweatshirt is a sweatshirt," said Moshe. "It's in the same condition as yours was; maybe even better!"

"That makes no difference," insisted Hillel. "Either return my sweatshirt or give me its cash value!"

"This doesn't seem fair to me," countered Moshe. "Let's go ask!"

The two approached Rabbi Dayan and explained the situation. Moshe asked:

**"Can Hillel demand that I pay him cash?"**

"When a guardian or *sho'el* (borrower) is liable for an entrusted item, he is liable for its value," replied Rabbi Dayan. "He is not required to replace the item."

"*Shach* (C.M. 291:2) compares a guardian who is liable to one who damages, since the *Gemara* (B.K. 4b) includes guardians in the framework of *avos*

**DID YOU KNOW?**  
An MCA (Merchant Cash Advance) is halachically considered a loan and subject to *hilchos ribbis*.

Ask your Rav or email  
[ask@businesshalacha.com](mailto:ask@businesshalacha.com)  
for guidance and solutions.



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

## DIAMOND DEFENSE

**Q:** I have owned several diamonds for the past few decades and I recently decided to sell them. I approached a diamond dealer and offered to sell him one for \$10,000. I showed him a certificate from the Gemological Institute of America (GIA), a body that grades diamonds based on carat weight, clarity, cut, and color, and he agreed to my price based on that certificate.

A week after I sold him the diamond, he called to tell me that he gave the diamond to the GIA for an updated evaluation, and according to their current assessment, the diamond is worth \$1,000 less than the price he paid based on the original certificate.

He claims that I must return the difference. Is he correct?

**A.** The first thing you should do is check whether the new GIA appraisal is accurate, because some of the factors in the appraisal are subjective, and another gemologist might appraise the stone's value in line with the earlier certificate.

The *shailah* arises only if it turns out that the current valuation is correct, and the first certificate is inaccurate.

There are two halachic concepts that relate to such a situation: *ona'ah* and *mekach ta'us*.

*Ona'ah* applies to cases in which there was no issue between the parties regarding the merchandise itself; the problem was the price. The *halachah* is that if the price was set too high or too low, if the margin of over- or underpricing represents less than a sixth (16.66%) of the item's value, we assume that most people would forgive the difference. The sale therefore remains final, with no option for compensation for the difference in price (*Shulchan Aruch, Choshen Mishpat* 227:3.)

There is also a halachic principle called *mekach ta'us* that applies to cases in which the merchandise, not the price, is problematic. This happens when the buyer claims that the item he received was damaged, or not of the size, weight, amount, or



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*nezikin*, categories of damage. The Torah requires one who damages to pay *meitav*, which the *Mishnah* (*Gittin* 48b) explains to mean that when paying with real estate, he must pay with higher grade (*idris*) (*C.M.* 389:2).

"Elsewhere, the *Gemara* (*B.K.* 7b) teaches that movable items are all considered *meitav*, since they can be sold readily here or there and converted to cash, unlike real estate, which is fixed in its location (*C.M.* 419:1).

"Regarding repayment of a loan, *Shulchan Aruch* rules that if the debtor has money, he cannot repay with moveable items or real estate unless the lender agrees. This is because the debtor received money and committed to return in kind (*C.M.* and *Sma* 101:1).

"However, regarding liability of damages or a guardian, this logic does not apply. Therefore, most *Rishonim* write that the owner cannot specifically demand cash payment. His primary right is to collect the value of his loss from *meitav*, and all moveable items are considered *meitav* (*Shach* 419:3).

"Thus, *Shulchan Aruch* rules that even if the one who damages has cash, he can pay with movable items. They should be evaluated according to their worth being sold locally and immediately (*C.M.* 419:1).

"We do not find a distinction between a *sho'el* and other guardians in this regard," concluded Rabbi Dayan. "Thus, Moshe can fulfill his liability with a replacement sweatshirt of equivalent value (*Pischei Choshen*, *Nezikin* 10:43[99])."

**Verdict: The owner of the entrusted or lent item that was lost cannot demand cash payment, and the guardian or *sho'el* can fulfill his liability with movable items of equivalent value, and certainly a replacement item.**



## MONEY MATTERS

Based on writings of Harav Chaim Kohn, shlita

### MONEY MATTERS Mechilah (Forgoing) #9 Loan Document or Collateral

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

**Q: I was *mochel* a debt but didn't return the loan document or collateral to the borrower. Is the *mechilah* valid?**

A: Some maintain that although a person cannot be *mochel* an item that he holds, here he forgoes the inherent debt obligation and *mechilah* is valid. Accordingly, he must return the associated loan document or collateral to the borrower (*Rema*, *C.M.* 241:2; *E.H.* 105:5; *Levush* 241:2; *Sma* 241:7; *Aruch Hashulchan* 241:3).

Others maintain that *mechilah* is not valid in this situation, for one of two reasons. First, so long as the creditor holds the loan document, he does not forgo with full intent. Second, when the debtor has assets, the loan document is considered as the loan having been collected, so that it is like *mechilah* of money that the creditor already holds, which would not be valid without a *kinyan* (*Sma* 12:21; *Shach* 12:17; *Tumim* 12:8; *Pischei Teshuvah* 12:14, 241:2).

In practice, some write that this issue remains unresolved. Thus, in practice the debt itself cannot be collected but the creditor does not have to return the physical document or collateral (*Shach* 241:4; *Nesivos* 241:1).



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quality he paid for. In such cases, even if the difference in price is negligible, the buyer may return the merchandise for a full refund (*ibid.* 232:1&3 and 233:1).

It would seem, at first glance, that your case is a scenario of *mekach ta'us*, since the diamond you sold the dealer was not of the quality he agreed to buy. This would be akin to a buyer receiving low-quality wheat when he paid for high-quality wheat, in which case he is allowed to return the wheat for a full refund even if the difference in value is less than a sixth (*ibid.*).

There is another perspective to consider, however. Some *Rishonim* (see *Rashi*, *Bava Metzia* 56b, s.v. *k'deba'i*) write that if only a professional is capable of appraising the quality of an object, and the appraiser erred in his evaluation, then if the buyer and seller agreed to a price based on the erroneous appraisal, it is considered a case of *ona'ah*, and the parties may void the sale only if the item's true value differed by more than a sixth of the price paid. The *halachah* of *mekach ta'us*, according to this approach, applies only to cases in which an ordinary person would be able to spot the difference between what the customer paid for and what he received. If only a professional can tell the difference, it is a case of *ona'ah*, even if the error related to the quality of the item, not the price (*Kuntras Raayos l'Riaz*).

According to this approach, since the \$1,000 difference on the diamond is less than a sixth of the price, the sale is final.

Other *Rishonim* maintain, however, that such a case is also considered a *mekach ta'us*, since the quality of the diamond is lower than what the buyer agreed to buy (see *Ramban*, *Rashba*, *Ritva*, and *Ran* to *Bava Metzia* 56b).

Either way, even if the buyer has a right to void the purchase – either because of *ona'ah* that was more than a sixth or because it was a *mekach ta'us* – he cannot insist that the seller return the difference in price if he does not want to void the sale and return the item (*Choshen Mishpat* 227:4).

After analyzing this case from a purely halachic standpoint, we discussed it with several diamond merchants, who informed us that the standard practice in their industry is that merchants may not void a sale or demand a refund in such situations. Diamond merchants know that each time a diamond is appraised, the valuation can differ. They enter each transaction with full knowledge that at times they will benefit from such a discrepancy and at times they will lose. Any merchant who wants to avoid a predicament like the one you describe would ask to have the diamond reappraised *before* purchasing it, or would make the purchase conditional on the new appraisal.

A practice that is considered the industry standard is binding in *halachah* even if it differs from what is written in halachic works (*ibid.* 232:19 and *Pischei Teshuvah* 6). You are therefore not required to return the \$1,000 to the merchant, who knows the conventional practice.

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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