THE WERDIGER EDITION

BUSINESS WEEKLY

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

Issue #713 | Korach | July 5, 2024 | 29 Sivan 5784

לע"נ הרב יחיאל מיכל בן ר' משה אהרן אורליאן

CASE FILE

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לע"נ הרב אהרן בן הרב גדליהו ע"ה

KULO PIKADON

Reuven's job covered his family's needs, and even left a little extra. However, he lacked significant savings or investment assets.

Reuven approached the bank for a home-improvement loan, which he felt confident that he could cover. However, the bank was hesitant to lend him without additional capital to his name.

Reuven discussed the issue with his cousin, Shimon.

"I just received an insurance settlement of $100,000," Shimon mentioned. "I plan to invest it in a 1-year CD. Rates now are quite good, around 5%!"

"Since you're not planning to use the money for a year," said Reuven, "would you allow me to deposit the $100,000 under my name? At the end of the year, I'll give you the $5,000 interest that the money earns?"

"What's the point?" asked Shimon.

"This way, the bank will see investment assets under my name," replied Reuven. "I have a better chance of getting the loan."

"I'm willing to consider this," said Shimon. "But how can I prove later that you must return the $100,000 to me?"

"We'll draft a loan document that you lent me $100,000," replied Reuven. "This way you'll be secure."

"But what about *ribbis*?" asked Shimon. "If I lend you $100,000 and your return $105,000, you're paying me prohibited interest!"

"We can draft a *heter iska,*" replied Reuven. "However, I don't see why this should be an issue of *ribbis*. I'm just giving you what you would earn anyway had the money remained yours!"

The two contacted Rabbi Dayan. Reuven asked:

"Do we need to draft a *heter iska*?"

"If you would explicitly arrange *not* to accept liability for the money, but rather to invest Shimon's money in a CD and give him at the end of the year whatever you receive back from the bank," replied Rabbi Dayan, "you would not need a *heter iska*. You would be considered Shimon's agent to deposit *his* money and receive interest for *him* from the bank" (*Y.D.* 186:16; *Shach* 186:34; *Bris Yehudah* 32:2).

"However, if you accept liability for the money, you become a borrower, and the $5,000 you add is considered interest for the money Shimon lends you. Therefore, although you give Shimon only what he would earn had he invested the money himself, you need a *heter iska* (*Bris Yehudah* 3:1[4]; *The Laws of Ribbis* 1:23).

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

MORTGAGE MAASER

Q. I generally give *maaser kesafim* from my business earnings. I recently invested in a real estate venture in which I provided a downpayment of 20% of the purchase price and took out a ten-year mortgage for the other 80%.

How and when do I calculate the *maaser* from the rental income, considering that it is offset by both the property taxes and the mortgage payments?

A. The *Poskim* (*Shu"t Chavos Ya'ir* 224; *Shu"t Shevus Yaakov* 2:86) write that when an object is sold, *maaser* is separated only from the profits, after deducting the object's original purchase price from the sale price.

Some *Poskim* rule that no expenses may be deducted from the gross income from such sales, comparing this to *maaser* of produce, in which *maaser* is separated from the entire crop without paying heed to how much the farmer invested into the crop (*Haflaah*, *Kesubos* 50a, among others). Some *Poskim* differentiate between the two types of *maaser* by explaining that *maaser kesafim* is supposed to be separated from profit, and expenses that are a normal part of doing business are therefore deducted before calculating the profit that must be *maasered* (see *Shu"t Nish'al David, Yoreh Dei'ah* 24, and *Sha'arei Tzedek* p. 302). Others explain that *maaser kesafim* is considered "partnering" with Hashem in one's business, and just as business partners deduct all expenses and losses before splitting the profit, so, too, we deduct expenses before calculating "Hashem's portion" from the profit (*Chavos Ya'ir* ibid.). Others disagree with the *Chavos Ya'ir* on the grounds that this turns the holy into the mundane and makes it sound as though a human can be on the same level as Hashem (*Shevus Yaakov* ibid.). The *Poskim* nevertheless rule leniently, explaining that since *maaser kesafim* is not an absolute obligation, but only a praiseworthy custom, it is permissible to deduct expenses before calculating the *maaser* (*She'eilas Yaavetz* 6).

For instance, if someone bought an object for $100 and sold it for $125, he separates *maaser* only from the $25 profit. Furthermore, most *Poskim* rule that if he had to invest money into making the sale, he deducts that amount from the sale price as well before giving *maaser*. (For instance, if he had to pay $5 to deliver the object, he would *maaser* only $20).

A businessman may therefore deduct all of his overhead

CASE FILE

"As explained in previously articles, the fundamental purpose of a *heter iska* is to redefine the 'loan' as an 'investment', in which some or all of the money remains – in principle – the lender's, so that he is rightfully entitled to profit earned from this money. Conversely, loss of this money is theoretically his.

"In the classic *iska* (silent partner) arrangement – *chatzi milveh* – half of the money granted remains a loan, for which the borrower assumes liability, and half is redefined as an investment, from which the lender earns profit. This arrangement was mutually beneficial, affording the lender some protection against loss, but allowing him to earn profit that is not considered *ribbis* (*Y.D.* 177:2).

"A second arrangement, known as *kulo pikadon*, redefines the entire loan as an investment. The money remains the lender's, which the 'borrower' invests on his behalf; accordingly, any loss should be entirely the lender's.

"In most cases, either arrangement can be used, but *Poskim* generally prefer the classic form. (see *The Laws of Ribbis* 23:8-11).

"In this particular case, though," concluded Rabbi Dayan, "since the money is being invested in a secure investment and the agreement is simply to give Shimon the $5,000 earned from the CD, a *kulo pikadon* form might be more appropriate, since it better reflects the true nature of the agreement."

Verdict: A Jew can lend a non-Jew with interest on behalf of another Jew if explicitly arranged that the middleman does not accept liability for the loan, but if he accepts liability as a borrower, they need a *heter iska.* Classic *iska* redefines the loan as half loan/ half investment; *kulo pikadon* forms redefine the entire loan as an investment. *Poskim* generally prefer *chatzi milveh*, but sometimes *kulo pikadon* better reflects the true nature of the agreement.

MONEY MATTERS

Based on writings of Harav Chaim Kohn, shlita

MONEY MATTERS

Minhag Hamedinah

Common Commercial Practice #29

Retirement

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

Q. Our shul has a chazzan who has served the community nobly for more than 40 years, but his weakening voice and health issues have led to dissatisfaction in shul members. Can he be made to retire?

A: Shulchan Aruch (*O.C.* 53:25) rules that as long as a *chazzan* can reasonably serve, even if his voice is not as pleasing as before, he should not be removed. He can have other people, especially his son, help him occasionally, as needed. If the majority of the community prefer another *chazzan*, whose voice is more pleasant, the two should serve together (*Mishnah Berurah* 53:85)

Regarding other employees who don't have positions of honor (*srarah*), we follow the terms of employment. Nonetheless, it is proper not to forsake a worker in his old age and to try to find a position suiting his current state (*Pis'chei Choshen*, *Sechirus* 10:11-12[36]).

If there is a common commercial practice regarding retirement or conditions to terminate employment, we follow the *minhag hamedinah* (*ibid*.).

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expenses — including office rental, electricity, phonelines, advertising, payroll, taxes and business-related travel expenses, and so on — from his gross income before calculating the *maaser*.

But anything that will remain in his possession — i.e., if he *purchased* office furniture — may not be deducted from the gross income. Since he can sell them at any point, they are not considered expenses. He may, however, deduct the depreciation (Rav Shlomo Zalman Auerbach, in *Kovetz Kol Torah* issue 39, p. 87 ; cf. *Shevet HaLevi* 9:201[6] for a more lenient approach; see *Psakim u'Teshuvos, Yoreh Dei'ah* 249:27).

The *Poskim* debate how to calculate the *maaser* in your case, where you intend to pay your mortgage from the rent you collect from your tenants. Some *Poskim* consider this akin to the sale of an object, in which the *maaser* is calculated only from the profit once it is sold (see *Shu"t Maharil Diskin* 22, in the footnote), but as long as the owner retains the object, even if it goes up in value, he is not obligated to deduct *maaser*.

In the case of a property, this would mean that you may deduct any expenses of the investment property from the rent you collect, including the amount you are paying toward your mortgage, each payment of which is comprised of principal (the original amount you borrowed) and interest, and you separate *maaser* only from the remainder of the rent. If you sell the property, or receive funds by refinancing the property, as is common in the industry, you then calculate the *maaser* by deducting your downpayment from the sale price (see *Kovetz Psakim* 15:5).

Other *Poskim* rule that you may not deduct the full mortgage payment, only the interest you are paying to the bank. The principal may not be deducted, according to these *Poskim*, because that is part of the purchase price of the property, which becomes fully yours when you pay off your mortgage, and the property then becomes part of your net worth, so it is not considered an expense and cannot be deducted before you separate *maaser* (*B'Orach Tzedakah* ch. 9, note 9, and *Psakim u'Tshuvos* loc. cit.).

Given this dispute, you should consult with your Rav as to which approach to follow.

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