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



CASE FILE

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Writer for the Business Halacha Institute



Ribbis Awareness Project

לע"נ הרב אהרן בן הרב גדליהו ע"ה

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PAY OR REPLACE?

Reuven was leaving yeshivah for Shabbos to visit his grandparents.

"Do you have a *Ketzos* that I can borrow for the weekend?" he asked his *chavrusah*, Shimon. "I have two copies at home but forgot to bring one with me."

"Yes, I bought one two weeks ago," Shimon answered. "I haven't had

a chance to use it yet."

"Then I'll be happy to put it into use!" smiled Reuven.

Shimon handed him the *Ketzos*. "It's brand-new," he said. "I haven't even removed the price sticker."

Reuven looked at the price. "\$35 you paid for it?!" he said. "I can get that edition for \$25 at Yankel's Seforim."

"Maybe on sale..." said Shimon. "Most places I priced were in the range of \$30, but I got a gift certificate to that particular store for my birthday, so I bought it there."

During the weekend, Reuven lost the *Ketzos*. When he returned, he apologized to Shimon. "I have a spare, unused copy of that edition at home that I'll give you," he said. "I have another edition with footnotes that I use."

"Actually, I was thinking that I also prefer the edition with footnotes," Shimon said. "Because you lost my *Ketzos*, I prefer that you pay me cash, and I'll buy the better edition."

"Why should I pay you cash when I can return to you exactly what I borrowed?" replied Reuven. "I don't have a real use for my spare copy and much prefer giving it to you than paying cash. Anyway, I'm certainly not paying \$35, when I can get it for less."

"I don't see why not," Shimon argued. "You lost something that cost \$35 and was brand-new. If you wouldn't have a spare copy you'd have to pay cash, so it's not fair to make me

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RIBBIS IN HOME PURCHASES

PART IV

Advance Payment

A seller may not explicitly tell a buyer that if he pays part of the purchase price

before the closing, he will lower the price of the house or allow him to live in it rent-free or for reduced rent (*Yoreh De'ah* 176:10). Similarly, he may not offer the buyer two prices — a lower price if he makes a large advance payment, and a higher price if he makes a lower advance payment. Because, according to *Halachah*, the buyer is not obligated to pay until the closing, any amount he pays in advance is considered a loan to the seller, and he may not receive any favor — such as a lower purchase price or rent-free dwelling — in exchange for extending that loan (*ibid.* 173:7). This practice is very common when houses or apartments are bought "on paper" (i.e., while they are under construction), and the developer requires a deposit upfront but is willing to give a reduced price in exchange.

It is also forbidden to stipulate that in exchange for the advance payment, the buyer will collect rent from a tenant living in the house, because the seller still owns the house, and he is allowing the buyer to collect the rent only in exchange for the "loan" (i.e., advance payment), which is a form of *ribbis*.

This issue can be averted through a *heter iska*, or by making an agreement in which each advance payment goes toward the purchase of a prorated portion of the property, which means that each money transfer from the buyer to the seller is not a loan but a purchase.

Another way that the seller may offer a discount without encountering a *ribbis* issue is to have the buyer deposit the advance payments with a third party. Because the buyer will not be able to use the money, it is not considered a loan.

Penalties

It is forbidden to stipulate that if the buyer does not make all the payments at the closing, the seller will continue to live in the house or collect the rent from the tenant. Because in the United States the buyer owns the

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CASE FILE

accept your spare copy!"

The two approached Rabbi Dayan and asked:

"Can Reuven give Shimon his spare copy, or must he pay cash? How much?"

"A borrower, or other guardian, who loses the entrusted item is liable for its *monetary value*," replied Rabbi Dayan. "He is not required to replace the item" (*Shach* 291:2; *Chazon Ish B.K.* 8:15-16).

"The item's value is assessed according to its fair market value at the time and place of the loss, regardless of the price that the owner paid for it, whether higher or lower (*Ketzos* 291:1). If the item was in used condition, the borrower is liable only for its value as a used item.

"Nowadays, most items can be bought or ordered online from various vendors for significantly different prices, so it is hard to establish a clear fair market value. Presumably, we follow some median value (*C.M.* 103:2; *Sma* 103:5).

"Moreover, if the item was only partially damaged, the borrower is not required to replace or repair it but is entitled to return the damaged item and add the loss of value (*C.M.* 344:2; *Pischei Choshen, Pikadon* 8:[49]). If he wants to return a new item for neighborly or moral reasons, he is allowed to, and there is no concern of *ribbis* when the item itself was meant to be returned (*she'eilah*, as opposed to *halva'ah*).

"In most situations, though, the lender is happy to have the borrower replace the item rather than pay its value. However, if he demands cash payment, whereas the borrower wants to replace the item, in principle the lender has a valid claim, because the guardian's liability is for the item's value, not replacement.

"Nonetheless, the *Gemara* (*B.K.* 7b) teaches that regarding payment of property damage and guardians — not of loans — movable items are equivalent to *meitav* (high-quality real estate) and even cash payment. Thus, Reuven can pay with a replacement item in lieu of his cash liability (*C.M.* 419:1; *Shach* 419:3).

"However, the cash value is what the plaintiff could readily get when selling the item," concluded Rabbi Dayan. "Thus, nowadays, even a new replacement item would likely not have the full cash value, because if Shimon would try to sell it, he would likely not get the full fair market value so Reuven might have to add a few dollars" (*C.M.* 101:9).

Verdict: A borrower's primary liability is for the fair market value of the item, or its depreciation if partially damaged. He can return, though, a replacement item of equivalent cash value.



MONEY MATTERS

Based on writings of Harav Chaim Kohn, shlita

MONEY MATTERS Shabbos and Yom Tov

#3

Non-Jewish Partner

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

Q: I own a business in partnership with a non-Jew. May he operate the business on Shabbos?

A: A partner is considered as acting also on behalf of his partner as his agent. Thus, you may not allow the non-Jewish partner to work in your stead on Shabbos, just like you may not allow a non-Jewish employee (*M.B.* 245:1). This applies even if you provide the capital (silent partner), and the non-Jewish partner operates the business in practice.

There are two primary ways in which a non-Jewish partner is allowed to operate a jointly owned business on Shabbos.

One, the Jew and non-Jew stipulate when first forming the partnership that on Shabbos the business belongs to the non-Jew alone, and he receives the profits of Shabbos. They can further stipulate that, correspondingly, on Sunday the business belongs to the Jew alone (*O.C.* 245:1).

When they stipulated so, if later — when dividing the profits — the non-Jew consents to share the profits equally without calculating Shabbos separately, it is permissible, because in this case he is effectively giving a gift to the Jew (*O.C.* 245:2).

However, if they did not stipulate so from the beginning, they cannot simply make this arrangement afterward, unless they dissolve the partnership and reform it with this stipulation (*O.C.* 245:3).

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house from the moment of the closing, whatever he hasn't paid is considered a loan, and if he allows the seller to keep the house or the rent in exchange, that's *ribbis*. This, too, can be mended with a *heter iska* (*ibid.* 174:1).

Purchase Partners

When a bank loans money to partners, each one is legally responsible for the entire loan. This poses a *ribbis* issue, because *Halachah* views each partner as an *areiv kablan* (see previous issue). This issue, too, must be dealt with in the *heter iska*.

If only one of the partners is the legal owner and the bank does not recognize the other partner, it is an even bigger *ribbis* issue, because the partner who is legally recognized is essentially borrowing all the money and then loaning half of it to his partner. As discussed in the previous issue (and explained in depth in issue 720), if the borrower who is legally recognized is aware of all of the other borrower's financial circumstances, an ordinary *heter iska* won't work at all.

In such a case, a very specific type of *heter iska* must be arranged in which the partner who is not signed on the mortgage will include the legal borrower in all of his financial holdings, which will lend validity to the *heter iska*.

The *Yaaros Devash* (2:5) writes that although the concept of a *heter iska* was established by Chazal, it must be written carefully, in accordance with the many relevant *halachos*. He adds: "A person who desires life and wants to rise with *techiyas hameisim* [*Tosafos* (*Bava Metzia* 70b) states that a person who lends with *ribbis* will not merit *techiyas hameisim* — ed.] must seek counsel from a *chacham* when he is involved in such a loan to save himself from evil. We have seen many wealthy people, great philanthropists, in our time, whose children are now living in severe poverty... only because they weren't careful with *ribbis*."

As we have seen in the last four issues, in modern times, borrowing money with interest is extremely commonplace and there are so many potential *ribbis* issues one can encounter, especially in the process of purchasing a home. Therefore, it is vital that a very specific *heter iska* be arranged in advance of a loan. That is why BHI has launched our initiative, which enables every person to find the exact type of *heter iska* for the specific loan he is about to take.



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